



City of Tigard  
**Tigard Business Meeting – Agenda**

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**TIGARD CITY COUNCIL & LOCAL CONTRACT REVIEW BOARD**

**MEETING DATE AND TIME:** July 14, 2015 - 6:30 p.m. Study Session; 7:30 p.m. Business Meeting

**MEETING LOCATION:** City of Tigard - Town Hall - 13125 SW Hall Blvd., Tigard, OR 97223

**PUBLIC NOTICE:**

Anyone wishing to speak on an agenda item should sign on the appropriate sign-up sheet(s). If no sheet is available, ask to be recognized by the Mayor at the beginning of that agenda item. Citizen Communication items are asked to be two minutes or less. Longer matters can be set for a future Agenda by contacting either the Mayor or the City Manager.

Times noted are *estimated*; it is recommended that persons interested in testifying be present by 7:15 p.m. to sign in on the testimony sign-in sheet. *Business agenda items can be heard in any order after 7:30 p.m.*

Assistive Listening Devices are available for persons with impaired hearing and should be scheduled for Council meetings by noon on the Monday prior to the Council meeting. Please call 503-639-4171, ext. 2410 (voice) or 503-684-2772 (TDD - Telecommunications Devices for the Deaf).

Upon request, the City will also endeavor to arrange for the following services:

- Qualified sign language interpreters for persons with speech or hearing impairments; and
- Qualified bilingual interpreters.

Since these services must be scheduled with outside service providers, it is important to allow as much lead time as possible. Please notify the City of your need by 5:00 p.m. on the Thursday preceding the meeting by calling: 503-639-4171, ext. 2410 (voice) or 503-684-2772 (TDD - Telecommunications Devices for the Deaf).

SEE ATTACHED AGENDA

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**VIEW LIVE VIDEO STREAMING ONLINE:**

<http://live.tigard-or.gov>

**CABLE VIEWERS:** The regular City Council meeting is shown live on Channel 28 at 7:30 p.m. The meeting will be rebroadcast at the following times on Channel 28:

Thursday	6:00 p.m.	Sunday	11:00 a.m.
Friday	10:00 p.m.	Monday	6:00 a.m.



City of Tigard

## Tigard Business Meeting – Agenda

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### TIGARD CITY COUNCIL & LOCAL CONTRACT REVIEW BOARD

**MEETING DATE AND TIME:** July 14, 2015 - 6:30 p.m. Study Session; 7:30 p.m. Business Meeting

**MEETING LOCATION:** City of Tigard - Town Hall - 13125 SW Hall Blvd., Tigard, OR 97223

6:30 PM

- STUDY SESSION

- A. COUNCIL LIAISON REPORTS **6:30 p.m. estimated time**

- B. CONTINUED DISCUSSION ON CHARTER BALLOT TITLES **6:45 p.m. estimated time**

- EXECUTIVE SESSION: The Tigard City Council may go into Executive Session. If an Executive Session is called to order, the appropriate ORS citation will be announced identifying the applicable statute. All discussions are confidential and those present may disclose nothing from the Session. Representatives of the news media are allowed to attend Executive Sessions, as provided by ORS 192.660(4), but must not disclose any information discussed. No Executive Session may be held for the purpose of taking any final action or making any final decision. Executive Sessions are closed to the public.

7:30 PM

- 1. BUSINESS MEETING

- A. Call to Order

- B. Roll Call

- C. Pledge of Allegiance

- D. Call to Council and Staff for Non-Agenda Items

- 2. CITIZEN COMMUNICATION (Two Minutes or Less, Please)

- A. Follow-up to Previous Citizen Communication

- B. Tigard Area Chamber of Commerce

- C. Citizen Communication – Sign Up Sheet

3. CONSENT AGENDA: (Tigard City Council, Local Contract Review Board) These items are considered routine and may be enacted in one motion without separate discussion. Anyone may request that an item be removed by motion for discussion and separate action. Motion to:  
**7:35 p.m. estimated time**
- LOCAL CONTRACT REVIEW BOARD -
  - A. APPROVE WORKERS' COMPENSATION INSURANCE FOR CITY VOLUNTEERS
  - B. APPROVE THE PURCHASE OF FOUR 2016 FORD EXPLORERS AS POLICE FLEET REPLACEMENT VEHICLES
4. PUBLIC HEARING - CONSIDERATION OF COMCAST CABLE FRANCHISE AGREEMENT RENEWAL **7:40 p.m. estimated time**
5. QUASI-JUDICIAL PUBLIC HEARING: CONSIDER APPEAL OF HERITAGE CROSSING ZONE CHANGE AND SUBDIVISION (ZON2015-00002, SUB2015-00001, VAR2015-00001) **8:00 p.m. estimated time**
6. QUASI-JUDICIAL PUBLIC HEARING: CONSIDER APPROVAL OF ROSACKER ANNEXATION (ZCA2015-00001) **8:50 p.m. estimated time**
7. AUTHORIZE THE CITY MANAGER TO SIGN A PROPERTY PURCHASE AGREEMENT **9:00 p.m. estimated time**
8. CONTINUED DISCUSSION ON COMMUNITY CENTER BALLOT TITLE APPROVAL **9:05 p.m. estimated time**
9. NON AGENDA ITEMS
10. EXECUTIVE SESSION: The Tigard City Council may go into Executive Session. If an Executive Session is called to order, the appropriate ORS citation will be announced identifying the applicable statute. All discussions are confidential and those present may disclose nothing from the Session. Representatives of the news media are allowed to attend Executive Sessions, as provided by ORS 192.660(4), but must not disclose any information discussed. No Executive Session may be held for the purpose of taking any final action or making any final decision. Executive Sessions are closed to the public.
11. ADJOURNMENT **9:35 p.m. estimated time**

AIS-2067

A.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 15 Minutes

**Agenda Title:** Council Liaison Reports

**Submitted By:** Norma Alley, City Management

**Item Type:** Update, Discussion, Direct Staff

**Meeting Type:** Council Business Mtg -  
Study Sess.

**Public Hearing:** No

**Publication Date:**

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**Information**

**ISSUE**

Council will present liaison reports.

**STAFF RECOMMENDATION / ACTION REQUEST**

**KEY FACTS AND INFORMATION SUMMARY**

**OTHER ALTERNATIVES**

**COUNCIL GOALS, POLICIES, APPROVED MASTER PLANS**

**DATES OF PREVIOUS COUNCIL CONSIDERATION**

N/A

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**Attachments**

*No file(s) attached.*

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AIS-2282

B.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 30 Minutes

**Agenda Title:** Continued Discussion on Charter Ballot Titles

**Prepared For:** Liz Newton, City Management      **Submitted By:** Norma Alley, City Management

**Item Type:** Update, Discussion, Direct Staff      **Meeting Type:** Council Business Mtg - Study Sess.

**Public Hearing:** No      **Publication Date:**

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**Information**

**ISSUE**

Review proposed language for two amendments to the City's Municipal Charter.

**STAFF RECOMMENDATION / ACTION REQUEST**

Review and reach consensus on the draft language for the two proposed amendments to the City's Municipal Charter.

**KEY FACTS AND INFORMATION SUMMARY**

At the conclusion of the council's discussion at the June 2 meeting, consensus was reached on placing two amendments to the city's Municipal Charter before the voters in November 2015.

The first amendment would allow sitting City Council members to seek election to a city office without resigning their current position. (Amendment 1 attached.)

The second amendment would allow council members to serve sixteen consecutive years instead twelve as currently provided for in the Charter. The draft language reflects the adopted May 12, 2015 council minutes (attached) and limits councilors to no more than three consecutive 4-year terms and the mayor to no more than two consecutive 4-year terms in any combination not to exceed 16 consecutive years total service (Amendment 2 attached.)

As drafted, both amendments would apply to current members of the city council.

**OTHER ALTERNATIVES**

- 1.) Revise the language of one or both of the proposed charter amendments.
- 2.) Refer only one charter amendment.
- 3.) Delay action until a later date.
- 4.) Decline to refer either proposal.

**COUNCIL GOALS, POLICIES, APPROVED MASTER PLANS**

Included as an item in the list of "Issues for Further Council Discussion" in the 2015-17 Tigard City Council goals adopted January 27, 2015.

## **DATES OF PREVIOUS COUNCIL CONSIDERATION**

December 22, 2014

March 17, 2015

May 12, 2015

June 2, 2015

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### **Attachments**

Proposed Charter Amendment #1

Proposed Charter Amendment #2

Excerpt of May 12, 2015 City Council minutes

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## Amendment 1

CAPTION: AMENDS CHARTER ALLOWING COUNCIL TO SEEK CITY OFFICE WITHOUT RESIGNING

QUESTION: Shall the Charter be amended to allow sitting City Council members to run for City office without resigning current position?

SUMMARY: The current Tigard City Charter ("Charter") requires an elected city official to resign from their office prior to seeking another elected City position, if there is overlap between the terms for the positions. This measure, if approved, would amend Section 7 of the Charter to remove the requirement that a person who is currently holding an elected position, as either Mayor or City Councilor, may not become a candidate for another City office held concurrently with their current position, unless that person first resigns from their currently held elected position. This would allow an elected City Councilor to run for Mayor without resigning their Council seat, if their council seat term overlapped with the mayoral term

## Amendment 2

CAPTION: AMENDS CHARTER TO ALLOW ADDITIONAL TERM

QUESTION: Shall the Charter be amended to allow Council Members to serve sixteen consecutive years instead of twelve consecutive years?

SUMMARY: This measure, if approved, would amend Section 7 of the City of Tigard Charter ("Charter") to provide that no person may serve on the City Council, as either the Mayor or a City Councilor, for more than sixteen consecutive years. Currently, under the Charter, no person may serve on the City Council for more than twelve consecutive years. This measure will change the term limits for the City Councilor, position from eight consecutive years to twelve consecutive years. The Mayor position would remain capped at eight consecutive years. Under the new measure a person could serve a total of sixteen consecutive years. The Charter provision providing that the term limitations would not apply to the filling of an unexpired term would remain unchanged. This change, if approved, would apply to the current City Council and to City Councils elected in the future.

ACTUAL CHARTER AMENDMENT (not included in the ballot title but we can put the relevant portion in the respective explanatory statements)(added language underlined, deleted language stricken):

Section 7. Mayor And Council.

The elective officers of the City shall be a Mayor and four councilors who together shall constitute the City Council. At the general election held in 1990, and every fourth year thereafter, a Mayor shall be elected for a term of four years. No councilor shall serve the City as councilor for more than ~~eight~~ twelve consecutive years, nor shall the Mayor serve as Mayor for more than eight consecutive years. In no case shall any person serve on the City Council for more than ~~twelve~~ sixteen consecutive years. These limitations do not apply to the filling of an unexpired term.

~~No person who is serving as Mayor or councilor shall become a candidate for any City office for a term which would be concurrent with the term in office then held unless that person first submits a written resignation from the then current office at the time of filing for the other office. A resignation submitted to satisfy this section shall not be withdrawn. A resignation shall be adequate for purposes of this section if it provides for the termination of the signer's service in the office not later than the last day before service would begin in the office for which that person seeks to become a candidate.~~

In the event the office of Mayor or councilor becomes vacant before the normal expiration of its term a special election may be held at the next available date to fill the office for the unexpired term. Such an election shall only take place if the Council can schedule and hold a special election at least twelve months before the term would otherwise expire. If an election is held, it shall be held in accordance with the election laws of the state of Oregon and City ordinances

not inconsistent with such election laws. The Council may appoint a person to fill a vacancy until an election can be held.

Councilor Woodard asked for City Attorney Ramis' perspective about whether the location should be defined in the ballot measure, as well as the costs and who the operator will be. City Attorney Ramis said council has broad authority to decide whether to put this on the ballot, when to do so and how much they want to fund. He said another possibility is seeking authority financially first and return with a measure. Councilor Woodard asked if a location could be defined as one-half mile out from a point in the city center. City Attorney Ramis said it could.

Council President Snider said he sensed the excitement in Town Hall. He said it is very important to put something on the ballot that is well thought through. He would like to see this on the November ballot this year but had concerns that it be done well so it passes. He said council also needs to see how it fits with other city priorities because the city does not have the staff to be able to drop everything else and work solely on this.

Councilor Goodhouse asked where the telephone survey numbers came from. Consultant Baker said Daxko works through a credible vendor to receive the contacts. They buy lists that are not just home phone numbers. He asked if the survey respondents wanted a recreation facility in general or were they asked if they wanted a YMCA. City Manager Wine said the study that Tigard conducted did have a specific question to determine what the demand was for a recreation program in general. Consultant Miller added that many questions on the YMCA study related to current exercise habits and use of facilities were asked without a Y prompt. Councilor Goodhouse noted that 80 percent of people polled were over 50 years of age. Consultant Miller said phone surveying industry-wide skews towards over 50 but they normalize the data so it is not affected by age for data analysis. In response to a question from Mayor Cook, she said screening questions included income over \$50,000 annually and higher household incomes include more homeowners than renters.

Mayor Cook asked about the percentage of revenue going towards charitable cases and asked how much charity the Sherwood Y provides. Mr. Hall responded that he did not know the exact numbers for Sherwood but the average is 25 percent.

Mayor Cook thanked Mr. Hall and Consultants Miller and Baker for coming to Tigard and said he looked forward to continuing this discussion at the May 19 workshop meeting.

## 9. CONTINUED DISCUSSION ON TIGARD CITY CHARTER REVIEW

Assistant City Manager Newton introduced this item and summarized the issues heard at the March 17 workshop. She said she is looking for direction from council on how to move forward in order to file by August 14.

Councilor Henderson asked how the ballot would appear. Assistant City Manager Newton said the city attorney would draft the language, voters would see the old and new language and could vote to support change or not. City Attorney Ramis confirmed that each item requires an individual vote. He said the council has unlimited discretion on what they want to put on the ballot.

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## TIGARD CITY COUNCIL MINUTES – MAY 12, 2015

Mayor Cook said there is a petition being circulated to place a two-term limit on county commissioners on the ballot and this will show the will of the people. He said that locally, voting someone out is a term limit. He asked council if they want to make it unlimited or have three terms total, in any combination of mayor/councilor. Councilor Henderson said he wants to see more retention of seniority and knowledge but there should be three terms at a maximum.

Council President Snider said he is a huge proponent of single-term term limits for each federal and even some state offices, in particular where the political system has been clouded by money. He said even at the City of Portland level, a scandal means getting voting out which is in effect, a term limit. He said that is a more effective way to limit terms at the local level than in Washington DC, where tenure has become a problem. He said he was also concerned about the appearance that the charter amendments are self-serving to the existing city council. He suggested a way to eliminate that would be to put in a provision that the changes do not go into effect until the current council leaves office.

 Councilor Goodhouse said he was initially favorable to term limits but wants to avoid too much turnover to retain some familiarity and history. With constant turnover no one knows why decisions were made. He suggested three years for council and three years for mayor, with a councilor able to become mayor or vice versa. He agreed that being voted out is a term limit and added that local candidates do not need to spend a lot of money to be elected. Councilor Goodhouse said his first choice was no term limits and second choice was three and three.

Councilor Woodard said he was in favor of three terms for councilors but only two terms for mayor. He suggested a mayor take a break after leaving office before running for council to avoid burnout. He also mentioned a concern about mayors being drawn into regional issues by the regional government and there is no way for mayors to push back.

City Manager Newton said she was hearing support for a three-term limit for council and a two-term limit for mayor and removal of the 12-year limit. Councilor Goodhouse suggested a scenario of someone with two terms as councilor then being elected for two terms as mayor. This would enable an experienced councilor to serve as mayor rather than someone new to local government and the city. He said the city needs to have familiar faces on the federal and regional level. Council President Snider agreed with three terms as councilor and two terms as mayor for a possibility of five terms. It could be 3/2 or 2/3.

Mayor Cook suggested making it effective for future council so there is no appearance of self-interest. Councilor Goodhouse disagreed and said if a current councilor wanted to run for a third term it is an advantage for the city to retain that experience.

A discussion was held on what constitutes a break in service, with Council President Snider and Councilor Goodhouse suggesting a full term as a break. Councilor Henderson said he thought that was the intent. City Attorney Ramis asked council what their definition of consecutive years of service was. He asked, "Could the cap be defeated by resigning in the last six months of the term and then running again?" A discussion was held on the desired length of a break. City Attorney Ramis will develop some clarifications for council review.

## **TIGARD CITY COUNCIL MINUTES – MAY 12, 2015**

Mayor Cook commented that three terms for council and two terms for mayor would come to 20 years so it might as well be unlimited. A discussion was held on having a 16-year cap. Mayor Cook suggested no more than two terms as mayor and no more than three terms as councilor in any combination with a 16-year cap. Councilors Woodard, Goodhouse, Henderson and Snider agreed.

10. NON AGENDA ITEMS There was none.

11. EXECUTIVE SESSION At 9:45 p.m. Mayor Cook read the Executive Session citation for consultation with counsel concerning legal rights and duties regarding current litigation or litigation likely to be filed, under ORS 192.660(2) (h). He said the Tigard City Council will adjourn from Red Rock Creek Conference Room after the Executive Session. City Attorney Ramis left the meeting. The Executive Session ended at 10:16 p.m.

12. ADJOURNMENT At 10:16 p.m. Council President Snider moved for adjournment. Councilor Woodard seconded the motion and all voted in favor.

	Yes	No
Councilor Woodard	✓	
Mayor Cook	✓	
Councilor Goodhouse	✓	
Councilor Henderson	✓	
Council President Snider	✓	

  
\_\_\_\_\_  
Carol A. Krager, City Recorder

Attest:

  
\_\_\_\_\_  
John L. Cook, Mayor

June 9, 2015  
Date

**TIGARD CITY COUNCIL MINUTES – MAY 12, 2015**

AIS-2281

3. A.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** Consent Item

**Agenda Title:** Approve Workers' Compensation Insurance for City Volunteers

**Prepared For:** Kent Wyatt

**Submitted By:** Kent Wyatt,  
City  
Management

**Item Type:** Resolution

**Meeting Type:** Consent  
Agenda

**Public Hearing** No

**Newspaper Legal Ad Required?:**

**Public Hearing Publication**

**Date in Newspaper:**

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**Information**

**ISSUE**

Should Tigard continue to provide workers' compensation insurance for city volunteers to protect them if they are injured during their volunteer service time?

**STAFF RECOMMENDATION / ACTION REQUEST**

Approve resolution to provide workers' compensation insurance to city volunteers 7/1/15 through 6/30/16.

**KEY FACTS AND INFORMATION SUMMARY**

Oregon law allows cities to elect coverage for various classes of volunteers. We define a volunteer as "any person who donates approved service without pay or reimbursement other than approved incidental expenses for those services rendered." For several years the City Council has elected to provide injury coverage.

The City has volunteers working in most of its departments. Volunteers support city departments and expand services to the public. Although volunteer assistance is not free, it is a valuable tool to involve the public in service delivery and understanding of their local government. The proposed resolution will allow the City to continue to provide workers' compensation to all City volunteers.

**OTHER ALTERNATIVES**

N/A

**COUNCIL OR CCDA GOALS, POLICIES, MASTER PLANS**

N/A

**DATES OF PREVIOUS CONSIDERATION**

N/A

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**Fiscal Impact**

**Cost:** \$14,519  
**Budgeted (yes or no):** Yes  
**Where Budgeted (department/program):** All Departments

**Additional Fiscal Notes:**

For FY 2015, the City will pay \$14,519 to cover City volunteers for workers' compensation.

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**Attachments**

Council Resolution

Volunteer Roster

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CITY OF TIGARD, OREGON  
TIGARD CITY COUNCIL  
RESOLUTION NO. 15-

A RESOLUTION EXTENDING CITY OF TIGARD'S WORKERS' COMPENSATION COVERAGE TO VOLUNTEERS OF THE CITY.

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WHEREAS, the City of Tigard acknowledges the valuable service rendered by City of Tigard volunteers; and

WHEREAS, the City of Tigard wishes to protect City volunteers by providing injury insurance for them when they volunteer; and

WHEREAS, Workers' Compensation Insurance is less costly and provides more benefits than health insurance; and

WHEREAS, the City Council places high value on volunteers and the volunteer program and has provided this coverage for several years to protect volunteers if they are injured during volunteer work; and

WHEREAS, Oregon law requires cities determine whether Workers' Compensation Insurance will be provided to volunteers (ORS 656.031); and

WHEREAS, the City of Tigard participates in the City County Insurance Services (CIS) Group Self-Insurance Program, which requires a resolution be adopted annually by the Tigard City Council to extend Workers' Compensation Insurance coverage to City of Tigard volunteers.

NOW, THEREFORE, BE IT RESOLVED by the Tigard City Council that:

SECTION 1: Pursuant to ORS 656.031, Workers' Compensation coverage will be provided to classifications listed on the attached Volunteer Program Worksheet (Exhibit A). Assumed wages for police reserve officers, boards and commissions, and the Mayor and Council are provided on attached Exhibit A. An assumed hourly wage of \$9.25 will be used for all other volunteers.

SECTION 2: A roster of active volunteers is updated monthly for reporting purposes. It is acknowledged that CIS may request copies of these rosters during year-end audit.

SECTION 3: Unanticipated volunteer projects or exposures not addressed herein will be added to the City of Tigard's coverage agreement by endorsement and advance notice to CIS, allowing at least two weeks for processing. It is hereby acknowledged that Worker's Compensation for unanticipated volunteer projects cannot be backdated.

SECTION 4: This resolution will be updated annually as long as Tigard is a member of the CIS Workers' Compensation Self-Insurance Services Group and chooses to provide Workers' Compensation Insurance for City volunteers.

SECTION 5: The coverage affected by this resolution is for the 2015/2016 coverage year (July 1, 2015 through June 30, 2016) with the City's membership in the CIS Workers' Compensation Self-Insurance Services Group.

SECTION 6: This resolution is effective immediately upon passage.

PASSED: This \_\_\_\_\_ day of \_\_\_\_\_ 2015.

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Mayor - City of Tigard

ATTEST:

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City Recorder - City of Tigard

**City of Tigard Volunteers  
Workers' Comp Program**

Position Title	WC Code	Volunteers Anticipated	Volunteer Time Anticipated (in hours)	Assumed Wage (per hour unless otherwise marked)	Notes	Estimated Payroll	
Photographer	4361V	2	25	\$9.25	Photographer indoors and outdoors - can use ladder	\$231	
Painting Services (Interior)	5474V	1	40	\$9.25	Bldg. interiors with latex paint & ladders	\$370	
Traffic & Accident Data Coord.	5506V	1	150	\$9.25	Office work and work within the ROW. Minimal traffic control & will require flagging training from certified COT staff member.	\$1,388	
Library Volunteers (Traveling)	7380V	8	400	\$9.25	Driving personal vehicles to homes of "shut ins" deliver materials - Friendly Visitor Program	\$3,700	
Community Service Supervisors	7720V	4	145	\$9.25	Supervision of community service, PEER Court & Municipal Court work crews/individuals	\$1,341	
Juvenile Court Offenders	7720V	0	0	\$9.25	Juveniles from Municipal Court providing community service	\$0	
CERT Volunteers Training/Activation	8411V	50	3,200	\$800/ month/ member	Training & activation. Estimated hours represent training only.	\$480,000	
Police Cadet Volunteers	8411V	11	1,700	\$800/ month/ member	Police Explorers are now called Cadets	\$105,600	
Reserve Police Officers	8411V	3	1,920	\$5,090/ month / member	Note: Assumed wage is mid-range police officer salary	\$173,916	
Police Chaplain	8742V	1	328	\$9.25	Chaplain	\$3,034	
Boards & Committees	8742V	See membership listing below	N/A	\$2,500/ board /yr.	8 boards & commissions (see list @ bottom of page 2). Meetings & limited travel to view field sites.	\$20,000	
Grant Writer Assistants (Indoors Only)	8810V	1	40	\$9.25	Working in office setting or in the home.	\$370	
Library Volunteers (No travel)	8810V	450	27,000	\$9.25	All tasks in-house; check-in materials, shelving, data entry, processing new materials, translation, etc.	\$249,750	
Office Assistance	8810V	5	250	\$9.25	Clerical type work assignments in administrative offices	\$2,313	
Translators	8810V	2	80	\$9.25	Working in office setting or in the home translating information from one language to another.	\$740	
PEER Court Service	8820V	25	450	\$9.25	Teenagers serving as attorneys, jurors, clerks in court room. Adults serving as judges and facilitation of process.	\$4,163	
Building Maintenance	9015V	2	25	\$9.25	Room set up & tear down, general cleaning	\$231	
DARE Camp Supervisors	9015V	0	0	\$9.25	Mentoring kids at camp (does not including driving)	\$0	
Park Landscape Maintenance	9102V	50	1,500	\$9.25	Planting trees, blackberry removal, greenway cleanup, path clean up, trail maintenance. This code allows use of gas powered leaf blowers and reciprocating weed eaters.	\$13,875	
Citywide Celebrations	9402V	500	1,750	\$9.25	Earth Day, Make A Difference Day, etc. Includes planting trees, library shelf cleaning, community cleanup, street cleanup patrols	\$16,188	
Storm/Water Maintenance	9402V	250	600	\$9.25	Stenciling catch basins, Adopt-A-Creek program with weeding & limited trash removal & cleaning/painting water hydrants. This code allows use of gas powered leaf blowers and reciprocating weed eaters. Also, trail counting and review.	\$5,550	
Street Cleanup Program	9402V	100	600	\$9.25	Roadside cleanup. This code allows use of gas powered leaf blowers and reciprocating weed eaters.	\$5,550	
Door to Door Distribution	9410V	3	30	\$9.25	Delivery of brochures/door hangers	\$278	
<b>Changes in Red</b>						<b>TOTAL Estimated Payroll for FY 2015/16</b>	<b>\$1,088,586</b>

NOTE: 9 boards, commission and task forces (WC Code 8742V) are as follows: Budget Committee (5 non-Council members), City Center Advisory Commission (10), Intergovernmental Water Board (Tigard only gets two appointees, three if the at-large/floating member is from Tigard), Library Board (9), Neighborhood Involvement Committee (10), Park & Recreation Advisory Board (9), Planning Commission (11), Tigard Transportation Advisory Committee (13), Tigard Youth Advisory Council (25)

NOTE: Minimum wage increased to \$9.25 on 1/1/15

NOTE: Mayor and Council are not reported as volunteers because they are paid monthly stipends which are reported with payroll figures under WC Code # 8742.

AIS-2289

3. B.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** Consent Item

**Agenda Title:** Approve the Purchase of Four 2016 Ford Explorers as Police Fleet Replacement Vehicles

**Prepared For:** Joseph Barrett

**Submitted By:** Joseph Barrett, Financial and Information Services

**Item Type:** Motion Requested **Meeting Type:** Consent Agenda - LCRB

**Public Hearing** No

**Newspaper Legal Ad Required?:**

**Public Hearing Publication**

**Date in Newspaper:**

**Information**

**ISSUE**

Shall the Local Contract Review Board approve the purchase of four (4) 2016 Ford Explorers as replacement vehicles for the police fleet?

**STAFF RECOMMENDATION / ACTION REQUEST**

Staff recommends the Local Contract Review Board approve the purchase of four (4) 2016 Ford Explorers from Landmark Ford, Inc. for a total of \$115,573 to replace aging fleet vehicles fleet and authorize the City Manager to take the necessary steps to execute the purchase.

**KEY FACTS AND INFORMATION SUMMARY**

**Overview:**

The Police Department needs to replace four (4) Ford Crown Victoria patrol vehicles that have met or exceeded one or more of the City’s replacement criteria. Typical criteria in determining a vehicle’s life cycle include:

- Mileage (for Police vehicles it is 75,000 miles),
- Age (for Police vehicles it is 3 years),
- Maintenance Record, or
- A Combination of the Above

The city conducts an assessment of a vehicle at the aforementioned years and mileage and determination is made by the vehicle's home department and fleet whether or not to request replacement of the vehicle. In this case the determination was made that the vehicles need to be replaced and the appropriations were placed in the 2015-16 fiscal year budget and subsequently approved by the Budget Committee and City Council.

The department is looking to replace these patrol vehicles with four (4) 2016 Ford Explorer Police Interceptors. The cost of each of the 2016 Ford Explorer Police Interceptors is \$28,893. The total for all four (4) vehicles for this purchase is \$115,572.

## Purchase Details

Staff is looking to make this purchase through a permissive cooperative procurement process. Under 279A.215, the city may establish a contract or purchase with a specific vendor under such a process. This is in line with Tigard Public Contracting Rule 10.085. Under this form of procurement the following is all that is required:

- An administering contracting agency with a solicitation and contract that is open and competitive, allows selection methods similar to Tigard's,
- The solicitation document and contract with the administering agency contains cooperative language which allows other agencies (such as Tigard) to establish their own contracts under the terms, conditions, and pricing of the original contract,
- A contractor that agrees to extend the terms, conditions, and pricing, and
- Public notice if the purchasing agency's contract will exceed \$250,000.

For these vehicles, the State of Oregon has an agreement with Landmark Ford (State Contract #5550) in Tigard that meets the first three bullets – the last bullet is not a factor as the purchase is under \$250,000. Tigard is also a member of the Oregon Cooperative Procurement Program (ORCPP) which makes the city eligible to utilize State of Oregon contracts.

Utilizing the state's contract for this purchase will afford the city reduce pricing through the state's higher volume. This process will also serve to save staff time and city resources by foregoing the typically required Invitation to Bid process.

## OTHER ALTERNATIVES

The Local Contract Review Board could decline the purchase and direct staff to conduct a formal solicitation for the vehicles. This would likely lead to higher purchase price and increased administrative costs for the purchase process.

## COUNCIL GOALS, POLICIES, APPROVED MASTER PLANS

N/A

## DATES OF PREVIOUS COUNCIL CONSIDERATION

The Council received a memo regarding this proposed purchase in their May 28, 2015 packet. Staff is asking for this memo to have served as first pass regarding this action request.

---

### Fiscal Impact

**Cost:** \$115,573

**Budgeted (yes or no):** Yes

**Where budgeted?:** General Fund

#### Additional Fiscal Notes:

The General Fund has a total of \$232,098 appropriated in FY 2015-16 for replacement of police vehicles. The total estimated purchase for these four vehicles is \$115,573, leaving \$116,525 left to outfit the patrol vehicles for police use and to purchase two additional vehicles which are slated for replacement in FY 2015-16. The additional vehicles have different specifications and will be purchased from a separate vendor at a later time.

---

### Attachments

*No file(s) attached.*

---

**AIS-2300**

**. C.**

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** Consent Item

**Agenda Title:** Receive and File: Council Calendar and Council Tentative Agenda

**Submitted By:** Carol Krager, City Management

**Item Type:** Receive and File

**Meeting Type:** Consent -  
Receive and  
File

**Public Hearing:** No

**Publication Date:**

---

**Information**

**ISSUE**

Receive and file the Council Calendar and the Tentative Agenda for future council meetings.

**STAFF RECOMMENDATION / ACTION REQUEST**

No action is requested; these are for information purposes.

**KEY FACTS AND INFORMATION SUMMARY**

Attached are the Council Calendar and the Tentative agenda for future Council meetings.

**OTHER ALTERNATIVES**

N/A

**COUNCIL GOALS, POLICIES, APPROVED MASTER PLANS**

N/A

**DATES OF PREVIOUS COUNCIL CONSIDERATION**

N/A - Receive and File Items

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**Attachments**

Three Month Calendar

Tentative Agenda

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# MEMORANDUM

TO: Honorable Mayor & City Council/City Center Development Agency Board

FROM: Carol A. Krager, City Recorder

RE: Three-Month Council/CCDA Meeting Calendar

DATE: July 7, 2015

## July

7 Tuesday City Center Development Agency Meeting **Cancelled**  
Council Summer BBQ Social – 6-8 p.m., Summerlake Park (big shelter)

14\* Tuesday Council Business Meeting – 6:30 p.m., Town Hall

21\* Tuesday Council Workshop Meeting – 6:30 p.m., Town Hall

28\* Tuesday Council/CCDA Business Meeting – 6:30 p.m., Town Hall

## August

4 Tuesday City Center Development Agency Meeting **Cancelled** (National Night Out)

11\* Tuesday Council Business Meeting – 6:30 p.m., Town Hall

18\* Tuesday Council/CCDA Workshop Meeting – 6:30 p.m., Town Hall

25\* Tuesday Council Business Meeting – 6:30 p.m., Town Hall

## September

1 Tuesday City Center Development Agency Meeting – 6:30 p.m., Town Hall

8\* Tuesday Council Business Meeting – 6:30 p.m., Town Hall

15\* Tuesday Council Workshop Meeting – 6:30 p.m., Town Hall

22\* Tuesday Council Business Meeting – 6:30 p.m., Town Hall

Regularly scheduled Council meetings are marked with an asterisk (\*).

Meeting Banner  Business Meeting   
 Study Session  Special Meeting   
 Consent Agenda  Meeting is Full   
 Workshop Meeting  CCDA Meeting

**City Council Tentative Agenda  
7/6/2015 4:56 PM - Updated**

Form #	Meeting Date	Submitted By	Meeting Type	Title	Department	Inbox or Finalized
2138	07/07/2015	Norma Alley	AAA	July 7, 2015 Cookout with City Council At Summerlake Park from 6-8 p.m. <b>City Manager Wine Absent</b>		
2027	07/14/2015	Norma Alley	AAA	July 14, 2015 Business Meeting		
2067	07/14/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
2282	07/14/2015	Norma Alley	ACCSTUDY	30 Minutes - Continued Discussion on Charter Ballot Titles	City Management	Newton L, Assistant City Manager
<b>Total Time: 45 of 45 Minutes Scheduled STUDY SESSION FULL</b>						
2281	07/14/2015	Kent Wyatt	ACONSENT	Consent Item - Approve Workers' Compensation Insurance for City Volunteers	City Management	Mills L, Asst to City Manager
2289	07/14/2015	Joseph Barrett	ACONSENT	Consent Item - Purchase Approval of Four 2016 Ford Explorers as Replacement Vehicles for Police Fleet	Police	07/06/2015
2191	07/14/2015	Louis Sears	CCBSNS	1 20 Minutes - Public Hearing: Comcast Cable Franchise Agreement Renewal	Financial and Information Services	07/06/2015
2267	07/14/2015	John Floyd	CCBSNS	2 50 Minutes - Appeal of Heritage Crossing Zone Change and Subdivision (ZON2015-00002 et. al.)	Community Development	07/06/2015
2270	07/14/2015	Cheryl Caines	CCBSNS	3 10 Minutes - Rosacker Annexation	Community Development	6/30/2015
2147	07/14/2015	Steve Martin	CCBSNS	4 5 Minutes - Authorize the City Manager to Sign a Property Purchase Agreement	Public Works	07/06/2015
2275	07/14/2015	Carol Krager	CCBSNS	5 30 Minutes - Continued Discussion on Community Center Ballot Title Approval	City Management	07/06/2015
<b>Total Time: 115 of 100 Minutes Scheduled MEETING OVERSCHEDULED</b>						

Meeting Banner  Business Meeting   
 Study Session  Special Meeting   
 Consent Agenda  Meeting is Full   
 Workshop Meeting  CCDA Meeting

**City Council Tentative Agenda  
7/6/2015 4:56 PM - Updated**

2028	07/21/2015	Norma Alley	AAA	July 21, 2015 Workshop Meeting <b>City Manager Wine Absent</b>		
<b>Total Time: 70 of 180 Minutes Scheduled</b>						
2221	07/21/2015	Mark Bernard	CCWKSHOP	1 40 Minutes - Presentation on Southwest Corridor Planning Progress	Community Development	Brown B., Assoc Transp Planner
2099	07/21/2015	Norma Alley	CCWKSHOP	2 15 Minutes - Provide a progress report on the implementation of the Strategic Plan	City Management	Wyatt K, Management Analyst
2166	07/21/2015	Lloyd Purdy	CCWKSHOP	3 15 Minutes - Economic Development Update	Community Development	Patton J., Senior Administrative Sp
<b>Total Time: 70 of 180 Minutes Scheduled</b>						
2029	07/28/2015	Norma Alley	AAA	July 28, 2015 Business Meeting		
2068	07/28/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
1888	07/28/2015	Judy Lawhead	ACCSTUDY	15 Minutes - Briefing on Capital Improvement Plan (CIP) Projects	Public Works	Faha L, City Engineer
<b>Total Time: 30 of 45 Minutes Scheduled</b>						
2245	07/28/2015	Gary Pagenstecher	CCBSNS	1 30 Minutes - Leg. & QJ Public Hearings: Dirksen Nature Park Wetlands Education	Community Development	Pagenstecher G, Assoc Planner
2252	07/28/2015	Carol Krager	CCBSNS	2 35 Minutes - Consider Resolution Approving Submitting Proposed City of Tigard Charter Changes to the Voters	City Management	Newton L, Assistant City Manager
2284	07/28/2015	Carol Krager	CCBSNS	3 35 Minutes - Consider Resolution Approving Submitting Proposed Community Center Measure to the Voters	City Management	Newton L, Assistant City Manager
<b>Total Time: 100 of 100 Minutes Scheduled MEETING FULL</b>						
				August 4, 2015 CCDA Cancelled <b>National Night Out</b>		

Meeting Banner  Business Meeting   
 Study Session  Special Meeting   
 Consent Agenda  Meeting is Full   
 Workshop Meeting  CCDA Meeting

**City Council Tentative Agenda  
 7/6/2015 4:56 PM - Updated**

2030	08/11/2015	Norma Alley	AAA	August 11, 2015 Business Meeting <b>Councilors Henderson and Snider Absent</b>		
2069	08/11/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
2290	08/11/2015	Norma Alley	ACCSTUDY	15 Minutes - Update on Youth Sports League Agreement	City Management	Newton L, Assistant City Manager
				<b>Total Time: 30 of 45 Minutes Scheduled</b>		
2192	08/11/2015	Lloyd Purdy	CCBSNS	15 Minutes - QJ Public Hearing: Comprehensive Plan Amendment (Hunziker Hillside)	Community Development	Pagenstecher G, Assoc Planner
2283	08/11/2015	Norma Alley	CCBSNS	20 Minutes - Placeholder if needed - Consider Resolution Approving Submitting Proposed City of Tigard Charter Changes to the Voters	City Management	Newton L, Assistant City Manager
2285	08/11/2015	Carol Krager	CCBSNS	20 Minutes - Placeholder if needed - Consider Resolution Approving Submitting Proposed Community Center Measure to the Voters	City Management	Newton L, Assistant City Manager
2295	08/11/2015	John Floyd	CCBSNS	30 Minutes - Tentative Continuance Date - Heritage Crossing Appeal	Community Development	Floyd J, Associate Planner
2297	08/11/2015	City Attorney Rihala	CCBSNS	15 Minutes - Resolution re 72 <sup>nd</sup> and Dartmouth Easement	City Management	MWine, City Manager
				<b>Total Time: 100 of 100 Minutes Scheduled MEETING FULL</b>		
2031	08/18/2015	Norma Alley	AAA	August 18, 2015 Workshop and CCDA Meeting <b>Councilors Goodhouse and Snider Absent</b>		
2086	08/18/2015	Tom McGuire	CCWKSHOP	40 Minutes - Joint Meeting with the Planning Commission to Receive a Briefing on the Tigard Triangle	Community Development	Caines C, Assoc Planner
2201	08/18/2015	Norma Alley	CCWKSHOP	50 Minutes - Continued Discussion on Street Maintenance Fee	Financial and Information Services	LaFrance T, Fin/Info Svcs Director

Meeting Banner	<input type="checkbox"/>	Business Meeting	<input type="checkbox"/>
Study Session	<input type="checkbox"/>	Special Meeting	<input type="checkbox"/>
Consent Agenda	<input type="checkbox"/>	Meeting is Full	<input type="checkbox"/>
Workshop Meeting	<input type="checkbox"/>	CCDA Meeting	<input type="checkbox"/>

**City Council Tentative Agenda  
7/6/2015 4:56 PM - Updated**

2258	08/18/2015	Sean Farrelly	CCWKSHOP	25 Minutes - Presentation on Tigard Street Heritage Trail Concept	Community Development	Farrelly S, Redev Project Manager
2259	08/18/2015	Sean Farrelly	CCWKSHOP	15 Minutes - Future of Saxony Site Study	Community Development	Farrelly S, Redev Project Manager
				<b>Total Time: 130 of 180 Minutes Scheduled</b>		
2032	08/25/2015	Norma Alley	AAA	August 25, 2015 Business Meeting <b>Mayor Cook Absent</b>		
2070	08/25/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
				<b>Total Time: 15 of 45 Minutes Scheduled</b>		
2183	08/25/2015	Nadine Robinson	CCBSNS	20 Minutes - Expansion of Tigard Municipal Court's minor traffic diversion programs	Administrative Services	Robinson N, Admin. Svcs. Manager
2288	08/25/2015	Louis Sears	CCBSNS	15 Minutes - CenturyLink Franchise Agreement	Financial and Information Services	Sears L, IT Network Admin
2291	08/25/2015	Norma Alley	CCBSNS	15 Minutes - Approve the Youth Sports League Agreement	City Management	Newton L, Assistant City Manager
				<b>Total Time: 50 of 100 Minutes Scheduled</b>		
2139	09/01/2015	Norma Alley	AAA	September 1, 2015 CCDA Meeting		
2124	09/01/2015	Sean Farrelly	CCDA	20 Minutes - Fanno Creek Remeander Presentation	Community Development	Farrelly S, Redev Project Manager
2126	09/01/2015	Sean Farrelly	CCDA	35 Minutes - Southwest Corridor/Downtown Zoom-In	Community Development	Farrelly S, Redev Project Manager

Meeting Banner  Business Meeting   
 Study Session  Special Meeting   
 Consent Agenda  Meeting is Full   
 Workshop Meeting  CCDA Meeting

**City Council Tentative Agenda  
7/6/2015 4:56 PM - Updated**

2128	09/01/2015	Sean Farrelly	CCDA	25 Minutes - Burnham/Ash Design & Permitting Update	Community Development	Farrelly S, Redev Project Manager
<b>Total Time: 80 of 180 Minutes Scheduled</b>						
2033	09/08/2015	Norma Alley	AAA	September 8, 2015 Business Meeting <b>Mayor Cook Absent</b>		
2071	09/08/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
2292	09/08/2015	Norma Alley	ACCSTUDY	30 Minutes - Executive Session per ORS 192.660(2)(i)	City Management	06/22/2015
<b>Total Time: 45 of 45 Minutes Scheduled STUDY SESSION FULL</b>						
2034	09/15/2015	Norma Alley	AAA	September 15, 2015 Workshop Meeting		
2294	09/15/2015	Norma Alley	CCWKSHOP	30 Minutes - Preview & Update on the Automated Material Handling (at Library)	Library	Grimes A, Conf. Exec. Assistant
<b>Total Time: 30 of 180 Minutes Scheduled</b>						
2035	09/22/2015	Norma Alley	AAA	September 22, 2015 Business Meeting		
2072	09/22/2015	Norma Alley	ACCSTUDY	15 Minutes - Council Liaison Reports	City Management	12/22/2014
2167	09/22/2015	Lloyd Purdy	ACCSTUDY	20 Minutes - Third Quarter Economic Development Update	Community Development	Purdy, L, Econ Development Mgr

Meeting Banner  Business Meeting   
 Study Session  Special Meeting   
 Consent Agenda  Meeting is Full   
 Workshop Meeting  CCDA Meeting 

**City Council Tentative Agenda**  
**7/6/2015 4:56 PM - Updated**

				<b>Total Time: 35 of 45 Minutes Scheduled</b>		
2286	09/22/2015	Carol Krager	CCBSNS	30 Minutes - Legislative Session Wrap-up	City Management	Newton, L., Asst. City Manager
2296	09/22/2015	Loreen Mills	CCBSNS	45 Minutes – Executive Session – exempt public records ORS 192.660 (2)(f)	City Management	07/01/2015
				<b>Total Time: 75 of 100 Minutes Scheduled</b>		
09/29/2015 Norma Alley		September 29, 2015 Council 5x1x10's <b>City Manager Wine &amp; Assistant City Manager Newton Absent</b>				

AIS-2191

4.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 20 Minutes

**Agenda Title:** Public Hearing: Comcast Cable Franchise Agreement Renewal

**Submitted By:** Louis Sears, Financial and Information Services

**Item Type:** Ordinance  
Public Hearing - Informational

**Meeting Type:** Council  
Business Meeting - Main

**Public Hearing** No

**Newspaper Legal Ad Required?:**

**Public Hearing Publication**

**Date in Newspaper:**

**Information**

**ISSUE**

Should City Council renew the Metro Area Communications Commission (MACC) franchise agreement with Comcast for 10 years?

**STAFF RECOMMENDATION / ACTION REQUEST**

Adopt the ordinance to renew the Comcast franchise agreement for 10 years.

**KEY FACTS AND INFORMATION SUMMARY**

The City of Tigard is a member of the Metro Area Communications Commission (MACC) with other regional jurisdictions which includes: Washington County, Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, King City, Lake Oswego, North Plains, Rivergrove, Hillsboro, West Linn, and Tualatin. MACC administers the cable franchise agreements for Comcast and Frontier for the MACC member jurisdictions. All MACC members must approve the franchise agreement for the franchise agreement to be renewed.

The current MACC franchise agreement with Comcast signed in 1999, expired January 31, 2014 and has been extended by MACC jurisdictions and Comcast to allow additional time to reach a franchise renewal agreement and avoid the more expensive formal negotiation process.

The side by side attachment highlights the key differences between the old franchise agreement and the new franchise agreement.

Three biggest changes in new franchise agreement may be:

1. Term is 10 years from the past agreement of 15 years
2. Competition clause
3. Gross Revenue Definition changed slightly

**OTHER ALTERNATIVES**

If one or more MACC jurisdictions does not renew to the proposed franchise agreement, a formal process based on federal law would most likely occur.

**COUNCIL OR CCDA GOALS, POLICIES, MASTER PLANS**

N/A

**DATES OF PREVIOUS CONSIDERATION**

City Council approved the current MACC franchise agreement with Comcast in 1999 and the franchise agreement expired on January 31, 2014.

City Council approved the extension of the current Comcast franchise agreement on January 14, 2014. Resolution No. 14-04.

City Council approved a second extension of the current Comcast franchise agreement on December 9, 2014. Resolution No. 14-54.

---

**Fiscal Impact**

**Cost:** n/a

**Budgeted (yes or no):** Yes

**Where Budgeted (department/program):** General Fund

**Additional Fiscal Notes:**

The adoption of this franchise ordinance does not impact or change the franchise revenue the city receives.

---

**Attachments**

Ordinance

Exhibit A - Franchise Agreement

MACC Staff Report

MACC Recommendation

FAQ

Old vs New Comparison

---

CITY OF TIGARD, OREGON  
TIGARD CITY COUNCIL  
ORDINANCE NO. 15-

AN ORDINANCE OF THE CITY OF TIGARD GRANTING A NON-EXCLUSIVE CABLE  
FRANCHISE TO COMCAST OF OREGON II, INC.

---

WHEREAS, in 1980 the Metropolitan Area Communications Commission (hereinafter "MACC") was formed by Intergovernmental Cooperation Agreement, amended in 2002 and now an Intergovernmental Agreement (hereinafter "IGA") to enable its member jurisdictions to work cooperatively and jointly on communications issues, in particular the joint franchising of cable services and the common administration and regulation of such franchises, and the City of Rivergrove (hereinafter "City") is a member of MACC;

WHEREAS, the IGA authorizes MACC and its member jurisdictions to grant one or more nonexclusive franchises for the construction, operation and maintenance of a cable service system within the combined boundaries of the member jurisdictions;

WHEREAS, the IGA requires that each member jurisdiction to be served by the proposed franchisee must approve any cable service franchise;

WHEREAS, the City has previously granted a cable franchise to TCI Cablevision of Tualatin Valley, Inc. and that franchise is now held by Comcast of Tualatin Valley, the grantee's lawful successor in interest;

WHEREAS, the Board of Commissioners of MACC, by Resolution 2015-05 adopted on the 10th day of June, 2015, recommended that the member jurisdictions grant a franchise to Comcast of Oregon II, Inc. in the form attached hereto as Exhibit "A," which authorizes the provision of cable services from July 1, 2015 through June 30, 2025;

WHEREAS, MACC provided adequate notice and opportunities for public comment on the proposed cable services franchise including public hearings on March 18, 2015 and June 10, 2015;

WHEREAS, the Council finds that approval of the recommended franchise is in the best interest of the City and its citizens, consistent with applicable federal law;

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: There is hereby granted to Comcast of Oregon II, Inc. a non-exclusive cable services franchise on the terms and conditions contained in Exhibit "A".

SECTION 2: The grant of franchise at Section 1 is conditioned upon each of the following events:

(a) The affirmative vote of the governing body of each MACC member jurisdiction;

(b) Comcast of Oregon II, Inc.'s fulfillment of the franchise acceptance provisions contained in the Franchise; and

(c) Formal written determination by the MACC Administrator that, in accordance with the requirements of the IGA, each of the above two events has occurred.

SECTION 3: This ordinance shall be effective 30 days after its passage by the council, signature by the mayor, and posting by the city recorder.

PASSED: By \_\_\_\_\_ vote of all council members present after being read by number and title only, this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Carol A. Krager, City Recorder

APPROVED: By Tigard City Council this \_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
John L. Cook, Mayor

Approved as to form:

\_\_\_\_\_  
City Attorney

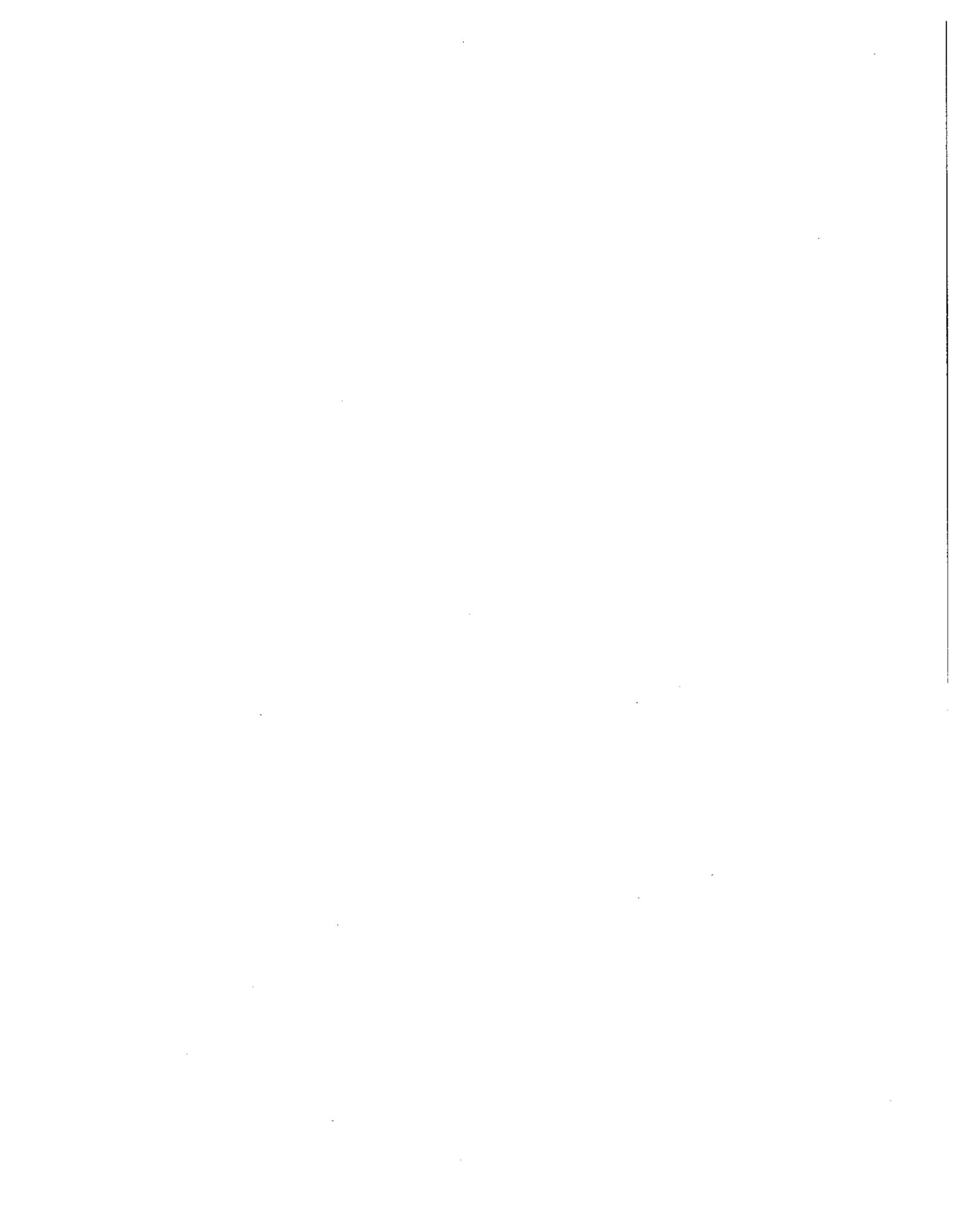
\_\_\_\_\_  
Date

**CABLE TELEVISION  
FRANCHISE AGREEMENT**

**Between the Jurisdictions participating in the  
METROPOLITAN AREA  
COMMUNICATIONS COMMISSION**

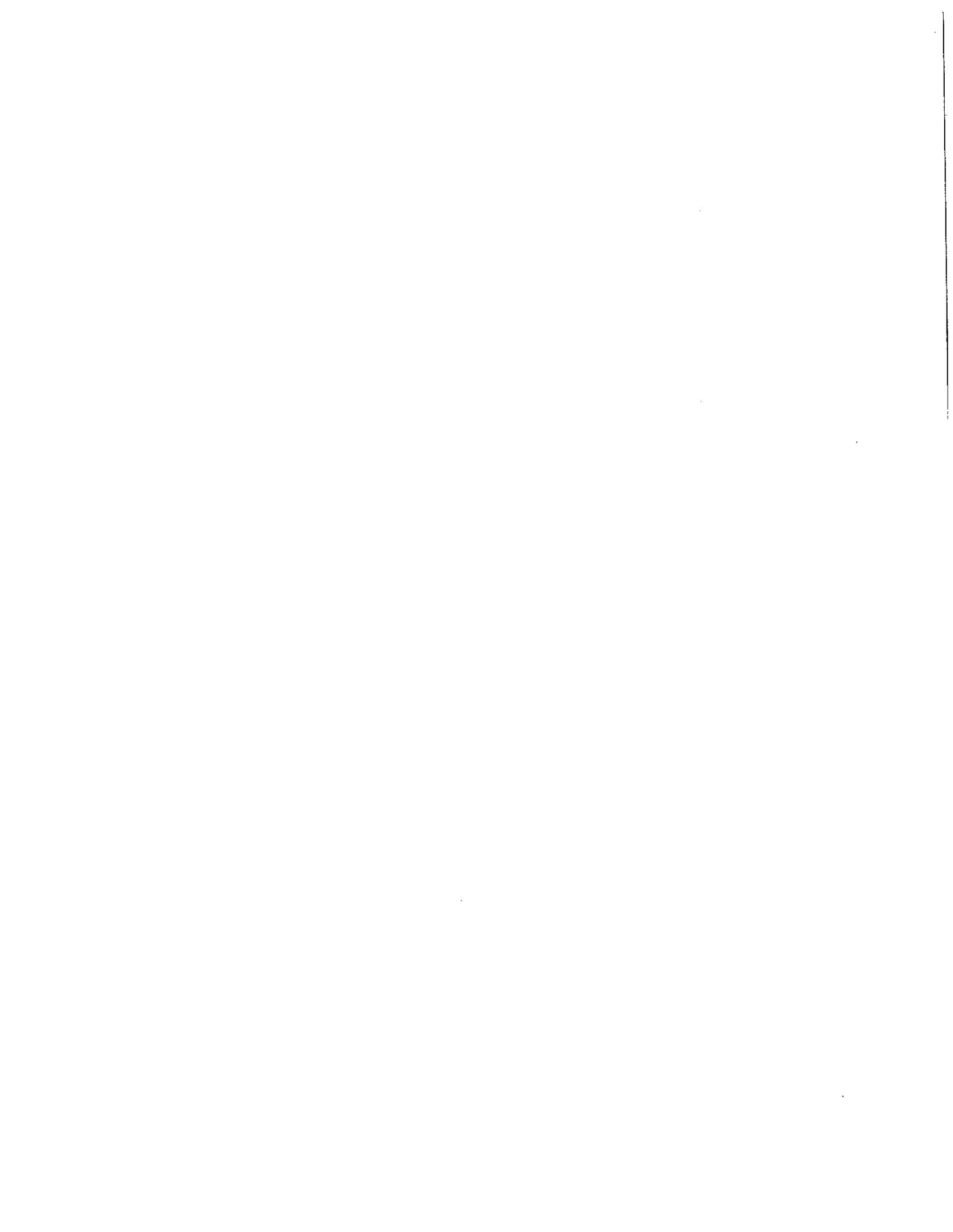
**AND  
COMCAST OF OREGON II, INC.**

**June 10, 2015**



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## SECTION 1. DEFINITIONS

For the purposes of this Agreement and all attachments included hereto, the following terms, phrases, words and their derivations shall have the meaning given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future, words in the plural include the singular, and words in the singular include the plural. Words not defined shall be given their common and ordinary meaning. The word "shall" is always mandatory and not merely directory.

- 1.1 **Access** means the availability for noncommercial use by various agencies, institutions, organizations, groups and individuals in the community, including Grantor and its designees, of the Cable System to acquire, create, receive, and distribute video and Signals as permitted under applicable law, including, but not limited to:
- (A) **Public Access** means Access where organizations, groups or individual members of the general public, on a nondiscriminatory basis, are the primary Programmers or users having editorial control over the content;
  - (B) **Educational Access** means Access where Schools and educational institutions are the primary Programmers or users having editorial control over the content;
  - (C) **Governmental Access** means Access where governmental institutions are the primary Programmers or users having editorial control over the content; and
  - (D) **PEG Access** means Public Access, Educational Access, and Governmental Access, collectively.
- 1.2 **Access Center** means a facility or facilities where Public, Educational, or Governmental use Signals are managed and delivered Upstream to the Grantee for Downstream transmission to Subscribers or to other Access Centers via a dedicated connection.
- 1.3 **Access Channel** means any Channel, or portion thereof, designated for non-commercial Access purposes or otherwise made available to facilitate or transmit Access programming or service.
- 1.4 **Affiliate** when used in connection with Grantee means any corporation, Person or entity that owns or controls, is owned or controlled by, or is under common ownership or control with, Grantee.
- 1.5 **Basic Service** means any service tier which includes the retransmission of local television broadcast Signals and PEG Access Channels, or as such service tier may be further defined by federal law.
- 1.6 **Cable Act** means the Cable Communications Policy Act of 1984 and the Cable Television Consumer Protection and Competition Act of 1992 and any amendments thereto, including those contained in the Telecommunications Act of 1996.
- 1.7 **Cable Operator** means any Person or group of Persons, including Grantee, who provide Cable Service over a Cable System and directly owns a significant interest in such Cable System, or who otherwise control or are responsible for, through any arrangement, the management and operation of such a Cable System.

- 1.8 **Cable Service** means the one-way transmission to Subscribers of video programming or other programming service and Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- 1.9 **Cable System** means a facility, consisting of a set of closed transmission paths and associated Signal generation, reception, and control equipment that is designed to provide Cable Service which includes video programming and which is provided to multiple Subscribers within a community, but such term does not include (1) a facility that serves only to retransmit the television Signals of one (1) or more television broadcast stations; (2) a facility that serves Subscribers without using any Public Right of Way; (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the federal Communications Act (47 U.S.C. 201 et seq.), except that such facility shall be considered a Cable System (other than for purposes of Section 621(c) (47 U.S.C. § 541(c)) to the extent such facility is used in the transmission of video programming directly to Subscribers, unless the extent of such use is solely to provide interactive on-demand service; (4) an open video system that complies with federal statutes; or (5) any facilities of any electric utility used solely for operating its electric utility systems.
- 1.10 **Capacity** means the maximum ability to carry Signals or other information within a specified format.
- 1.11 **Capital or Capital Cost** means the expenditure of funds for resources whose useful life can be expected to exceed a period of one (1) year or longer as consistent with Generally Accepted Accounting Principles ("GAAP").
- 1.12 **Channel** means a time or frequency slot or technical equivalent on the Cable System in a specified format, discretely identified and capable of carrying full motion color video and audio, and may include other non-video subcarriers and digital information.
- 1.13 **Commission** means the Metropolitan Area Communications Commission and its officers, agents and employees, created and exercising its powers pursuant to an Intergovernmental Cooperation Agreement entered into by Grantors herein, as authorized by state law (particularly ORS Chapter 190) and the laws, charters, and other authority of the individual member units of local government who are members of the Commission. The powers of the Commission have been delegated to it by Grantors and although it may exercise those powers as an entity, it remains a composite of Grantors herein.
- 1.14 **Demarcation** means up to and including the device (as of the Effective Date known as the "modulator") where the DAP Signal is converted into a format to be transmitted over a fiber connection to Grantee.
- 1.15 **Designated Access Provider ("DAP")** means the entity or entities designated by the Grantor to manage or co-manage PE G Access Channels and Access Centers. The Grantor may be a Designated Access Provider; however, any entity designated by the Grantor shall not be a third party beneficiary under this Agreement.
- 1.16 **Downstream** means the transport of Signals from the Headend to Subscribers or to Interconnection points served by the Cable System.
- 1.17 **Effective Date** means the date defined in Section 2.4 herein.
- 1.18 **FCC** means the Federal Communications Commission.

- 1.19 **Fiber** means a transmission medium of optical strands of cable capable of carrying Signals by means of lightwave impulses.
- 1.20 **Franchise** means the non-exclusive and revocable authorization or renewal thereof for the construction or operation of a Cable System such as is granted by this Agreement, whether such authorization is designated as a Franchise, license, resolution, contract, certificate, agreement or otherwise.
- 1.21 **Franchise Area** means the area within the legal jurisdictional boundaries of the individual member units of local government who are members of the Commission during the term of this Agreement. The Franchise Area shall include any additional signers of the Intergovernmental Agreement only if Grantee is currently providing Cable Service in such additional areas. For purposes of Washington County, the Franchise Area includes only the unincorporated areas within the legal jurisdictional boundaries of the County.
- 1.22 **Grantee** means Comcast of Oregon, II, Inc. or its permitted successors, transferees or assignees.
- 1.23 **Grantor** means, individually and, where applicable, collectively, the Oregon cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Tigard, Tualatin, and West Linn together with Washington County, Oregon.
- 1.24 **Gross Revenue** means, and shall be construed broadly to include, all amounts in whatever form and from all sources derived directly or indirectly by Grantee and/or an Affiliate from the operation of Grantee's Cable System to provide Cable Services within the Franchise Area. Gross Revenues include, by way of illustration and not limitation:
- Fees for Cable Services, regardless of whether such Cable Services are provided to residential or commercial Subscribers, including revenues derived from the provision of all Cable Services (including but not limited to pay or premium Cable Services, digital Cable Services, pay-per-view, pay-per-event, audio channels and video-on-demand Cable Services);
  - Installation, disconnection, reconnection, downgrade, upgrade, maintenance, repair, or similar charges associated with Subscriber Cable Service;
  - fees paid to Grantee for Channels designated for commercial/leased access use; which shall be allocated on a pro rata basis using total Cable Service Subscribers within the Franchise Area;
  - Converter, remote control, and other Cable Service equipment rentals, leases, or sales;
  - Payments for pre-paid Cable Services and/or equipment;
  - Advertising Revenues as defined herein;
  - Fees including, but not limited to: (1) late fees, convenience fees and administrative fees which shall be allocated on a pro rata basis using Cable Services revenue as a percentage of total Grantee revenues within the Franchise Area; (2) Franchise fees; (3) the FCC user fee and (4) PEG fees if included on Subscriber billing statements;
  - Revenues from program guides; and
  - Commissions from home shopping channels and other Cable Service revenue sharing arrangements which shall be allocated on a pro rata basis using total Cable Service Subscribers within the Franchise Area.

- "Gross Revenues" shall not be net of: (1) any operating expense; (2) any accrual, including without limitation, any accrual for commissions to Affiliates; or (3) any other expenditure, regardless of whether such expense, accrual, or expenditure reflects a cash payment. "Gross Revenues", however, shall not be double counted. Revenues of both Grantee and an Affiliate that represent a transfer of funds between the Grantee and the Affiliate, and that would otherwise constitute Gross Revenues of both the Grantee and the Affiliate, shall be counted only once for purposes of determining Gross Revenues. Similarly, operating expenses of the Grantee which are payable from Grantee's revenue to an Affiliate and which may otherwise constitute revenue of the Affiliate, shall not constitute additional Gross Revenues for the purpose of this Franchise. "Gross Revenues" shall include amounts earned by Affiliates only to the extent that Grantee could, in concept, have earned such types of revenue in connection with the operation of Grantee's Cable System to provide Cable Services and recorded such types of revenue in its books and Records directly, but for the existence of Affiliates. "Gross Revenues" shall not include sales taxes imposed by law on Subscribers that the Grantee is obligated to collect. With the exception of recovered bad debt, "Gross Revenues" shall not include bad debt.
- (A) "Advertising Revenues" shall mean amounts derived from sales of advertising that are made available to Grantee's Cable System Subscribers within the Franchise Area and shall be allocated on a pro rata basis using total Cable Service Subscribers reached by the advertising. Whenever Grantee acts as the principal in advertising arrangements involving representation firms and/or advertising Interconnects and/or other multichannel video providers, Advertising Revenues subject to Franchise fees shall include the total amount from advertising that is sold, and not be reduced by any operating expenses (e.g., "revenue offsets" and "contra expenses" and "administrative expenses" or similar expenses), or by fees, commissions, or other amounts paid to or retained by National Cable Communications or Comcast Spotlight or similarly affiliated advertising representations firms to Grantee or their successors involved with sales of advertising on the Cable System within the Franchise Area.
- (B) "Gross Revenues" shall **not** include:
- Actual Cable Services bad debt write-offs, except any portion which is subsequently collected which shall be allocated on a *pro rata* basis using Cable Services revenue as a percentage of total Grantee revenues within the Franchise Area;
  - Any taxes and/or fees on services furnished by Grantee imposed on Subscribers by any municipality, state or other governmental unit, provided that the Franchise fee, the FCC user fee and PEG fee shall not be regarded as such a tax or fee;
  - Launch fees and marketing co-op fees; and,
  - Revenues associated with the provision of managed network services provided under separate business contract.
  - Unaffiliated third party advertising sales agency fees or commissions which are reflected as a deduction from revenues, except when Grantee acts as a principal as specified in paragraph (A) immediately above.

- (C) To the extent revenues are derived by Grantee for the provision of a discounted bundle of services which includes Cable Services and non-Cable Services, Grantee shall calculate revenues to be included in Gross Revenues using a methodology that allocates revenue on a *pro rata* basis when comparing the bundled service price and its components to the sum of the published rate card prices for such components. Except as required by specific federal, state or local law, it is expressly understood that equipment may be subject to inclusion in the bundled price at full rate card value. This calculation shall be applied to every bundled service package containing Cable Service from which Grantee derives revenues in the Franchise Area. The Grantor reserves its right to review and to challenge Grantee's calculations.

Example: Prior to any bundle-related price reduction, if Cable Service is valued at 50% of the total of the services to be offered in a bundle, then Cable Service is to be valued and reported as being no less than fifty percent (50%) of the price of the bundled service total.

- (D) Grantee reserves the right to change the allocation methodologies set forth in paragraph (C) above to meet standards mandated by the Financial Accounting Standards Board ("FASB"), Emerging Issues Task Force ("EITF") and/or the U.S. Securities and Exchange Commission ("SEC"). Grantor acknowledges and agrees that Grantee shall calculate Gross Revenues in a manner consistent with GAAP where applicable; however, the Grantor reserves its right to challenge Grantee's calculation of Gross Revenues, including Grantee's interpretation of GAAP and Grantee's interpretation of FASB, EITF and SEC directives. Grantee agrees to explain and document the source of any change it deems required by FASB, EITF and SEC concurrently with any Franchise-required document at the time of submittal, identifying each revised Section or line item.
- (E) Grantor agrees and acknowledges that Grantee shall maintain its books and Records in accordance with GAAP.

- 1.25 **Headend** means Grantee's facility for Signal reception and dissemination on the Cable System, including cables, antennas, wires, satellite dishes, monitors, switches, modulators, processors, equipment for the Interconnection of the Cable System with adjacent Cable Systems or other separate communications network, and all other related equipment and facilities.
- 1.26 **Interconnect or Interconnection** means the provision by Grantee of technical, engineering, physical, financial and all other necessary components to provide and adequately maintain a physical linking of Grantee's Cable System with any other designated Cable System or any separate communications network, so that services of technically adequate quality may be sent to, and received from, such other systems to the extent required by this Agreement.
- 1.27 **Leased Access Channel** means any Channel commercially available for programming for a fee or charge by Grantee to members of the general public.
- 1.28 **Origination Point** means a location other than an Access Center, where Public, Educational, or Governmental use programming is delivered to the Grantee for Upstream transmission.

- 1.29 **Parent Corporation** means Comcast Communications, Inc. or successors and assigns and includes any other existing or future corporations with greater than fifty percent (50%) ownership or control over Grantee.
- 1.30 **Person** means any individual, sole proprietorship, partnership, association, corporation, or any other form of organization authorized to do business in the State of Oregon, and includes any natural person.
- 1.31 **Programmer** means any Person responsible for PEG Access Programming on the Cable System, including, without limitation, any Person who produces or otherwise provides PEG Access Programming for transmission on the Cable System.
- 1.32 **Programming** means television programs, audio, video or other patterns of Signals to be transmitted on the Cable System, and includes all programs or patterns of Signals transmitted, or capable of being transmitted, on the Cable System.
- 1.33 **Public Communications Network ("PCN")** means the separate communications institutional network provided by the Grantee under Section 12 of this Agreement designed principally for the provision of non-entertainment, interactive services to public Schools, public universities and colleges, Pacific University, public agencies, or the Virginia Garcia Health Centers (or successor agencies) for use in connection with the ongoing operations of such institutions. Services provided include data to PCN users on an individual application, private channel basis.
- 1.34 **Public Rights of Way** include, but are not limited to, Streets, bridges, sidewalks, trails, paths, public utility easements, and all other public ways, including the subsurface under and air space over these areas, excluding parks and parkways, but only to the extent of the Grantor's right, title, interest, or authority to grant a Franchise to occupy and use such Streets and easements for Cable System facilities. "Public Rights of Way" shall also include any easement granted to or owned by the Grantor and acquired, established, dedicated, or devoted for public utility purposes. Nothing in this Agreement shall preclude Grantee's use of private easements as set forth in 47 U.S.C. §541(a)(2).
- 1.35 **Record** means written or graphic materials, however produced or reproduced, or any other tangible permanent record, to the extent related to the enforcement or administration of this Agreement.
- 1.36 **Quarterly or Quarter** means the standard calendar periods of January 1 – March 31, April 1 – June 30, July 1 – September 30, and October 1 – December 31, unless otherwise specified in this Agreement.
- 1.37 **School** means any accredited educational institution, public or private, including, but not limited to, primary and secondary Schools.
- 1.38 **Section** means a provision of this Agreement, unless specified as part of another document.
- 1.39 **Signal** means any electrical or light impulses carried on the Cable System, whether one-way or bi-directional.
- 1.40 **Streets** means the surface of any public Street, road, alley or highway, within the Grantor, used or intended to be used by the general public for general transportation purposes to

the extent the Grantor has the right to allow the Grantee to use them, and the space above and below.

1.41 **Subscriber** means any Person who is lawfully receiving, for any purpose or reason, any Cable Service provided by Grantee by means of, or in connection with, the Cable System.

1.42 **Upstream** means the transport of Signals to the Headend from remote points on the Cable System or from Interconnection points on the Cable System.

## **SECTION 2. GRANT OF FRANCHISE**

### **2.1 Grant**

- (A) Grantor hereby grants to Grantee in the public interest a nonexclusive and revocable authorization to make lawful use of the Public Rights of Way within the Franchise Area to construct, operate, maintain, reconstruct, and repair a Cable System for the purpose of providing Cable Services and to provide a PCN for voice, video, and data, subject to the terms and conditions set forth in this Agreement.
- (B) This Agreement is intended to convey limited rights and interests only as to those Public Rights of Way, in which the Grantor has an actual interest. It is not a warranty of title or interest in any Public Rights of Way, it does not provide the Grantee any interest in any particular location within the Public Rights of Way, and it does not confer rights other than as expressly provided in the grant hereof. This Agreement does not deprive the Grantor of any powers, rights, or privileges it now has, or may acquire in the future, to use, perform work on, or regulate the use and control of the Grantor's Public Rights of Way covered by this Agreement, including without limitation, the right to perform work on its Streets, or appurtenant public works facilities, including constructing, altering, paving, widening, grading, or excavating thereof.
- (C) This Agreement authorizes Grantee to engage in providing Cable Service, as that term is defined in 47 U.S.C. Sec. 522(6) as amended, and to provide a related PCN as described in Section 12 of this Agreement. This Agreement shall not be interpreted to prevent the Grantor from imposing lawful additional conditions including additional compensation conditions for use of the Public Rights of Way should Grantee provide service other than Cable Service. Nothing herein shall be interpreted to prevent Grantee from challenging the lawfulness or enforceability of any provisions of applicable law.
- (D) Grantee promises and guarantees as a condition of exercising the privileges granted by this Agreement, that any agent, Affiliate or joint venture or partner of the Grantee directly involved in the offering of Cable Service in the Franchise Area, or directly involved in the management or operation of the Cable System in the Franchise Area, will also comply with the terms and conditions of this Agreement.

### **2.2 Use of Public Rights of Way**

Subject to Grantor's supervision and control and the terms of this Agreement, Grantee may erect, install, construct, repair, replace, reconstruct, and retain in, on, over, under, upon, across, and along the Public Rights of Way within the Franchise Area, such wires, cables, conductors, ducts,

conduits, vaults, amplifiers, pedestals, attachments, and other property and equipment as are necessary and appurtenant to the operation of a Cable System for the provision of Cable Service within the Franchise Area. Grantee shall comply with all applicable construction codes, laws, ordinances, regulations and procedures now in effect or enacted hereafter, and must obtain any and all necessary permits from the appropriate agencies of Grantor prior to commencing any construction activities. Grantee, through this Agreement, is granted extensive and valuable rights to operate its Cable System for profit using Grantor's Public Rights of Way within the Franchise Area in compliance with all applicable Grantor construction codes and procedures. As trustee for the public, Grantor is entitled to fair compensation to be paid for these valuable rights throughout the term of this Agreement subject to federal law.

### 2.3 **Duration**

The term of this Agreement and all rights, privileges, obligations, and restrictions pertaining thereto shall be from the Effective Date of this Agreement through June 30, 2025, unless extended or terminated sooner as hereinafter provided.

### 2.4 **Effective Date**

The Effective Date of this Agreement shall be July 1, 2015 unless Grantee fails to file an unconditional written acceptance of this Agreement and post the security required hereunder by Section 5.4. Grantee shall accept this Agreement within forty-five (45) days of the Effective Date, unless the time for acceptance is extended by Grantor. In the event acceptance does not take place or the security is not posted as required hereunder, this Agreement shall be voidable at the reasonable discretion of Grantor, and any and all rights of Grantee to own or operate a Cable System within the Franchise Area under the express terms of this Agreement shall be of no force or effect.

### 2.5 **Franchise Nonexclusive**

This Agreement shall be nonexclusive, and is subject to all prior rights, interests, agreements, permits, easements or licenses granted by Grantor to any Person to use any Street, Public Rights of Way, easements not otherwise restricted, or property for any purpose whatsoever, including the right of Grantor to use same for any purpose it deems fit, including the same or similar purposes allowed Grantee hereunder. Grantor may, at any time, grant authorization to use the Public Rights of Way for any purpose not incompatible with Grantee's authority under this Agreement and for such additional Franchises for Cable Systems as Grantor deems appropriate subject to Section 2.6 below.

### 2.6 **Grant of Other Franchises**

- (A) The Grantor reserves the right to grant additional Franchises or similar authorizations to provide video programming services via Cable Systems or similar wireline systems located in the Public Rights of Way. Grantor intends to treat wireline competitors in a nondiscriminatory manner in keeping with federal law. If the Grantor grants such an additional Franchise or authorization to use the Public Rights of Way to provide such services and Grantee believes the Grantor has done so on terms materially more favorable than the obligations under this Agreement, then the provisions of this Section 2.6 will apply.
- (B) As part of this Agreement, the Grantor and Grantee have mutually agreed that the following material Franchise terms may be used to compare Grantee's Franchise

to a wireline competitor: a 5% (five percent) Franchise fee, PEG funding, PEG Access Channels, customer service obligations, and complimentary services (hereinafter "Material Obligations"). Grantor and Grantee agree that these Material Obligations bear no relationship to the technology employed by the Grantee or a wireline competitor and as such can reasonably be expected to be applied fairly across all wireline competitors.

- (C) Within one (1) year of the adoption of a wireline competitor's Franchise or similar authorization, Grantee must notify the Grantor in writing of the Material Obligations in this Agreement that exceed the Material Obligations of the wireline competitor's Franchise or similar authorization. The Grantor shall have one hundred twenty (120) days to agree to allow Grantee to adopt the same Material Obligations provided to the wireline competitor, or dispute that the Material Obligations are different. In the event the Grantor disputes the Material Obligations are different, Grantee may bring an action in federal or state court for a determination as to whether the Material Obligations are different and as to what Franchise amendments would be necessary to remedy the disparity. Alternatively, Grantee may notify the Grantor that it elects to immediately commence the renewal process under 47 USC § 546 and to have the remaining term of this Franchise shortened to not more than thirty (30) months.
- (D) Nothing in this Section 2.6 is intended to alter the rights or obligations of either party under applicable federal or state law, and it shall only apply to the extent permitted under applicable law and FCC orders. In no event will the Grantor be required to refund or to offset against future amounts due the value of benefits already received.
- (E) This provision does not apply if the Grantor is ordered or required to issue a Franchise on different terms and conditions, or it is legally unable to do so; and the relief is contingent on the new Cable Operator actually commencing provision of service in the market to its first customer. Should the new Cable Operator fail to continuously provide service for a period of six (6) months, the Grantor has the right to implement this Agreement with its original terms upon one hundred eighty (180) days' notice to Grantee.
- (F) This Section shall apply separately in the individual member units of local government who are members of the Commission. Grantee may seek to invoke the provisions of this Section only in that individual jurisdiction, not in any jurisdiction where a competitor has not secured a competitive Franchise. This Section does not apply to open video systems, nor does it apply to common carrier systems exempted from Franchise requirements pursuant to 47 U.S.C. Section 571; or to systems that serve less than 5% (five per cent) of the geographic area of the Grantor; or to systems that only provide video services via the public Internet.

## 2.7 Police Powers

Grantee's rights hereunder are subject to the lawful police powers of Grantor to adopt and enforce ordinances necessary to the safety, health, and welfare of the general public. Nothing in this Agreement shall be deemed to waive the requirements of the other codes and ordinances of general applicability enacted, or hereafter enacted, by Grantor. Grantee agrees to comply with all applicable laws and ordinances enacted, or hereafter enacted, by Grantor or any other legally-constituted governmental unit having lawful jurisdiction over the subject matter hereof.

Nothing in this Section shall be deemed a waiver by Grantee or the Grantor of the rights of Grantee or the Grantor under applicable law.

## 2.8 Relations to Other Provisions of Law

This Agreement and all rights and privileges granted under it are subject to, and the Grantee must exercise all rights in accordance with, applicable law as amended over the Franchise term. This Agreement is a contract, subject to the Grantor's exercise of its police and other regulatory powers and such applicable law. This Agreement does not confer rights or immunities upon the Grantee other than as expressly provided herein. In cases of conflict between this Agreement and any ordinance of general application enacted pursuant to the Grantor's police power, the ordinance shall govern. Grantee reserves all rights it may have to challenge the lawfulness of any Grantor ordinance, whether arising in contract or at law. The Grantor reserves all of its rights and defenses to such challenges, whether arising in contract or at law. The Franchise issued, and the Franchise fee paid hereunder, are not in lieu of any other required permit, authorization, fee, charge, or tax, unless expressly stated herein.

## 2.9 Effect of Acceptance

By accepting the Franchise the Grantee: (1) acknowledges and accepts the Grantor's legal right to issue and enforce the Agreement; (2) agrees that it will not oppose the Grantor's intervening or other participation in any proceeding affecting the Cable System; (3) accepts and agrees to comply with each and every provision of this Agreement; and (4) agrees that the Franchise was granted pursuant to processes and procedures consistent with applicable law, and that it will not raise any claim to the contrary.

# SECTION 3. FRANCHISE FEE AND FINANCIAL CONTROLS

## 3.1 Franchise Fees

- (A) As compensation for the benefits and privileges granted under this Agreement, and in consideration of permission to use Public Rights of Way, Grantee shall pay as a Franchise fee to Grantor, throughout the duration of this Agreement, an amount equal to five percent (5%) of Grantee's Gross Revenues. Accrual of such Franchise fees shall commence as of the Effective Date of this Agreement. The Franchise fees are in addition to all other fees, assessments, taxes, or payments of general applicability that the Grantee may be required to pay under any federal, state, or local law to the extent not inconsistent with applicable law. This Agreement and the Franchise fees paid hereunder are not in lieu of any other generally applicable required permit, authorization, fee, charge, or tax.
- (B) In the event any law or valid rule or regulation applicable to this Franchise limits Franchise fees below the five percent (5%) of Gross Revenues required herein, the Grantee agrees to and shall pay the maximum permissible amount and, if such law or valid rule or regulation is later repealed or amended to allow a higher permissible amount, then the Grantee shall pay the higher amount up to the maximum allowable by law, not to exceed five percent (5%) during all affected time periods.

### 3.2 **Payments**

Grantee's Franchise fee payments to Grantor shall be computed Quarterly. Each Quarterly payment shall be due and delivered to Grantor no later than forty-five (45) days after the last day of the preceding Quarter.

### 3.3 **Acceptance of Payment and Recomputation**

No acceptance of any payment shall be construed as an accord by Grantor that the amount paid is, in fact, the correct amount, nor shall any acceptance of payments be construed as a release of any claim Grantor may have for further or additional sums payable or for the performance of any other obligation of Grantee.

### 3.4 **Quarterly Franchise Fee Reports**

Each payment shall be accompanied by a written report to Grantor, verified by an authorized representative of the Grantee, containing an accurate statement in summarized form, as well as in detail, and in a form approved by Grantor, of Grantee's Gross Revenues and the computation of the payment amount.

### 3.5 **Annual Franchise Fee Reports**

Grantee shall, no later than one hundred twenty (120) days after the end of each calendar year, furnish to Grantor a statement verified by an authorized representative of the Grantee, stating the total amount of Gross Revenues and all payments, deductions, and computations for the period covered by the payments.

### 3.6 **Audit/Reviews**

No more frequently than every twenty-four (24) months, upon thirty (30) days prior written notice, Grantor shall have the right to conduct an independent audit or review of Grantee's Records reasonably related to the administration or enforcement of this Agreement. The Grantor may hire an independent third party to audit or review the Grantee's financial Records, in which case the Grantee shall provide all necessary Records to the third party. All such Records shall be made available in the local offices of the Grantee, or provided in electronic format fully compatible with Grantor's software. If the audit or review shows that Franchise fees have been underpaid by four percent (4%) or more, Grantee shall reimburse Grantor the reasonable cost of the audit or review up to fifteen thousand dollars (\$15,000) within thirty (30) days of the Grantor's written demand for same. Records for audit/review purposes shall include without limitation:

- (A) Source documents, which demonstrate the original or beginning amount, and the final amount shown on any report related to and/or included in the determination of Franchise fees, revenues or expenses related thereto.
- (B) Source documents that completely explain any and all calculations related to any allocation of any amounts involving Franchise fees, revenues, or expenses related thereto.
- (C) Any and all accounting schedules, statements, and any other form of representation, which relate to, account for, and/or support and/or correlate to any accounts involving Franchise fees, revenues or expenses related thereto.

### 3.7 Interest on Late Payments

Payments not received within forty-five (45) days from the Quarter ending date or are underpaid shall be assessed interest from the due date at a rate equal to the legal interest rate on judgments in the State of Oregon.

### 3.8 Additional Commitments Not Franchise Fees

No term or condition in this Agreement shall in any way modify or affect Grantee's obligation to pay Franchise fees related to Cable Services to Grantor in accordance with applicable law. Although the total sum of Franchise fee payments and additional commitments set forth elsewhere in this Agreement may total more than five percent (5%) of Grantee's Gross Revenues in any twelve (12) month period, Grantee agrees that the additional commitments herein are not Franchise fees as defined under federal law, to the extent not inconsistent with applicable federal law, nor are they to be offset or credited against any Franchise fee payments due to Grantor.

### 3.9 Costs of Publication

Grantee shall pay the reasonable cost of newspaper notices and publication pertaining to this Agreement, and any amendments thereto, including changes in control or transfers of ownership, as such notice or publication is reasonably required by Grantor or applicable law.

### 3.10 Tax Liability

Payment of the Franchise fees under this Agreement shall not exempt Grantee from the payment of any generally applicable license, permit fee or other generally applicable fee, tax or charge on the business, occupation, property or income of Grantee that may be imposed by Grantor.

### 3.11 Payment on Termination

If this Agreement terminates for any reason, the Grantee shall file with the Grantor within ninety (90) calendar days of the date of the termination, a financial statement, certified by an independent certified public accountant, showing the Gross Revenues received by the Grantee since the end of the previous fiscal year. The Grantor reserves the right to satisfy any remaining financial obligations of the Grantee to the Grantor by utilizing the funds available in a performance bond or other security provided by the Grantee.

## **SECTION 4. ADMINISTRATION AND REGULATION**

### 4.1 Authority

Grantor is vested with the power and right to regulate the exercise of the privileges permitted by this Agreement in the public interest, or to delegate that power and right, or any part thereof, to the extent permitted under state and local law, to any agent, in its sole discretion. Grantor has vested the Commission with the administration of this Agreement and Grantee is expected to rely upon, look to, communicate with and comply with the decisions and orders of the Commissions, its agents and employees on all cable matters to which the Grantor has lawfully delegated the exercise of its authority under this Agreement to the Commission during such time that Grantor is a member of the Commission.

#### 4.2 **Rates and Charges**

All of Grantee's rates and charges related to or regarding Cable Service shall be subject to regulation by Grantor to the full extent authorized by applicable federal, state and local laws.

#### 4.3 **Rate Discrimination**

All of Grantee's rates and charges shall be published (in the form of a publicly available rate card), and shall be nondiscriminatory as to all Persons and organizations of similar classes, under similar circumstances and conditions. Grantee shall apply its rates in accordance with governing law, without regard to race, color, familial, ethnic or national origin, religion, age, sex, sexual orientation, marital, military status, or physical or mental disability, or geographic location in the Franchise Area to the extent required by applicable law.

#### 4.4 **Filing of Rates and Charges**

Throughout the term of this Agreement, Grantee shall maintain on file with Grantor a complete schedule of applicable rates and charges for Cable Service provided under this Agreement.

#### 4.5 **Time Limits Strictly Construed**

Whenever this Agreement sets forth a time for any act to be performed by Grantee, such time shall be deemed to be of the essence, and any failure of Grantee to perform within the allotted time may be considered a material violation of this Agreement and sufficient grounds for Grantor to invoke any relevant provision of this Agreement. However, in the event that Grantee is prevented or delayed in the performance of any of its obligations under this Agreement by reason of a force majeure occurrence, as defined in Section 4.7, Grantee's performance shall be excused during the force majeure occurrence and Grantee thereafter shall, under the circumstances, promptly perform the affected obligations under this Agreement or procure a substitute for performance which is satisfactory to Grantor. Grantee shall not be excused by mere economic hardship or by misfeasance or malfeasance of its directors, officers, employees, or duly authorized agents.

#### 4.6 **Mid-Term Performance Evaluation Session**

- (A) Grantor may hold a single performance evaluation session during the term of this Agreement. Grantor shall conduct such evaluation session.
- (B) Evaluation session shall be open to the public and announced at least one week in advance in a newspaper of general circulation in the Franchise Area.
- (C) Evaluation session shall deal with the Grantee's performance of the terms and conditions of this Agreement and compliance with state and federal laws and regulations.
- (D) As part of the performance evaluation session, Grantee shall submit to the Grantor a plant survey, report, or map, in a format mutually acceptable to Grantor and Grantee, which includes a description of the portions of the Franchise Area that are cabled and have all Cable Services available. Such report shall also include the number of miles and location of overhead and underground cable plant. If the Grantor has reason to believe that a portion or all of the Cable System does not meet the applicable FCC technical standards, the Grantor, at its expense,

reserves the right to appoint a qualified independent engineer to evaluate and verify the technical performance of the Cable System.

- (E) During the evaluation under this Section, Grantee shall fully cooperate with Grantor and shall provide such information and documents as necessary and reasonable for Grantor to perform the evaluation subject to Section 7.2.

#### 4.7 **Force Majeure**

For the purposes of interpreting the requirements in this Agreement, Force Majeure shall mean: an event or events reasonably beyond the ability of Grantee to anticipate and control. This includes, but is not limited to, severe weather conditions, strikes, labor disturbances, lockouts, war or act of war (whether an actual declaration of war is made or not), insurrection, riots, acts of public enemy, actions or inactions of any government instrumentality or public utility including condemnation, accidents for which Grantee is not primarily responsible, fire, flood, or other acts of God, or documented work delays caused by waiting for utility providers to service or monitor utility poles to which Grantee's facilities are attached, and documented unavailability of materials and/or qualified labor to perform the work necessary to the extent that such unavailability of materials or labor was reasonably beyond the control of Grantee to foresee or control.

### **SECTION 5. FINANCIAL AND INSURANCE REQUIREMENTS**

#### 5.1 **Insurance Requirements**

- (A) **General Requirement.** Grantee must have adequate insurance during the entire term of this Agreement to protect against claims for injuries to Persons or damages to property which in any way relate to, arise from, or are connected with this Agreement or involve Grantee, its duly authorized agents, representatives, contractors, subcontractors and their employees.
- (B) **Initial Insurance Limits.** Grantee must keep insurance in effect in accordance with the minimum insurance limits herein set forth by the Grantor. The Grantee shall obtain policies for the following initial minimum insurance limits:
  - (1) **Commercial General Liability:** Three million dollar (\$3,000,000) combined single limit per occurrence for bodily injury, personal injury, and property damage, and for those policies with aggregate limits, a four million dollar (\$4,000,000) aggregate limit; one million dollar (\$1,000,000) limit for broadcasters liability.
  - (2) **Automobile Liability:** Two million dollar (\$2,000,000) combined single limit per accident for bodily injury and property damage; and
  - (3) **Employer's Liability:** Two million dollar (\$2,000,000) limit.

#### 5.2 **Deductibles and Self-Insured Retentions**

If Grantee changes its policy to include a self-insured retention, the Grantee shall give notice of such change to the Grantor. Grantor's approval will be given if the self-insured retention is consistent with standard industry practices. Any deductible or self-insured retention of the policies shall not in any way limit Grantee's liability to the Grantor.

(A) Endorsements.

(1) All policies shall contain, or shall be endorsed so that:

- (a) The Grantor, its officers, officials, employees, and duly authorized agents are to be covered as, and have the rights of, additional insureds with respect to liability arising out of activities performed by, or on behalf of, Grantee under this Agreement or applicable law, or in the construction, operation or repair, or ownership of its Cable System;
- (b) The Grantee's insurance coverage shall be primary insurance with respect to the Grantor, its officers, officials, employees, and duly authorized agents. Any insurance or self-insurance maintained by the Grantor, its officers, officials, employees, and duly authorized agents shall be in excess of the Grantee's insurance and shall not contribute to it;
- (c) Grantee's insurance shall apply separately to each insured against whom a claim is made or lawsuit is brought, except with respect to the limits of the insurer's liability; and
- (d) The policy shall not be suspended, voided, canceled, or reduced in coverage or in limits, nor shall the intention not to renew be stated by the insurance company except after forty-five (45) days prior written notice, return receipt requested, has been given to the Grantor.

(B) Acceptability of Insurers. The insurance obtained by Grantee shall be placed with insurers with an A.M. Best's rating of no less than "A-".

(C) Verification of Coverage. The Grantee shall furnish the Grantor with certificates of insurance and endorsements or a copy of the page of the policy reflecting blanket additional insured status. The certificates and endorsements for each insurance policy are to be signed by a Person authorized by that insurer to bind coverage on its behalf. The certificates and endorsements for each insurance policy are to be on standard forms or such forms as are consistent with standard industry practices, and are to be received and approved by the Grantor prior to the commencement of activities associated with this Agreement. The Grantee hereby warrants that its insurance policies satisfy the requirements of this Agreement and Grantor's ordinances and laws.

5.3 **Indemnification**

(A) Scope of Indemnity. Grantee shall, at its sole cost and expense, indemnify, hold harmless, and defend the Grantor and its officers, boards, commissions, duly authorized agents, and employees against any and all claims, including, but not limited to, third party claims, suits, causes of action, proceedings, and judgments for damages or equitable relief, to the extent such liability arises out of or through the acts or omissions of the Grantee arising out of the construction, operation or repair of its Cable System regardless of whether the act or omission complained of is authorized, allowed, or prohibited by this Agreement, provided, however, the

Grantee will not be obligated to indemnify Grantor should Grantor intervene in any proceeding regarding the grant of this Agreement pursuant to Section 2.9 of this Agreement; and provided further Grantee will not be obligated to indemnify Grantor for damage or injury resulting from the negligence or willful negligence of Grantor. Without limiting in any way the Grantee's obligation to indemnify the Grantor and its officers, boards, commissions, duly authorized agents, and employees, as set forth above, this indemnity provision also includes damages and liabilities such as:

- (1) To persons or property, to the extent such liability arises out of or through the acts or omissions of the Grantee, its contractors, subcontractors, and their officers, employees, or duly authorized agents, or to which the Grantee's negligence or fault shall in any way contribute;
  - (2) Arising out of any claim for invasion of the right of privacy; for defamation of any Person, firm or corporation; for the violation or infringement of any copyright, trademark, trade name, service mark, or patent; for a failure by the Grantee to secure consents from the owners or authorized distributors of programs to be delivered by the Cable System; or for violation of any other right of any Person, to the extent such liability arises out of or through the acts or omissions of the Grantee, provided, however, that Grantee will not be required to indemnify Grantor for any claims arising out of use of PEG Access Channels or use of PEG funds by Grantor and/or DAP;
  - (3) Arising out of Grantee's failure to comply with the provisions of any federal, state or local statute, ordinance, rule or regulation applicable to the Grantee with respect to any aspect of its business to which this Agreement applies, to the extent such liability arises out of or through the acts or omissions of the Grantee; and
  - (4) Arising from any third party suit, action or litigation, whether brought by a competitor to Grantee or by any other Person or entity, to the extent such liability arises out of or through the acts or omissions of the Grantee, whether such Person or entity does or does not have standing to bring such suit, action or litigation if such action (1) challenges the authority of the Grantor to issue this Agreement to Grantee; or (2) alleges that, in issuing this Agreement to Grantee, the Grantor has acted in a disparate or discriminatory manner.
- (B) Duty to Give Notice and Tender Defense. The Grantor shall give the Grantee timely written notice of any claim or of the commencement of any action, suit or other proceeding covered by the indemnity obligation in this Section. In the event any such claim arises, the Grantor or any other indemnified party shall tender the defense thereof to the Grantee and the Grantee shall have the obligation and duty to defend, settle or compromise any claims arising thereunder, and the Grantor shall cooperate fully therein. Grantee shall accept or decline the tender within thirty (30) days. Grantee shall reimburse reasonable attorney fees and costs incurred by the Grantor during the thirty (30) day period in which the Grantee accepts or declines tender. In the event that the Grantee declines defense of the claim in violation of Section 5.3, the Grantor may defend such claim and seek recovery from Grantee its expenses for reasonable attorney fees and

disbursements, including expert witness fees, incurred by Grantor for defense and in seeking such recovery.

#### 5.4 **Performance Bond**

- (A) In addition to any other generally applicable bond or security fund obligations required by local ordinance, upon the Effective Date of this Agreement, the Grantee shall furnish proof of the posting of a faithful performance bond running to the Grantors collectively with good and sufficient surety approved by the Commission, in the penal sum of Three Hundred Fifty Thousand Dollars (\$350,000.00), conditioned that Grantee shall well and truly observe, fulfill and perform each term and condition of this Agreement. Such bond shall be issued by a bonding company licensed to do business in the state of Oregon and shall be maintained by the Grantee throughout the term of this Agreement.
- (B) The bond shall contain a provision that it shall not be terminated or otherwise allowed to expire without thirty (30) days written notice first being given to the Grantor. The bond shall be subject to the approval of the Grantor or the Commission as to its adequacy under the requirements of this Section. During the term of the bond, Grantee shall file with the Grantor a duplicate copy of the bond along with written evidence of payment of the required premiums unless the bond otherwise provides that the bond shall not expire or be terminated without thirty (30) days prior written notice to the Grantor.

### **SECTION 6. CUSTOMER SERVICE**

- 6.1 Customer service obligations are set forth herein as Attachment A and are hereby incorporated by this reference.
- 6.2 Emergency Broadcast. Grantee will comply with the Emergency Alert System (EAS) as provided under applicable FCC Regulations, the Oregon State EAS Plan and the local EAS plan, if any, that applies to Grantor.
- 6.3 ADA Accessible Equipment. Grantee shall comply with the Americans with Disabilities Act ("ADA"), any amendments thereto and any other applicable federal, state or local laws or regulations. Grantee shall notify Subscribers of the availability of ADA equipment and services and shall provide such equipment and services in accordance with federal and state laws.
- 6.4 Discriminatory Practices. Grantee shall not deny Cable Service, or otherwise discriminate against Subscribers, Programmers or any other Persons on the basis of race, color, religion, age, sex, national origin, sexual orientation or physical or mental disability. Grantee shall comply at all times with all other applicable federal, state or local laws, rules and regulations relating to non-discrimination.

### **SECTION 7. REPORTS AND RECORDS**

#### 7.1 **Open Records**

- (A) Grantee shall manage all of its operations in accordance with a policy of keeping its documents and Records open and accessible to Grantor. Grantor shall have access to, and the right to inspect, any books and Records of Grantee, its Parent

Corporations and Affiliated entities that are reasonably related and necessary to the administration or enforcement of the terms of this Agreement. Grantee shall not deny Grantor access to any of Grantee's Records on the basis that Grantee's Records are under the control of any Parent Corporation, Affiliated entity or a third party. Grantor may, in writing, request copies of any such Records or books and Grantee shall provide such copies within ten (10) business days of the transmittal of such request. If the requested books and Records are too voluminous, or for security reasons cannot be copied or removed, then Grantee may request, in writing within ten (10) business days, that Grantor inspect them at one of Grantee's local area offices. If any books or Records of Grantee are not kept in a local office, Grantee will provide or otherwise make such documents available for inspection and review at the local office within ten (10) business days.

- (B) Grantee shall provide Grantor with a sample Cable Services bill, on a monthly basis. Cable Services bills associated with complimentary services accounts provided under this Agreement shall satisfy this requirement.
- (C) Grantee shall at all times maintain and allow Grantor, with reasonable notice, access and the right to review a full and complete set of plans, Records and "as built" maps showing the approximate location of all Cable System equipment installed or in use in the Franchise Area, exclusive of electronics, Subscriber drops and equipment provided in Subscribers' homes. These maps shall be maintained in a standard format and medium consistent with Grantee's regular business practices. Grantor's review of the plans, Records, and as-built maps, provided for herein, shall occur at the Grantee's local office.
- (D) The ability for Grantor to obtain Records and information from Grantee is critical to the administration of this Agreement and the requirements herein. Therefore, Grantee's failure to comply with the requirements of this Section may result in fines as prescribed in Section 15.

## 7.2 **Confidentiality**

Subject to the limits of the Oregon Public Records Law, Grantor agrees to treat as confidential any books and Records that constitute proprietary or confidential information under federal or state law, to the extent Grantee makes Grantor aware of such confidentiality. Grantee shall be responsible for clearly and conspicuously stamping the word "Confidential" on each page that contains confidential or proprietary information, and shall provide a brief written explanation as to why such information is confidential under state or federal law. If Grantor believes it must release any such confidential books and Records in the course of enforcing this Agreement, or for any other reason, it shall advise Grantee in advance so that Grantee may take appropriate steps to protect its interests. If Grantor receives a demand from any Person for disclosure of any information designated by Grantee as confidential, Grantor shall, so far as consistent with applicable law, advise Grantee and provide Grantee with a copy of any written request by the party demanding access to such information within a reasonable time. Until otherwise ordered by a court or agency of competent jurisdiction, Grantor agrees that, to the extent permitted by state and federal law, it shall deny access to any of Grantee's books and Records marked confidential as set forth above to any Person.

### 7.3 Copies of Federal and State Documents

Upon thirty (30) days of a request by Grantor, Grantee shall submit to Grantor a list, or copies of actual documents, of all pleadings, applications, notifications, communications and documents of any kind, submitted by Grantee or its Parent Corporations or Affiliates to any federal, state or local courts; regulatory agencies or other government bodies if such documents specifically relate to the operations of Grantee's Cable System within the Franchise Area. To the extent allowed by law, any such confidential material determined to be exempt from public disclosure shall be retained in confidence by Grantor and its duly authorized agents and shall not be made available for public inspection.

### 7.4 Complaint File and Reports

- (A) Grantee shall keep an accurate and comprehensive Record of any and all complaints regarding the operation and performance of the Cable System within the Franchise Area, in a manner consistent with the privacy rights of Subscribers, and Grantee's actions in response to those complaints. Those Records shall be retained for three (3) years, and remain available to Grantor during Normal Business Hours.
- (1) Grantee shall provide an executive summary report Quarterly (within forty-five (45) days of the end of the preceding Quarter) to Grantor, which shall include the following information:
- (a) Nature and type of customer complaints.
  - (b) Number, duration, general location and customer impact of unplanned service interruptions.
  - (c) Any significant construction activities which affect the quality or otherwise enhance the service of the Cable System.
  - (d) Subscriber reports indicating the total number of Subscribers by service categories in such format as Grantee commonly prepares such reports, including Total Subscribers, Equivalent Billing Unit ("EBU") Reporting Number, Basic Tier Subscribers, and "Pay" Subscribers.
  - (e) Total disconnections and major reasons for those disconnections.
  - (f) Total number of service calls.
  - (g) Video programming changes (additions/deletions).
  - (h) A Telephone Response activity report provided in a manner consistent with the requirements of Attachment A showing Total Calls Answered within thirty (30) seconds, Average Hold Time, Percent of Calls Answered within thirty (30) Seconds, Percent of Abandoned Calls, and the Percent of Lines Available. A sample of an acceptable report pursuant to this Section is attached to this Agreement as Attachment B.

- (i) Such other information about special problems, activities, or achievements as Grantee may want to provide Grantor.
- (2) Grantor shall also have the right to request such information as appropriate and reasonable to determine whether or not Grantee is in compliance with applicable Customer Service Standards, as referenced in Attachment A. Such information shall be provided to Grantor in such format as Grantee customarily prepares reports. Grantee shall fully cooperate with Grantor and shall provide such information and documents as necessary and reasonable for Grantor to evaluate compliance.

#### 7.5 **Inspection of Facilities**

Grantor may inspect upon request any of Grantee's facilities and equipment to confirm performance under this Agreement at any time upon at least twenty-four (24) hours' notice, or, in case of an emergency, upon demand without prior notice.

#### 7.6 **False Statements**

Any intentional false or misleading statement or representation in any report required by this Agreement may be deemed a violation of this Agreement and may subject Grantee to all remedies, legal or equitable, which are available to Grantor under this Agreement or otherwise. Grantor shall have the right to determine the severity of the violation based upon the report in question.

#### 7.7 **Report Expense**

All reports and Records required under this or any other Section shall be furnished, without cost, to Grantor.

### **SECTION 8. PROGRAMMING**

#### 8.1 **Broad Programming Categories**

- (A) Grantee's Cable System shall provide the widest diversity of Programming possible. Grantee shall provide at least the following broad categories of Programming to the extent such categories are reasonably available:
  - (1) Educational Programming.
  - (2) Sports.
  - (3) General entertainment (including movies).
  - (4) Children/family-oriented.
  - (5) Arts, culture and performing arts.
  - (6) Foreign language.
  - (7) Science/documentary.

- (8) Weather information.
  - (9) Programming addressed to diverse ethnic and minority interests in the Franchise Area; and
  - (10) National, state, and local government affairs.
- (B) Grantee shall not delete any broad category of Programming within its control.

## 8.2 **Parental Control Devices**

Upon request by any Subscriber, Grantee shall make available a parental control or lockout device, traps, or filters to enable a Subscriber to control access to both the audio and video portions of any or all Channels. Grantee shall inform its Subscribers of the availability of the lockout device at the time of their initial subscription and periodically thereafter.

## 8.3 **Leased Access Channels**

Grantee shall meet the requirements for Leased Access Channels imposed by federal law.

## 8.4 **Continuity of Service**

- (A) It shall be the right of all Subscribers to continue to receive Cable Service from Grantee insofar as their financial and other obligations to Grantee are satisfied. Subject to the force majeure provisions of Section 4.7 of this Agreement, Grantee shall use its best efforts to ensure that all Subscribers receive continuous, uninterrupted Cable Service regardless of the circumstances.
- (B) In the event of a change in ownership, or in the event a new Cable Operator acquires the Cable System in accordance with this Agreement, Grantee shall cooperate with Grantor and such new Cable Operator in maintaining continuity of service to all Subscribers.

# SECTION 9. PUBLIC, EDUCATIONAL AND GOVERNMENTAL ACCESS

## 9.1 **Management and Control of Access Channels**

- (A) Grantor may authorize a DAP to control and manage the use of any and all Access Centers provided by Grantee under this Agreement, including, without limitation, the operation of Access Channels. To the extent of such designation by Grantor, as between the DAP and Grantee, the DAP(s) shall have sole and exclusive responsibility for operating and managing such Access Centers. The Grantor or its designee may formulate rules for the operation of the Public Access Channel, consistent with this Agreement; such rules shall not be designed to control the content of Public Access Programming. Nothing herein shall prohibit the Grantor from authorizing itself to be a DAP.
- (B) Grantee shall cooperate with Grantor and DAPs in the use of the Cable System and Access Centers for the provision of PEG Access.
- (C) Except as provided in this Agreement, the Grantor shall allocate Access resources to DAPs only.

- (D) The Grantee shall, at Grantee's expense, provide connection, including all necessary terminal equipment for the transmission, of all PEG Access Channels required in this Agreement to and from the Grantee's Headend and the DAP headend as of the Effective Date of this Agreement. If the Grantor designates new Access providers, or if a current DAP moves its site or location at its own instigation after the Effective Date of this Agreement, the direct costs to construct the Cable System from the new site or location to the nearest distribution point of the Cable System shall not be the responsibility of Grantee and may be funded from the PEG capital fee under Section 13 of this Agreement.

## 9.2 **Channel Capacity and Use**

- (A) Upon the Effective Date of this Agreement, all Access Channels provided for herein are administered by the Grantor or a DAP.
  - (1) Existing Access Channels: Grantee shall provide five (5) standard definition ("SD") Downstream Channels for distribution on Grantee's Basic Service level of Public, Educational, and Governmental Access Programming. The Channel designations of those Channels as of the Effective Date of this Agreement shall be: Channel 11; Channel 21; Channel 23; Channel 28; and Channel 30. Grantee does not relinquish its ownership of or ultimate right of control over Cable System capacity or a Channel position by initially designating it for PEG Access use.
  - (2) Throughout the term of this Agreement, Grantee shall, at Grantee's expense and free of charge to the Grantor and any DAP, provide and maintain existing Fiber Upstream links to enable character generated, pre-recorded, and live cablecasts between the Origination Points provided pursuant in Section 9.8 and any DAP headend facility to enable the distribution of PEG Access Programming to Subscribers on PEG Channels.

## 9.3 **Standard Definition Channels**

Grantee shall carry all components of the SD Access Channel Signals provided by the DAP including, but not limited to, closed captioning, stereo audio and other elements associated with the Programming. The DAP shall be responsible for providing the Access Channel Signal in a SD format to the Demarcation point at the designated point of origination for the Access Channel. Grantee shall be responsible for costs associated with the transport and distribution of the SD Access Channel on its side of the Demarcation point.

## 9.4 **High Definition Channels**

- (A) Within one hundred twenty (120) days of the Effective Date of this Agreement, or a later date mutually agreed upon by Grantee and Grantor, following written notice by the Grantor, Grantee shall activate one (1) of the existing Access Channels, as designated by the Grantor, in high definition ("HD") format and simultaneously carry that SD Access Channel Signal provided under Section 9.2.
- (B) Grantee shall carry all components of the HD format Access Channel Signals provided by the DAP including, but not limited to, closed captioning, stereo audio and other elements associated with the Programming. The DAP shall be

responsible for the costs associated with providing the Access Channel Signal in an HD format to the Demarcation point at the designated point of origination for the Access Channel. Grantee shall be responsible for actual costs associated with the transport and distribution of the HD Access Channel on its side of the Demarcation point, except that Grantee may offset its actual costs in an amount not to exceed Eight Thousand Dollars (\$8,000) per PEG Channel against the PEG capital fee in Section 13 for the one-time purchase of network equipment associated with the provision of HD PEG Programming.

(C) Additional HD PEG Access Channels.

- (1) No earlier than twelve (12) months after the Effective Date of this Agreement, and upon one hundred sixty (160) days written notice from Grantor, which notice may be sent prior to the twelfth (12<sup>th</sup>) month after the Effective Date, Grantee shall provide and activate one (1) more of the existing SD Access Channels provided under Section 9.2, as designated by written notice of the Grantor, in an HD format, and simultaneously carry the SD Signal of that Channel for a total of two (2) HD format Access Channels.
- (2) No earlier than four (4) years following the Effective Date of this Agreement, and upon one hundred sixty (160) days written notice from Grantor, Grantee shall provide and activate one (1) more of the existing SD Access Channels provided under Section 9.2, as designated by written notice of the Grantor, in an HD format, and simultaneously carry the SD Signal of that Channel for a total of three (3) HD format Access Channels (subject to the conditions in Section 9.4.C (3) below). The maximum number of PEG Access Channels to be provided under this Agreement after year four (4), whether in HD or SD, shall be eight (8).
- (3) Activation of the third (3<sup>rd</sup>) HD Access Channel under Section 9.4.C (2) above shall be subject to the following conditions:
  - (a) At least eighty percent (80%) of the basic tier Channels (or its equivalent tier), excluding the Access Channels, are provided in HD;
  - (b) On the SD Access Channel identified by the Grantor to be simulcast as the third (3<sup>rd</sup>) HD Channel, at least eighty percent (80%) of the Programming carried on that Access Channel is produced in HD format for the three (3) month time period prior to the notice provided under this Section; and
  - (c) On the SD Access Channel identified by the Grantor to be simulcast as the third (3<sup>rd</sup>) HD Channel, not more than fifty percent (50%) of the Access Programming content carried on that SD Access Channels is character-generated only Programming for the three (3) month time period prior to the notice provided under this Section.

- (D) Grantee shall have no more than one hundred twenty (120) days from the date of the written notices in this Section 9.4 to fully activate the Access Channels from the

DAP to Subscribers in the HD format. Grantee shall verify HD Channel Signal delivery to Subscribers with the DAP. Upon request, Grantor shall provide documentation to confirm that the criteria set forth above has been met.

- (E) At such time as all other Basic Service Channels (or its equivalent tier) excluding Access Channels, are carried in HD, all remaining SD Access Channel Signals will also be carried by Grantee in HD, at which time the SD Channels will be discontinued and the maximum number of PEG Access Channels shall be five (5) HD Channels.
- (F) The Grantor acknowledges that receipt of HD format Access Channels may require Subscribers to buy or lease special equipment, or pay additional HD charges applicable to HD services. Grantee shall not be obligated to provide complimentary HD receiving equipment to institutional or courtesy accounts as a result of the obligations set forth in this Section 9.4.

#### 9.5 Quality of SD and HD Access Channel Signals.

The Grantee shall not unreasonably discriminate against SD and HD Access Channels with respect to accessibility, functionality and to the application of any applicable FCC Rules and Regulations, including without limitation Subpart K Channel Signal standards. With respect to Signal quality, Grantee shall not be required to carry an Access Channel in a higher quality format than that of the Channel Signal delivered to Grantee, but Grantee shall distribute the Access Channel Signal without degradation. There shall be no restriction on Grantee's technology used to deploy and deliver SD or HD Signals so long as the requirements of this Agreement are otherwise met. Grantee may implement HD carriage of PEG Access Channels in any manner (including selection of compression, utilization of IP, and other processing characteristics) that produces a Signal quality for the Subscriber that is reasonably comparable and functionally equivalent to similar commercial HD Channels carried on the Cable System. In the event the Grantor believes and provides evidence that Grantee fails to meet this standard, Grantor will notify Grantee of such concern, and Grantee will respond to any complaints in a timely manner. Disputes under this Section 9.5 shall be addressed through the Franchise enforcement procedures set forth in Section 15. Upon reasonable written request by a DAP, Grantee shall verify that Access Channel Signal delivery to Subscribers is consistent with the requirements of this Section 9.5.

#### 9.6 Relocation of Access Channels

Grantee shall make reasonable efforts to coordinate the cablecasting of all Programming on the Cable System on the same Channel designations as such Programming is currently cablecast in the Franchise Area as set forth in Section 9.2 herein. If at any time during the duration of this Agreement, Grantee reassigns the location of an Access Channel on its Cable System, Grantee shall provide at least sixty (60) days advance notice to the Grantor and the DAP (s). Grantee shall make "best efforts" in the event of Channel relocation, to place the Access Channels within reasonable proximity from the Channel location for network affiliate. Grantee shall also make "best efforts" to assign the HD PEG Access Channel a number near the other HD local broadcast stations if such Channel positions are not already taken, or if that is not possible, near HD news/public affairs Programming Channels if such Channel positions are not already taken, or if not possible, as reasonably close as available Channel numbering will allow. Grantee shall ensure that Subscribers are notified of such reassignment in accordance with the notice requirements in Attachment A that include its customer messaging function, for at least fifteen (15) days prior to the change and fifteen (15) days after the change. In conjunction with any

reassignment of any SD Access Channels, Grantee shall provide either (1) a reimbursement up to Five Thousand Dollars (\$5,000) to the Grantors collectively or the Commission for actual costs associated with the change, or (2) Nine Thousand Dollars (\$9,000) of in-kind airtime on advertiser supported Channels to the Grantors collectively or the Commission for the purpose of airing multiple thirty (30) second public service announcements produced by DAP. The Grantor shall cooperate with the DAP and Grantee for such airing. All reimbursement, whether in cash or in-kind, shall be paid or provided on a per-event basis, regardless of the number of Channels affected by the change.

#### 9.7 **Access Interconnections**

The Grantee shall, at Grantee's expense and free of charge to the Grantor and any DAP, maintain for the duration of this Agreement any and all existing Interconnections of Access Channels with contiguous Cable Systems owned by the Grantee as of the Effective Date of this Agreement, in order to receive from and deliver to the DAP's headend, via the Grantee's Headend, all the Access Channels required by this Agreement and originating by the Grantor or its designee.

#### 9.8 **Origination Points**

- (A) The existing Origination Points listed in Attachment C I will remain available, at the expense of Grantee, for use by the DAP to enable the distribution of PEG Access Programming on the Cable System during the term of this Agreement.
- (B) The additional permanent Origination Points required by the Grantor or DAP listed in Attachment C II shall be provided by Grantee within ninety (90) days following receipt of written notice from Grantor, at the expense of Grantee.
- (C) The additional Origination Points that may be required by the Grantor or a DAP at the future public sites listed on Attachment CIII, shall be provided by Grantee within ninety (90) days following receipt of written notice from Grantor, at the expense of Grantee, up to a distance of one hundred twenty-five (125) feet from Grantee's existing outside plant facilities provided that Grantee can reach the Demarcation point using (1) existing conduit, (2) conduit provided by Grantor, or (3) an aerial connection. Grantor shall be responsible for any additional actual connection costs beyond the one hundred twenty-five (125) feet. Such additional costs may be paid for from the PEG capital fee in Section 13.
- (D) Additional permanent Origination Points requested by the Grantor or DAP in writing shall be provided by Grantee as soon as reasonably possible at the expense of Grantor or DAP. Such costs may be paid for from the PEG capital fee in Section 13.
- (E) There shall be no charge to the Grantor, to the Commission, to any other DAP, or to any other Person for the use of the Upstream Capacity from the program origination locations described in this Section, so long as the transmissions are designed for re-routing and distribution on any PEG Channel(s).

#### 9.9 **Changes in Technology**

In the event Grantee makes any change in the Cable System and related equipment and facilities or in Grantee's Signal delivery technology, which directly or indirectly affects the Signal quality or transmission of Access services or Programming or requires Grantor to obtain new equipment in

order to be compatible with such change for purposes of transport of and delivery of any Access Channels (SD or HD), Grantee shall, at its own expense and free of charge to Grantor and DAP, take necessary technical steps or provide necessary technical assistance, including the purchase or acquisition and maintenance of all necessary equipment, and training of Grantor's Access personnel to ensure that the capabilities of Access services are not diminished or adversely affected by such change.

#### 9.10 Technical Quality

The Grantee shall maintain all Upstream and Downstream Access services, Programming and Interconnections at the same level of technical quality and reliability required by this Agreement and all other applicable laws, rules and regulations. Grantee shall provide routine maintenance and shall repair and replace all transmission equipment, including transmitters/receivers, associated cable and equipment in use upon the Effective Date of this Agreement, necessary to carry a quality Signal to and from Demarcation at Grantor's or DAP's facilities.

#### 9.11 PEG Access Program Listings On Cable System's Digital Channel Guide

To the extent the configuration of the Cable System allows for detailed program listings to be included on the digital Channel guide, Grantee will allow Grantor or the DAP to make arrangements with the Channel guide vendor to make detailed Programming listings available on the guide. The Grantor or DAP will be solely responsible for providing the program information to the vendor in the format and timing required by the vendor and shall bear all costs of this guide service. The cost for this service may be funded by the PEG capital fee as set forth in Section 13.

### **SECTION 10. GENERAL STREET USE AND CONSTRUCTION**

#### 10.1 Construction

- (A) Subject to applicable laws, regulations and ordinances of Grantor and the provisions of this Agreement, Grantee may perform all construction and maintenance necessary for the operation of its Cable System. All construction and maintenance of any and all facilities within the Public Rights of Way incident to Grantee's Cable System shall, regardless of who performs the construction, be and remain Grantee's responsibility. Except as permitted in Section 10.1(D), prior to performing any construction or maintenance in the Public Rights of Way, Grantee shall apply for, and obtain, all necessary permits. Grantee shall pay, prior to issuance, all applicable fees of the requisite construction permits and give appropriate notices to any other Cable Operators, licensees or permittees of the Grantor, or other units of government owning or maintaining pipes, wires, conduits or other facilities which may be affected by the proposed excavation.
- (B) All construction shall be performed in compliance with this Agreement, all applicable Grantor ordinances and codes, and any permit issued by the Grantor. When obtaining a permit, Grantee shall inquire in writing about other construction currently in progress, planned or proposed, in order to investigate thoroughly all opportunities for joint trenching or boring. Whenever it is possible and reasonably practicable to joint trench or share bores or cuts, Grantee shall work with other providers, Cable Operators, and permittees so as to reduce as far as possible the number of Street cuts.

- (C) Grantor shall have the right to inspect all construction or installation work performed within the Franchise Area as it shall find necessary to ensure compliance with the terms of this Agreement, other pertinent provisions of law, and any permit issued by the Grantor.
- (D) In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such emergency repairs, and shall apply for appropriate permits as soon as reasonably practicable but in no event later than forty-eight (48) hours after discovery of the emergency. Grantee shall comply with all applicable City regulations relating to such excavations or construction, including the payment of permit or license fees.
- (E) Whenever possible, to avoid additional wear and tear on the Public Rights of Way, Grantee shall utilize existing poles and conduit. Grantee may charge for use of the conduit consistent with all applicable laws. Notwithstanding the foregoing, this Agreement does not grant, give or convey to the Grantee the right or privilege to install its facilities in any manner on specific utility poles or equipment of the Grantor or any other Person without their permission. Copies of agreements for use of poles, conduits or other utility facilities must be provided upon request by the Grantor upon demonstrated need and subject to protecting Grantee's proprietary information from disclosure to third parties.

## 10.2 Location of Facilities

Grantee shall comply with the requirements of Oregon Utility Notification Center ORS 757.542-757.562 and ORS 757.993 (2009) (penalty for violation of utility excavation notification provisions), and applicable rules and regulations promulgated thereunder in OAR Chapter 952 relating to Oregon Utility Notification Center.

## 10.3 Relocation

- (A) Relocation for Grantor.
  - (1) Grantor shall have the right to require Grantee to change the location of any part of Grantee's Cable System within the Public Rights of Way when the public convenience requires such change, and the expense thereof shall be paid by Grantee (however payment by Grantee shall in no way limit Grantee's right, if any, to seek reimbursement for such costs from any third party). Should Grantee fail to remove or relocate any such facilities by the date established by Grantor, Grantor may effect such removal or relocation, and the expense thereof shall be paid by Grantee, including all costs and expenses incurred by Grantor due to Grantee's delay. If Grantor requires Grantee to relocate its facilities located within the Public Rights of Way, Grantor shall make a reasonable effort to provide Grantee with an alternate location within the Public Rights of Way.
  - (2) If public funds, which Grantor received, are available to any other user of the Public Rights of Way (except for Grantor) for the purpose of defraying the cost of relocating or removing facilities and Grantee relocates or removes its facilities as required by Grantor under this Agreement, the Grantor shall notify Grantee of such funding and will consider reimbursing Grantee for such costs to the extent permitted or allowed by the funding

source or applicable state law and to the extent other users of the Public Rights of Way are provided such funds.

- (B) Relocation by Grantor. The Grantor may remove, replace, modify or disconnect Grantee's facilities and equipment located in the Public Right of Way or on any other property of the Grantor in the case of fire, disaster, or other emergency, provided that Grantor shall be responsible for any damage to Grantee's facilities as a result of Grantor's negligence or gross negligence in performing work under this Section. The Grantor shall attempt to provide notice to Grantee prior to taking such action and shall, when feasible, provide Grantee with the opportunity to perform such action.
- (C) Movement for Other Franchise Holders. If any removal, replacement, modification or disconnection is required to accommodate the construction, operation or repair of the facilities or equipment of another Franchise holder, Grantee shall, after at least thirty (30) days' advance written notice, take action to effect the necessary changes requested by the responsible entity. Grantee and such other Franchise holder shall determine how costs associated with the removal or relocation required herein shall be allocated.
- (D) Movement for Other Permittees. At the request of any Person holding a valid permit and upon reasonable advance notice, Grantee shall temporarily raise, lower or remove its wires as necessary to permit the moving of a building, vehicle, equipment or other item. The permit holder must pay the expense of such temporary changes, and Grantee may require the permit holder to pay the full amount in advance.

#### 10.4 **Restoration of Public Rights of Way**

Whenever Grantee excavates, damages, or disturbs the surface of any Public Right of Way for any purpose, including but not limited to relocation or undergrounding as required in this Section, Grantee shall promptly restore the Public Right of Way to the satisfaction of the Grantor in accordance with applicable Grantor ordinances and codes and any permit issued by the Grantor. In the event there is no applicable ordinance, code or permit, Grantee shall promptly restore the Public Right of Way to at least its prior condition. Unless otherwise provided in any permit issued by Grantor, when any opening is made by Grantee in a hard surface pavement in any Public Right of Way, Grantee shall refill within twenty-four (24) hours. Grantee shall be responsible for restoration and maintenance of the Public Right of Way and its surface affected by the excavation in accordance with applicable regulations of the Grantor. Grantor may, after providing notice to Grantee, or without notice where the disturbance or damage may create a risk to public health or safety, refill or repave any opening made by Grantee in the Public Rights of Way, and the expense thereof shall be paid by Grantee. Grantor may, after providing notice to Grantee, remove and/or repair any work done by Grantee that, in the determination of Grantor, is inadequate. The cost thereof, including the costs of inspection and supervision, shall be paid by Grantee. Within thirty (30) days of receipt of an itemized list of those costs, including the costs of labor, materials and equipment, the Grantee shall pay the Grantor. All excavations made by Grantee in the Public Rights of Way shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this Agreement, and this Section in particular, shall be done in strict compliance with all rules, regulations and ordinances of Grantor.

## 10.5 Maintenance and Workmanship

- (A) Grantee's Cable System shall be constructed and maintained in such manner as not to interfere with sewers, water pipes, or any other property of Grantor, or with any other pipes, wires, conduits, pedestals, structures, equipment or other facilities that may have been laid in the Public Rights of Way by, or under, Grantor's authority.
- (B) Grantee shall maintain and use any equipment necessary to control and carry Grantee's cable television Signals so as to prevent injury to Grantor's property or property belonging to any Person. Grantee, at its own expense, shall repair, change and improve its facilities to keep them in good repair, and safe and presentable condition.

## 10.6 Reservation of Grantor Public Rights of Way

Nothing in this Agreement shall prevent Grantor or utilities owned, maintained or operated by public entities other than Grantor, from constructing sewers; grading, paving, repairing or altering any Public Right of Way; repairing or removing water mains; or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as not to obstruct, injure or prevent the use and operation of Grantee's Cable System. However, if any of Grantee's Cable System interferes with the construction or repair of any Public Right of Way or public improvement, including construction, repair or removal of a sewer or water main or any other public work, Grantee's Cable System shall be removed or replaced in the manner Grantor shall direct, and Grantor shall in no event be liable for any damage to any portion of Grantee's Cable System. Any and all such removal or replacement shall be at the expense of Grantee. Should Grantee fail to remove, adjust or relocate its facilities by the date established by Grantor's written notice to Grantee, Grantor may effect such removal, adjustment or relocation, and the expense thereof shall be paid by Grantee, including all reasonable costs and expenses incurred by Grantor due to Grantee's delay.

## 10.7 Use of Conduits by Grantor

Grantor may install or affix and maintain wires and equipment owned by Grantor for governmental purposes in or upon any and all of Grantee's ducts, conduits or equipment in the Public Rights of Way and other public places without charge to Grantor, to the extent space therein or thereon is reasonably available and feasible without compromising the integrity of the Cable System or facility, and pursuant to all applicable ordinances and codes. For the purposes of this Section 10.7, "governmental purposes" includes, but is not limited to, the use of the structures and installations by Grantor for fire, police, traffic, water, telephone, or signal systems, but not for Cable System purposes or provision of services in competition with Grantee. Grantee shall not deduct the value of such use of its facilities from its Franchise fees payable to Grantor except as otherwise may be authorized by federal law.

## 10.8 Public Rights of Way Vacation

If any Public Right of Way or portion thereof used by Grantee is vacated by Grantor during the term of this Agreement, unless Grantor specifically reserves to Grantee the right to continue its installation in the vacated Public Right of Way, Grantee shall, without delay or expense to Grantor, remove its facilities from such Public Right of Way, and restore, repair or reconstruct the Public Right of Way where such removal has occurred, and place the Public Right of Way in such condition as may be required by Grantor. In the event of failure, neglect or refusal of Grantee,

after thirty (30) days' notice by Grantor, to restore, repair or reconstruct such Public Right of Way, Grantor may do such work or cause it to be done, and the reasonable cost thereof, as found and declared by Grantor, shall be paid by Grantee within thirty (30) days of receipt of an invoice and documentation, and failure to make such payment shall be considered a material violation of this Agreement.

#### 10.9 Discontinuing Use of Facilities

Whenever Grantee intends to discontinue using any facility within the Public Rights of Way, Grantee shall submit for Grantor's approval a complete description of the facility and the date on which Grantee intends to discontinue using the facility. Grantee may remove the facility or request that Grantor allow it to remain in place. Notwithstanding Grantee's request that any such facility remain in place, Grantor may require Grantee to remove the facility from the Public Rights of Way or modify the facility to protect the public health, welfare, safety, and convenience, or otherwise serve the public interest. Grantor may require Grantee to perform a combination of modification and removal of the facility. Grantee shall complete such removal or modification in accordance with a reasonable schedule set by Grantor. Until such time as Grantee removes or modifies the facility as directed by Grantor, or until the rights to and responsibility for the facility are accepted by another Person having authority to construct and maintain such facility, Grantee shall be responsible for all necessary repairs and relocations of the facility, as well as maintenance of the Public Rights of Way, in the same manner and degree as if the facility were in active use, and Grantee shall retain all liability for such facility.

#### 10.10 Hazardous Substances

- (A) Grantee shall comply with all applicable local, state and federal laws, statutes, regulations and orders concerning hazardous substances relating to Grantee's Cable System in the Public Rights of Way.
- (B) Grantee shall maintain and inspect its Cable System located in the Public Rights of Way. Upon reasonable notice to Grantee, Grantor may inspect Grantee's facilities in the Public Rights of Way to determine if any release of hazardous substances has occurred, or may occur, from or related to Grantee's Cable System. In removing or modifying Grantee's facilities as provided in this Agreement, Grantee shall also remove all residue of hazardous substances related thereto.
- (C) Grantee agrees to forever indemnify the Grantor, its officers, boards, commissions, duly authorized agents, and employees, from and against any claims, costs and expenses of any kind, pursuant to and in accordance with applicable State or federal laws, rules and regulations, for the removal or remediation of any leaks, spills, contamination or residues of hazardous substances attributable to Grantee's Cable System in the Public Rights of Way.

#### 10.11 Undergrounding of Cable

- (A) Where all utility lines are installed underground at the time of Cable System construction, or when such lines are subsequently placed underground, all Cable System lines or wiring and equipment shall also be placed underground on a nondiscriminatory basis with other utility lines at no additional expense to the Grantor or Subscribers, to the extent permitted by law and applicable safety codes. Cable must be installed underground where: (1) all existing utility lines are placed underground, (2) statute, ordinance, policy, or other regulation of an individual

Grantor or Commission requires utility lines to be placed underground, or (3) all overhead utility lines are placed underground.

- (B) Related Cable System equipment such as pedestals must be placed in accordance with applicable code requirements and underground utility rules; provided, however, nothing in this Agreement shall be construed to require Grantee to construct, operate, or maintain underground any ground-mounted appurtenances such as customer taps, line extenders, system passive devices, amplifiers, pedestals, power supplies, or other related equipment. In areas where electric or telephone utility wiring is aerial, the Grantee may install aerial cable, except when a property owner or resident requests underground installation and agrees to bear the reasonable additional cost in excess of aerial installation.
- (C) For purposes of this Section 10.11, "utility lines" and "utility wiring" does not include high voltage electric lines.

#### 10.12 **Tree Trimming**

Subject to acquiring prior written permission of the Grantor, including any required permit, the Grantee shall have the authority to trim trees that overhang a Public Right of Way of the Grantor so as to prevent the branches of such trees from coming in contact with its Cable System, in accordance with applicable codes and regulations and current, accepted professional tree trimming practices.

#### 10.13 **Construction, Building and Zoning Codes**

Grantee shall strictly adhere to all applicable construction, building and zoning codes currently or hereafter in effect. Grantee shall arrange its lines, cables and other appurtenances, on both public and private property, in such a manner as to not cause unreasonable interference with the use of said public or private property by any Person. In the event of such interference, Grantor may require the removal or relocation of Grantee's lines, cables, and other appurtenances, at Grantee's cost, from the property in question.

#### 10.14 **Standards**

- (A) All work authorized and required hereunder shall be done in a safe, thorough and workmanlike manner. The Grantee must comply with all safety requirements, rules, and practices and employ all necessary devices as required by applicable law during construction, operation and repair of its Cable System. By way of illustration and not limitation, the Grantee must comply with applicable provisions of the National Electrical Code, National Electrical Safety Code and Occupational Safety and Health Administration (OSHA) Standards.
- (B) Grantee shall ensure that individual Cable System drops are properly bonded to the electrical power ground at the home at time of installation, and are consistent, in all respects, with applicable provisions of the National Electrical Code and the National Electrical Safety Code.

## **SECTION 11. SYSTEM DESIGN AND STANDARDS**

### **11.1 Subscriber Network**

- (A) As of the Effective Date of this Agreement, the Cable System utilizes a Fiber to the node architecture serving no more than fifteen hundred (1,500) Subscribers per node. All active electronics are 750 MHz capable equipment, or equipment of higher bandwidth. Grantee agrees to maintain and improve upon this architecture as demand requires.
- (B) Grantee's Subscriber network shall, at all times, meet or exceed the minimum system design and performance specifications required by the FCC.

### **11.2 Test and Compliance Procedures**

- (A) Upon request, Grantee shall advise Grantor of schedules and methods for testing the Cable System on a regular basis to determine compliance with the provisions of applicable FCC technical standards. Representatives of Grantor may witness tests, and written test reports may be made available to Grantor upon request.
- (B) As required by FCC Rules, Grantee shall conduct proof of performance tests and cumulative leakage index tests designed to demonstrate compliance with FCC requirements. Grantee shall provide Grantor summary written reports of the results of such tests.

### **11.3 Standby Power**

Grantee shall provide standby power generating capacity at the Cable System Headend capable of providing at least twelve (12) hours of emergency operation. Grantee shall maintain standby power system supplies, to the node, rated for at least two (2) hours duration. In addition, throughout the term of this Agreement, Grantee shall have a plan in place, along with all resources necessary for implementing such plan, for dealing with outages of more than two (2) hours.

## **SECTION 12. INSTITUTIONAL NETWORK SERVICES.**

### **12.1 History**

Grantee has constructed and provided managed network services through an institutional network known as the Public Communications Network ("PCN"). The PCN was provided by the Grantee to the Grantor and the Grantor-authorized Users of the PCN, including public agencies/Schools, public universities, Pacific University, and the Virginia Garcia Health Centers, or their successor agencies ("PCN Users"). Grantor and Grantee have agreed to transition the PCN Users to the managed services provided by Grantee's Metro-E network ("Managed Services").

### **12.2 Grantee Responsible for Providing Institutional Network Service**

- (A) Grantee or an Affiliate shall be fully responsible for and at all times shall operate, repair, maintain, manage and ensure provision of the Managed Services to all eligible PCN Users in accordance with the terms of the Master Services Agreement and all attachments and amendments, including the First Amendment

and the Rate Card, copies of which are attached hereto as Attachment D (collectively the "MSA") and the provisions of this Section 12. The parties agree that regardless of whether Grantee or an Affiliate provides the Managed Services, these Managed Services comprise an institutional network required under this Agreement as authorized by Section 611 of the Cable Act, and Grantee is ultimately responsible for the provision, operation and management of the Managed Services pursuant to the MSA. During the term of this Agreement, Grantee shall not terminate nor legally challenge the requirement to provide the Managed Services as provided in the MSA.

- (B) Should any designated Affiliate of the Grantee be unable or unwilling to provide the Managed Services described in this Section and the MSA, the parties agree that Grantee is fully and unconditionally responsible for continued provision of the Managed Services, including the assumption of responsibilities of PCN User contracts and the MSA.

### 12.3 **Master Services Agreement**

Subject to the transition plan set forth in Section 12.4 below, Grantee, or its Affiliate, shall at all times provide the Managed Services to PCN Users in accordance with an executed MSA. Grantee shall not offer, and shall not cause any Affiliate to offer, to any PCN User or eligible PCN User a Managed Services agreement other than the MSA. Where the MSA conflicts with any term or condition of this Agreement, the MSA shall prevail. If Grantor or any PCN User terminates in any manner the Managed Services provided under its MSA prior to the expiration date of this Agreement, such termination shall not affect any other rights or obligations under this Agreement or obligate Grantee to provide any other managed network or institutional network services to Grantor or any PCN User.

### 12.4 **Transition/Upgrade to Master Services Agreement**

- (A) Prior to any transition of a PCN User to services under the MSA, Grantee shall continue providing PCN services to PCN Users as agreed to under its existing Grantor-approved PCN User contract. Grantee or its Affiliate shall transition PCN Users to Managed Services under the MSA within twenty four (24) months from the Effective Date of this Agreement, but shall implement rates consistent with the Rate Card no later than January 1, 2016. This will include an upgrade of current Grantee supplied equipment at PCN User sites at no cost to PCN Users that sign contracts with a term greater than one (1) year.
- (B) Grantee shall develop a proposed transition plan that shall be provided to a current PCN User no later than three (3) months prior to the proposed transition date. The PCN User shall have thirty (30) days to review and comment on the proposed plan. Upon receipt of any comments from the PCN User on the proposed transition plan, Grantee shall confer with the PCN User and shall provide a mutually agreed upon transition plan to such User no later than thirty (30) days prior to the transition. If the PCN User does not comment on the proposed transition plan, the date of the transition shall be that set forth in the proposed plan.
- (C) For network cutover and transition work that will result in service outages, Grantee shall schedule the work between the hours of 12:00 a.m. and 5:00 a.m., or at another time agreed to in writing by the affected PCN Users. Grantee shall provide shorter windows for those cutover activities that can be performed in less than two

(2) hours. When scheduled work has the potential to use the full five (5) hour window, Grantee will clearly communicate this to affected PCN Users.

#### 12.5 **Breach of the Master Service Agreement**

The parties intend that day-to-day issues regarding the provision of Managed Services shall be addressed and resolved with reference solely to the MSA. If there is a sustained and ongoing material failure by the Grantee, or its Affiliate, to provide the Managed Services pursuant to the terms of the MSA, such failure may be deemed a breach of this Agreement and shall be subject to the fines and procedures set forth in Section 15 of this Agreement. All other breaches of the MSA shall be subject to the remedies set forth in the MSA.

#### 12.6 **Grantor/User Meetings**

Grantee and any Affiliate providing the Managed Services agree to meet at least once annually with the members of the Broadband Users Group ("BUG") or its successor organization, to discuss planned improvements or changes to the Managed Services provided under a MSA, and to hear the comments and concerns of the BUG.

#### 12.7 **Annual Report to Grantor**

Within forty-five (45) days of the end of each calendar year, Grantee shall provide Grantor with a report listing each PCN User site under the MSA, along with that site's address and the level of service provided at that site.

#### 12.8 **Security**

Grantee agrees to abide by all privacy and security requirements in applicable state and federal laws and regulations with respect to Managed Services provided for in this Section 12.

### **SECTION 13. PEG ACCESS AND PCN GRANT FUND**

Grantee shall support the continued viability of Institutional Network and Public, Educational and Government (PEG) Programming, through the following funding:

#### 13.1 **Fund Payments**

During the term of this Agreement, Grantee agrees to collect and pay Grantor Eighty Cents (\$0.80) per Subscriber, per month to support the Capital equipment and facility needs of PEG Access and the Grantor institutional network (previously known as the PCN), which funds shall be used in accordance with applicable federal law. Nothing in this Section 13 shall be viewed as a waiver of Grantor's rights to use the funds provided to Grantor in this Section 13.1 for any lawful purpose permitted under applicable federal law. Grantee shall make such payments Quarterly, following the Effective Date of this Agreement, for the preceding quarter ending March 31, June 30, September 30, and December 31. Each payment shall be due and payable no later than forty-five (45) days after the end of each Quarter.

#### 13.2 **Annual Grant Award Report**

- (A) Grantor shall provide a report annually to the Grantee on the use of the funds provided by to the Grantor under this Section. Reports shall be submitted to the Grantee within one hundred twenty (120) days of the close of Grantor's fiscal year.

- (B) Grantee may reasonably review Records of the Grantor (and of the DAP) related to the use of funds in such reports to confirm that funds are used in accordance with federal law and this Agreement. Grantee will notify the Grantor in writing at least thirty (30) days prior to the date of such a review and identify the relevant financial Records of Grantor (and the DAP) that Grantee wants to review. The time period of the review shall be for the fund payments received no more than thirty-six (36) months prior to the date the Grantee notifies Grantor of its intent to perform a review. The Grantor shall make such Records available for inspection and copying during normal business hours at the office of the Grantor (or the DAP).

### 13.3 **PEG Access Not Franchise Fees**

- (A) Grantee agrees that financial support for the PEG Access and PCN Grant Fund, and all other Grantee PEG and PCN obligations set forth in this Agreement shall in no way modify or otherwise affect Grantee's obligations to pay Franchise fees to Grantor. Grantee agrees that although the sum of Franchise fee and the payments set forth in this Section may total more than five percent (5%) of Grantee's Gross Revenues in any twelve (12) month period, the additional commitments shall not be offset or otherwise credited in any way against any past, present or future Franchise fee payments under this Agreement so long as such fees are used in a manner consistent with this Agreement and federal law.
- (B) Grantor recognizes Franchise fees and certain additional commitments are external costs as defined under the FCC rate regulations in force at the time of adoption of this Agreement and Grantee has the right and ability to include Franchise fees and certain other commitments on the bills of cable Subscribers (47 C.F.R. Section 76.922).

## **SECTION 14. SERVICE EXTENSION, CONSTRUCTION, AND INTERCONNECTION**

### 14.1 **Equivalent Service**

It is Grantee's general policy that all residential dwelling units in the Franchise Area have equivalent availability to Cable Service from Grantee's Cable System under nondiscriminatory rates and reasonable terms and conditions, subject to federal law. Grantee shall not arbitrarily refuse to provide Cable Service to any Person within its Franchise Area.

### 14.2 **Service Availability**

- (A) **Service to New Subdivisions.** Grantee shall provide Cable Service in new subdivisions upon the earlier of either of the following occurrences: 1) Within sixty (60) days of the time when foundations have been installed in fifty (50) percent of the dwelling units in any individual subdivision; or 2) Within thirty (30) days following a request from a resident. For purposes of this Section, a receipt shall be deemed to be made on the signing of a service agreement, receipt of funds by the Grantee, receipt of a written request by Grantee, or receipt by Grantee of a verified verbal request.
- (B) Grantee shall provide such service:
  - (1) With no line extension charge except as specifically authorized elsewhere in this Agreement.

- (2) At a nondiscriminatory installation charge for a standard installation, consisting of a drop no longer than one hundred twenty five (125) feet, with additional charges for non-standard installations computed according to a nondiscriminatory methodology for such installations, adopted by Grantee and provided in writing to Grantor; and at nondiscriminatory monthly rates for residential Subscribers, subject to federal law.
- (C) Required Extensions of Service. Whenever the Grantee shall receive a request for service from at least ten (10) residences within 1320 cable-bearing strand feet (one-quarter cable mile) of its trunk or distribution cable, it shall extend its Cable System to such potential Subscribers at no cost to said Subscribers for Cable System extension, other than the usual connection fees for all Subscribers within ninety (90) days, provided that such extension is technically feasible, and if it will not adversely affect the operation of the Cable System.
- (D) Customer Charges for Extensions of Service. No potential Subscriber shall be refused service arbitrarily. However, for unusual circumstances, such as a potential Subscriber's request to locate a cable drop underground, existence of more than one hundred twenty-five (125) feet of distance from distribution cable to connection of service to such Subscriber, or a density of less than ten (10) residences per one thousand three hundred twenty (1,320) cable-bearing strand feet of trunk or distribution cable, service may be made available on the basis of a capital contribution in aid of construction, including cost of material, labor, and easements. For the purpose of determining the amount of capital contribution in aid of construction to be borne by the Grantee and potential Subscribers in the area in which service may be expanded, the Grantee will contribute an amount equal to the construction and other costs per mile, multiplied by a fraction whose numerator equals the actual number of residences per one thousand three hundred twenty (1320) cable-bearing strand feet of its trunks or distribution cable and whose denominator equals ten (10) residences. Subscribers who request service hereunder will bear the remainder of the construction and other costs on a pro rata basis. The Grantee may require that the payment of the capital contribution in aid of construction borne by such potential Subscriber be paid in advance.
- (E) Enforcement. Failure to meet these standards shall subject Grantee to enforcement actions on a per Subscriber basis in Section 15.

### 14.3 Connection of Public Facilities

As a voluntary initiative, Grantee shall, at no cost to Grantor, provide one (1) outlet of basic and digital economy tier (or its functional equivalent) Programming to public use buildings, as designated by the Grantor, and all libraries and Schools. Those portions of buildings housing prison/jail populations shall be excluded from this requirement. In addition, Grantee agrees to provide, at no cost, one (1) outlet of basic and digital economy tier (or its functional equivalent) Programming to all such future public buildings if the drop line to such building does not exceed one hundred and twenty five (125) cable feet or if Grantor or other agency agrees to pay the incremental cost of such drop line in excess of one hundred twenty five (125) feet, including the cost of such excess labor and materials. Outlets of basic and digital economy tier (or its functional equivalent) Programming provided in accordance with this subsection may be used to distribute Cable Service throughout such buildings, provided such distribution can be accomplished without

causing Cable System disruption and general technical standards are maintained. Cost for any additional outlets shall be the responsibility of Grantor.

## **SECTION 15. FRANCHISE VIOLATIONS; REVOCATION OF FRANCHISE**

### **15.1 Procedure for Remedying Franchise Violations**

- (A) If Grantor believes that Grantee has failed to perform any obligation under this Agreement or has failed to perform in a timely manner, Grantor shall notify Grantee in writing, stating with reasonable specificity the nature of the alleged violation.
- (B) The Grantor must provide written notice of a violation. Upon receipt of notice, the Grantee will have a period of thirty (30) days to cure the violation or thirty (30) days to present to the Grantor a reasonable remedial plan. The Grantor shall, with Grantee's consent, decide whether to accept, reject, or modify the remedial plan presented by the Grantee. Fines shall be assessed only in the event that either a cure has not occurred within thirty (30) days or the Grantor rejects the remedial plan. The procedures provided in Section 15 shall be utilized to impose any fines. The date of violation will be the date of the event and not the date Grantee receives notice of the violation provided, however, that if Grantor has actual knowledge of the violation and fails to give the Grantee the notice called for herein, then the date of the violation shall be no earlier than ten (10) business days before the Grantor gives Grantee the notice of the violation. Grantee shall have thirty (30) calendar days from the date of receipt of such notice to:
  - (1) Respond to Grantor, contesting Grantor's assertion that a violation has occurred, and requesting a hearing in accordance with subsection (E) below, or;
  - (2) Cure the violation, or;
  - (3) Notify Grantor that Grantee cannot cure the violation within the thirty (30) days, and notify the Grantor in writing of what steps the Grantee shall take to cure the violation, including the Grantee's projected completion date for such cure. In such case, Grantor shall set a hearing date within thirty (30) days of receipt of such response in accordance with subsection (C) below.
- (C) In the event that the Grantee notifies the Grantor that it cannot cure the violation within the thirty (30) day cure period, Grantor shall, within thirty (30) days of Grantor's receipt of such notice, set a hearing. At the hearing, Grantor shall review and determine whether the Grantee has taken reasonable steps to cure the violation and whether the Grantee's proposed plan and completion date for cure are reasonable. In the event such plan and completion date are determined by mutual consent to be reasonable, the same may be approved by the Grantor, who may waive all or part of the fines for such extended cure period in accordance with the criteria set forth in subsection (G) below.
- (D) In the event that the Grantee fails to cure the violation within the thirty (30) day basic cure period, or within an extended cure period approved by the Grantor pursuant to subsection (C), the Grantor shall set a hearing to determine what fines, if any, shall be applied.

- (E) In the event that the Grantee contests the Grantor's assertion that a violation has occurred, and requests a hearing in accordance with subsection (B)(1) above, the Grantor shall set a hearing within sixty (60) days of the Grantor's receipt of the hearing request to determine whether the violation has occurred, and if a violation is found, what fines shall be applied.
- (F) In the case of any hearing pursuant to this Section, Grantor shall notify Grantee of the hearing in writing and at the hearing, Grantee shall be provided an opportunity to be heard, examine Grantor's witnesses, and to present evidence in its defense. The Grantor may also hear any other Person interested in the subject, and may provide additional hearing procedures as Grantor deems appropriate.
- (G) The fines set forth in Section 15.2 of this Agreement may be reduced at the discretion of the Grantor, taking into consideration the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:
  - (1) Whether the violation was unintentional;
  - (2) The nature of the harm which resulted;
  - (3) Whether there is a history of prior violations of the same or other requirements;
  - (4) Whether there is a history of overall compliance, and/or;
  - (5) Whether the violation was voluntarily disclosed, admitted or cured.
- (H) If, after the hearing, Grantor determines that a violation exists, Grantor may use one or more of the following remedies:
  - (1) Order Grantee to correct or remedy the violation within a reasonable time frame as Grantor shall determine;
  - (2) Establish the amount of fine set forth in Section 15.2, taking into consideration the criteria provided for in subsection (G) of this Section as appropriate in Grantor's discretion;
  - (3) Revoke this Agreement, and/or;
  - (4) Pursue any other legal or equitable remedy available under this Agreement or any applicable law.
- (I) Fines shall not be imposed in an amount in excess of seventy-five thousand dollars (\$75,000) for the Grantors collectively within any twelve (12) month consecutive period.
- (J) The determination as to whether a violation of this Agreement has occurred shall be within the sole discretion of the Grantor or its designee, provided that any such final determination shall be subject to review by a court of competent jurisdiction under applicable law.

## 15.2 Fines

(A) Failure to comply with provisions of this Agreement may result in injury to Grantor. Grantor and Grantee recognize it will be difficult to accurately estimate the extent of such injury. Therefore, the financial penalty provisions of this Agreement are intended as a reasonable forecast of compensation to the Grantors collectively for the harm caused by violation of this Agreement, including but not limited to administrative expense, legal fees, publication of notices, and holding of a hearing or hearings as provided herein.

- (1) For violating aggregate performance telephone answering standards for a Quarterly measurement period:
  - (a) \$10,000 for the first such violation;
  - (b) \$20,000 for the second such violation, unless the violation has been cured;
  - (c) \$30,000 for any and all subsequent violations, unless the violation has been cured;

A cure is defined as meeting the Subscriber telephone answering standards for two (2) consecutive Quarterly measurement periods;

- (2) For violation of applicable Subscriber service standards where violations are not measured in terms of aggregate performance standards: \$250 per violation, per day;
- (3) For all other violations of this Agreement, except as otherwise provided herein, (for example, but not limited to, Record submissions under Section 7): \$250/day for each violation for each day the violation continues.

(B) The fines set forth in Section 15.2(A) may be reduced at the sole discretion of the Grantor, taking into consideration the nature, circumstances, extent and gravity of violation as reflected by one or more of the following factors:

- (a) whether the violation was unintentional;
- (b) the nature of the harm which resulted;
- (c) whether there is a history of prior violations of the same or other requirements;
- (d) whether there is a history of overall compliance, and/or;
- (e) whether the violation was voluntarily disclosed, admitted or cured.

(C) Collection of Fines. The collection of fines by the Grantor shall in no respect affect:

- (1) Compensation owed to Subscribers; or

- (2) The Grantee's obligation to comply with all of the provisions of this Agreement or applicable law; or
- (3) Other remedies available to the Grantors provided, however, that collection of fines shall be the exclusive remedy for the Grantors for the particular incident or for the particular time period for which it is imposed other than reasonable attorney fees and costs, if applicable. If the violation continues beyond the particular time period, Grantor shall have the right to pursue other remedies under this Agreement.

### 15.3 **Revocation**

- (A) Should Grantor seek to revoke the Franchise after following the procedures set forth in Section 15.1, Grantor shall give written notice to Grantee of its intent. The notice shall set forth the exact nature of the noncompliance. Grantee shall have ninety (90) days from such notice to object in writing and to state its reasons for such objection. In the event Grantor has not received a satisfactory response from Grantee, it may then seek termination of the Franchise at a public hearing. Grantor shall cause to be served upon Grantee, at least thirty (30) days prior to such public hearing, a written notice specifying the time and place of such hearing and stating its intent to revoke the Franchise.
- (B) At the designated hearing, Grantee shall be provided a fair opportunity for full participation, including the right to be represented by legal counsel, to introduce relevant evidence, to require the production of evidence, to compel the relevant testimony of the officials, agents, employees or consultants of Grantor, to compel the testimony of other persons as permitted by law, and to question and/or cross examine witnesses. A complete verbatim record and transcript shall be made of such hearing.
- (C) Following the public hearing, Grantee shall be provided up to thirty (30) days to submit its proposed findings and conclusions in writing and thereafter Grantor shall determine (i) whether an event of default has occurred; (ii) whether such event of default is excusable; and (iii) whether such event of default has been cured or will be cured by Grantee. Grantor shall also determine whether to revoke the Franchise based on the information presented, or, where applicable, grant additional time to Grantee to effect any cure. If Grantor determines that the Franchise shall be revoked, Grantor shall promptly provide Grantee with a written decision setting forth its reasoning. Grantee may appeal such determination of Grantor to an appropriate court, which shall have the power to review the decision of Grantor. Grantee shall be entitled to such relief as the court finds appropriate. Such appeal must be taken within sixty (60) days of Grantee's receipt of the determination of the Grantor.
- (D) Grantor may, at its sole discretion, take any lawful action which it deems appropriate to enforce Grantor's rights under the Agreement in lieu of revocation of the Franchise.

### 15.4 **Relationship of Remedies**

- (A) Remedies are Non-exclusive. The remedies provided for in this Agreement are cumulative and not exclusive; the exercise of one remedy shall not prevent the

exercise of another remedy, or the exercise of any rights of the Grantor at law or equity, provided that the cumulative remedies may not be disproportionate to the magnitude and severity for the breach for which they are imposed except as otherwise provided in Section 15.2. By way of example and not limitation, the collection of fines by Grantor shall in no respect affect:

- (1) Refunds or credits owed to Subscribers; or
  - (2) Grantee's obligation to comply with the provisions of this Agreement or applicable law.
- (B) No Election of Remedies. Without limitation, the withdrawal of amounts from the Grantee's performance bond, or the recovery of amounts under the insurance, indemnity or penalty provisions of this Agreement shall not be construed as any of the following: an election of remedies; a limit on the liability of Grantee under the Agreement for fines or otherwise, except as provided in Section 15.2; or an excuse of faithful performance by Grantee.

#### 15.5 **Removal**

- (A) In the event of termination, expiration or revocation of this Agreement, Grantor may order the removal of the above-ground Cable System facilities and such underground facilities as required by Grantor in order to achieve reasonable engineering or Public Rights of Way use purposes, from the Franchise Area at Grantee's sole expense within a reasonable period of time as determined by Grantor. In removing its plant, structures and equipment, Grantee shall refill, at its own expense, any excavation that is made by it and shall leave all Public Rights of Way, public places and private property in as good a condition as that prevailing prior to Grantee's removal of its equipment.
- (B) If Grantee fails to complete any required removal to the satisfaction of Grantor, Grantor may cause the work to be done and Grantee shall reimburse Grantor for the reasonable costs incurred within thirty (30) days after receipt of an itemized list of the costs and Grantor may recover the costs through the Performance Bond provided by Grantee.

#### 15.6 **Receivership and Foreclosure** Grantor and Grantee acknowledge that the following paragraphs may not be applicable or are subject to the jurisdiction of the bankruptcy court.

- (A) At the option of Grantor, subject to applicable law, this Agreement may be revoked one-hundred twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of Grantee whether in a receivership, reorganization, bankruptcy or other action or proceeding unless:
- (1) The receivership or trusteeship is vacated within one hundred twenty (120) days of appointment, or;
  - (2) The receiver(s) or trustee(s) have, within one hundred twenty (120) days after their election or appointment, fully complied with all the terms and provisions of this Agreement and have remedied all violations under the Agreement. Additionally, the receiver(s) or trustee(s) shall have executed an agreement duly approved by the court having jurisdiction, by which the

receiver(s) or trustee(s) assume and agree to be bound by each and every term and provision of this Agreement.

- (B) If there is a foreclosure or other involuntary sale of the whole or any part of the plant, property and equipment of Grantee, Grantor may serve notice of revocation on Grantee and to the purchaser at the sale, and the rights and privileges of Grantee under this Agreement shall be revoked thirty (30) days after service of such notice, unless:
- (1) Grantor has approved the transfer of this Agreement, in accordance with the procedures set forth in this Agreement and as provided by law; and
  - (2) The purchaser has agreed with Grantor to assume and be bound by all of the terms and conditions of this Agreement.

#### **15.7 No Recourse Against Grantor**

Grantee shall not have any monetary recourse against Grantor or its officials, boards, commissions, agents or employees for any loss, costs, expenses or damages arising out of any provision or requirement of this Agreement or the enforcement thereof, in accordance with the provisions of applicable federal, state and local law. The rights of the Grantor under this Agreement are in addition to, and shall not be read to limit, any rights or immunities the Grantor may enjoy under federal, state or local law. However, under federal law, Grantee does have the right to seek injunctive and declaratory relief.

#### **15.8 Nonenforcement By Grantor**

Grantee is not relieved of its obligation to comply with any of the provisions of this Agreement by reason of any failure of Grantor to enforce prompt compliance. Grantor's forbearance or failure to enforce any provision of this Agreement shall not serve as a basis to stop any subsequent enforcement. The failure of the Grantor on one or more occasions to exercise a right or to require compliance or performance under this Agreement or any applicable law shall not be deemed to constitute a waiver of such right or a waiver of compliance or performance, unless such right has been specifically waived in writing. Any waiver of a violation is not a waiver of any other violation, whether similar or different from that waived.

### **SECTION 16. ABANDONMENT**

#### **16.1 Effect of Abandonment**

If the Grantee abandons its System during the Franchise term, or fails to operate its Cable System in accordance with its duty to provide continuous service, the Grantor, at its option, may operate the Cable System; designate another entity to operate the Cable System temporarily until the Grantee restores service under conditions acceptable to the Grantor or until this Agreement is revoked and a new grantee is selected by the Grantor; or obtain an injunction requiring the Grantee to continue operations. If the Grantor is required to operate or designate another entity to operate the Cable System, the Grantee shall reimburse the Grantor or its designee for all reasonable costs, expenses and damages incurred.

## 16.2 What Constitutes Abandonment

- (A) The Grantor shall be entitled to exercise its options and obtain any required injunctive relief if:
  - (1) The Grantee fails to provide Cable Service in accordance with this Agreement to the Franchise Area for ninety-six (96) consecutive hours, unless the Grantor authorizes a longer interruption of service, except if such failure to provide service is due to a force majeure occurrence, as described in Section 4.7; or
  - (2) The Grantee, for any period, willfully and without cause refuses to provide Cable Service in accordance with this Agreement.

## SECTION 17. FRANCHISE RENEWAL AND TRANSFER

### 17.1 Renewal

- (A) The Grantor and Grantee agree that any proceedings undertaken by the Grantor that relate to the renewal of Grantee's Agreement shall be governed by and comply with the provisions of the Cable Act (47 USC § 546), unless the procedures and substantive protections set forth therein shall be deemed to be preempted and superseded by the provisions of any subsequent provision of federal or state law.
- (B) In addition to the procedures set forth in the Cable Act, the Grantor agrees to notify Grantee of the completion of its assessments regarding the identification of future cable-related community needs and interests, as well as the past performance of Grantee under the then current Franchise term. Notwithstanding anything to the contrary set forth herein, Grantee and Grantor agree that at any time during the term of the then current Agreement, while affording the public adequate notice and opportunity for comment, the Grantor and Grantee may agree to undertake and finalize negotiations regarding renewal of the then current Agreement and the Grantor may grant a renewal thereof. Grantee and Grantor consider the terms set forth in this Section to be consistent with the express provisions of the Cable Act.

### 17.2 Transfer of Ownership or Control

- (A) The Cable System and this Agreement shall not be sold, assigned, transferred, leased, or disposed of, either in whole or in part, either by involuntary sale or by voluntary sale, merger, consolidation, nor shall title thereto, either legal or equitable, or any right, interest, or property therein pass to or vest in any Person or entity, without the prior written consent of the Grantor, which consent shall not be unreasonably withheld.
- (B) The Grantee shall promptly notify the Grantor of any actual or proposed change in, or transfer of, or acquisition by any other party of control of the Grantee. The word "control" as used herein is not limited to majority stockholders but includes actual working control in whatever manner exercised. A rebuttable presumption that a transfer of control has occurred shall arise on the acquisition or accumulation by any Person or group of Persons of ten percent (10%) of the shares or the general partnership interest in the Grantee, except that this sentence shall not apply in the case of a transfer to any Person or group already owning at least a ten percent

(10%) interest of the shares or the general partnership interest in the Grantee. Every change, transfer or acquisition of control of the Grantee shall make this Agreement subject to revocation unless and until the Grantor shall have consented thereto.

- (C) The parties to the sale or transfer shall make a written request to the Grantor for its approval of a sale or transfer and furnish all information required by law and the Grantor.
- (D) The Grantor shall render a final written decision on the request within one hundred twenty (120) days of the request, provided it has received all requested information. Subject to the foregoing, if the Grantor fails to render a final decision on the request within one hundred twenty (120) days, such request shall be deemed granted unless the requesting party and the Grantor agree to an extension of time.
- (E) Within thirty (30) days of any transfer or sale, if approved or deemed granted by the Grantor, Grantee shall file with the Grantor a copy of the deed, agreement, lease or other written instrument evidencing such sale or transfer of ownership or control, certified and sworn to as correct by Grantee and the transferee.
- (F) In reviewing a request for sale or transfer, the Grantor may inquire into the legal, technical and financial qualifications of the prospective controlling party or transferee, and Grantee shall assist the Grantor in so inquiring. The Grantor may condition said sale or transfer upon such terms and conditions as it deems reasonably appropriate, provided, however, any such terms and conditions so attached shall be related to the legal, technical, and financial qualifications of the prospective controlling party or transferee and to the resolution of outstanding and unresolved issues of noncompliance with the terms and conditions of this Agreement by Grantee.
- (G) The consent or approval of the Grantor to any transfer by the Grantee shall not constitute a waiver or release of any rights of the Grantor, and any transfer shall, by its terms, be expressly subordinate to the terms and conditions of this Agreement.
- (H) Notwithstanding anything to the contrary in this Section, the prior approval of the Grantor shall not be required for any sale, assignment or transfer of the Agreement or Cable System for cable television system usage to an entity controlling, controlled by or under the same common control as Grantee, provided that the proposed assignee or transferee must show financial responsibility as may be determined necessary by the Grantor and must agree in writing to comply with all provisions of the Agreement. No consent shall be required for a transfer in trust, by mortgage, by other hypothecation, by assignment of any rights, title, interest of Grantee in the Franchise or Cable System in order to secure indebtedness.

## **SECTION 18. SEVERABILITY**

If any Section, subsection, paragraph, term, or provision of this Agreement or any ordinance, law, or document incorporated herein by reference is held by a court of competent jurisdiction to be invalid, unconstitutional, or unenforceable, such holding shall be confined in its operation to the Section, subsection, paragraph, term, or provision directly involved in the controversy in which

such holding shall have been rendered, and shall not in any way affect the validity of any other Section, subsection, paragraph, term, or provision hereof. Under such a circumstance the Grantee shall, upon the Grantor's request, meet and confer with the Grantor to consider amendments to this Agreement. The purpose of the amendments shall be to place the parties, as nearly as possible, in the position that they were in prior to such determination, consistent with applicable law. In the event the parties are unable to agree to a modification of this Agreement within sixty (60) days, either party may (1) seek appropriate legal remedies to amend this Agreement, or (2) shorten this Agreement to thirty-six (36) months, at which point either party may invoke the renewal procedures under 47 U.S.C. § 546. Each party agrees to participate in up to sixteen (16) hours of negotiation during the sixty (60) day period.

## **SECTION 19. MISCELLANEOUS PROVISIONS**

### **19.1 Preferential or Discriminatory Practices Prohibited**

Grantee shall not discriminate in hiring, employment or promotion on the basis of race, color, creed, ethnic or national origin, religion, age, sex, sexual orientation, marital status, or physical or mental disability. Throughout the term of this Agreement, Grantee shall fully comply with all equal employment or nondiscrimination provisions and requirements of federal, state and local law and, in particular, FCC rules and regulations relating thereto.

### **19.2 Dispute Resolution**

- (A) The Grantor and Grantee agree that should a dispute arise between the parties concerning any aspect of this Agreement which is not resolved by mutual agreement of the parties, and unless either party believes in good faith that injunctive relief is warranted, the dispute will be submitted to mediated negotiation prior to any party commencing litigation. In such event, the Grantor and Grantee agree to participate in good faith in a non-binding mediation process. The mediator shall be selected by mutual agreement of the parties. In the absence of such mutual agreement, each party shall select a temporary mediator, and those mediators shall jointly select a permanent mediator.
- (B) If the parties are unable to successfully conclude the mediation within forty-five (45) days from the date of the selection of the mediator, either party may terminate further mediation by sending written notice to the other. After written notice has been received by the other party, either party may pursue whatever legal remedies exist. All costs associated with mediation shall be borne, equally and separately, by the parties.

### **19.3 Notices**

- (A) Throughout the term of this Agreement, Grantee shall maintain and file with Grantor a designated legal or local address for the service of notices by mail. A copy of all notices from Grantor to Grantee shall be sent, postage prepaid, to such address and such notices shall be effective upon the date of mailing. At the Effective Date of this Agreement, such addresses shall be:

Comcast of Oregon, II, Inc.  
Attn: Government Affairs  
9605 SW Nimbus Ave  
Beaverton, OR 97008

with copy to:

Attn : West Division/Government Affairs  
15815 25<sup>th</sup> Ave West  
Lynnwood, WA 98087

- (B) All notices to be sent by Grantee to Grantor under this Agreement shall be sent, postage prepaid, and such notices shall be effective upon the date of mailing. At the Effective Date of this Agreement, such address shall be:

Metropolitan Area Communications Commission  
15201 NW Greenbrier Parkway, C-1  
Beaverton, OR 97006

**19.4 Binding Effect**

This Agreement shall be binding upon the parties hereto, their permitted successors and assigns.

**19.5 Authority to Amend**

This Agreement may be amended at any time by written agreement between the parties.

**19.6 Governing Law**

This Agreement shall be governed in all respects by the laws of the State of Oregon.

**19.7 Guarantee**

The performance of the Grantee shall be guaranteed in all respects by TCI West, LLC. A signed guarantee, in a form acceptable to the Grantor, shall be filed with the Grantor prior to the Effective Date hereof.

**19.8 Captions**

The captions and headings of this Agreement are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of any provisions of this Agreement.

**19.9 Entire Agreement**

This Agreement, together with all appendices and attachments, contains the entire agreement between the parties, supersedes all prior agreements or proposals except as specifically set forth herein, and cannot be changed orally but only by an instrument in writing executed by the parties.

**19.10 Construction of Agreement**

The provisions of this Agreement shall be liberally construed to promote the public interest.

Agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2015

COMCAST OF OREGON II, INC.

METROPOLITAN AREA  
COMMUNICATIONS COMMISSION

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

Division President

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

Administrator



## **Attachment A CUSTOMER SERVICE**

These standards shall apply to Grantee to the extent it is providing Cable Services over the Cable System in the Franchise Area. This Attachment A sets forth the minimum customer service standards that the Grantee must satisfy.

### **1. Definitions**

- (A) Normal Business Hours mean those hours during which most similar businesses in the Franchise Area are open to serve customers. In all cases, "Normal Business Hours" must include some evening hours at least one night per week and/or some weekend hours.
- (B) Normal Operating Conditions: Those service conditions that are within the control of the Grantee, as defined under 47 C.F.R. § 76.309(c)(4)(ii). Those conditions which are not within the control of the Grantee include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which are ordinarily within the control of the Grantee include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the Cable System.
- (C) Respond: The start of Grantee's investigation of a Service Interruption by receiving a Subscriber call, and opening a trouble ticket, and begin working, if required.
- (D) Service Call: The action taken by Grantee to correct a Service Interruption the effect of which is limited to an individual Subscriber.
- (E) Service Interruption. The loss of picture or sound on one or more cable Channels.
- (F) Significant Outage: A significant outage of the Cable Service shall mean any Service Interruption lasting at least four (4) continuous hours that affects at least ten percent (10%) of the Subscribers in the Service Area.
- (G) Standard Installation: Installations where the Subscriber is within one hundred twenty five (125) feet of trunk or feeder lines.

### **2. Telephone Availability**

- (A) Grantee shall maintain a toll-free number to receive all calls and inquiries from Subscribers in the Franchise Area and/or residents regarding Cable Service. Grantee representatives trained and qualified to answer questions related to Cable Service in the Service Area must be available to receive reports of Service Interruptions twenty-four (24) hours a day, seven (7) days a week, and such representatives shall be available to receive all other inquiries at least forty-five (45) hours per week including at least one night per week and/or some weekend hours. Grantee representatives shall identify themselves by name when answering this number.
- (B) Grantee's telephone numbers shall be listed, with appropriate description (e.g. administration, customer service, billing, repair, etc.), in the directory published by

the local telephone company or companies serving the Service Area, beginning with the next publication cycle after acceptance of this Agreement by Grantee.

- (C) Grantee may use an Automated Response Unit ("ARU") or a Voice Response Unit ("VRU") to distribute calls. If a foreign language routing option is provided, and the Subscriber does not enter an option, the menu will default to the first tier menu of English options.

After the first tier menu (not including a foreign language rollout) has run through three times, if Subscribers do not select any option, the ARU or VRU will forward the call to a queue for a live representative. Grantee may reasonably substitute this requirement with another method of handling calls from Subscribers who do not have touch-tone telephones.

- (D) Under Normal Operating Conditions, calls received by the Grantee shall be answered within thirty (30) seconds during Normal Business Hours. The Grantee shall meet this standard for ninety percent (90%) of the calls it receives at call centers receiving calls from Franchise Area Subscribers, as measured on a cumulative Quarterly calendar basis. Measurement of this standard shall include all calls received by the Grantee at all call centers receiving calls from Subscribers, whether they are answered by a live representative, by an automated attendant, or abandoned after thirty (30) seconds of call waiting. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds.
- (E) Under Normal Operating Conditions, callers to the Grantee shall receive a busy signal no more than three (3%) percent of the time during any calendar Quarter.
- (F) Forty-five (45) days following the end of each Quarter, the Grantee shall report to Grantor, the following for all call centers receiving calls from Subscribers except for temporary telephone numbers set up for national promotions:
  - (1) Percentage of calls answered within thirty (30) seconds as set forth in subsection 2( D) of this Attachment A; and
  - (2) Percentage of time Subscribers received a busy signal when calling the Grantee's service center as set forth in Section 2( E) of this Attachment A.
- (G) At the Grantee's option, the measurements and reporting above may be changed from calendar quarters to billing or accounting quarters one time during the term of this Agreement. Grantee shall notify Grantor of such a change not less than thirty (30) days in advance.

### 3. Installations and Service Appointments

- (A) All installations will be in accordance with FCC rules, including but not limited to, appropriate grounding/bonding, connection of equipment to ensure reception of Cable Service, and the provision of required consumer information and literature to adequately inform the Subscriber in the utilization of Grantee-supplied equipment and Cable Service.
- (B) The Standard Installation shall be performed within seven (7) business days of Subscriber request. Grantee shall meet this standard for ninety-five percent (95%)

of the Standard Installations it performs, as measured on a calendar quarter basis, excluding those requested by the Subscriber outside of the seven (7) day period.

- (C) Grantee shall provide Grantor with a report forty-five (45) days following the end of the Quarter, noting the percentage of Standard Installations completed within the seven (7) day period, excluding those requested outside of the seven (7) day period by the Subscriber. Subject to consumer privacy requirements, underlying activity will be made available to Grantor for review upon reasonable request.
- (D) At Grantee's option, the measurements and reporting above may be changed from calendar quarters to billing or accounting quarters one time during the term of this Agreement. Grantee shall notify Grantor of such a change not less than thirty (30) days in advance.
- (E) Grantee will offer Subscribers "appointment window" alternatives for arrival to perform installations, Service Calls and other activities of a maximum four (4) hours scheduled time block during appropriate daylight available hours, usually beginning at 8:00 AM unless it is deemed appropriate to begin earlier by location exception. At Grantee's discretion, Grantee may offer Subscribers appointment arrival times other than these four (4) hour time blocks, if agreeable to the Subscriber.
  - (1) Grantee may not cancel an appointment window with a customer after the close of business on the business day prior to the scheduled appointment.
  - (2) If Grantee's representative is running late for an appointment with a Subscriber and will not be able to keep the appointment as scheduled, the Subscriber will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the Subscriber.
- (F) Grantee must provide for the pick up or drop off of equipment free of charge in one of the following manners: (i) by having a Grantee representative go to the Subscriber's residence, (ii) by using a mailer, or (iii) by establishing a local business office within the Franchise Area. If requested by a mobility-limited Subscriber, the Grantee shall arrange for pickup and/or replacement of converters or other Grantee equipment at Subscriber's address or by a satisfactory equivalent.

#### 4. **Service Interruptions and Outages**

- (A) Grantee shall promptly notify Grantor of any Significant Outage of the Cable Service.
- (B) Grantee shall exercise commercially reasonable efforts to limit any Significant Outage for the purpose of maintaining, repairing, or constructing the Cable System. Except in an emergency or other situation necessitating a more expedited or alternative notification procedure, Grantee may schedule a Significant Outage for a period of more than four (4) hours during any twenty-four (24) hour period only after Grantor and each affected Subscriber in the Service Area have been given fifteen (15) days prior notice of the proposed Significant Outage. Notwithstanding the foregoing, Grantee may perform modifications, repairs and upgrades to the System between 12:01 a.m. and 6 a.m., which may interrupt

service, and this Section's notice obligations respecting such possible interruptions will be satisfied by notice provided to Subscribers upon installation and in the annual Subscriber notice.

- (C) Grantee representatives who are capable of responding to Service Interruptions must be available to Respond twenty-four (24) hours a day, seven (7) days a week.
- (D) Under Normal Operating Conditions, Grantee must Respond to a call from a Subscriber regarding a Service Interruption or other service problems within the following time frames:
  - (1) Within twenty-four (24) hours, including weekends, of receiving Subscriber calls about Service Interruptions in the Service Area.
  - (2) Grantee must begin actions to correct all other Cable Service problems the next business day after notification by the Subscriber or Grantor of a Cable Service problem.
- (E) Under Normal Operating Conditions, Grantee shall complete Service Calls within seventy-two (72) hours of the time Grantee commences to Respond to the Service Interruption, not including weekends and situations where the Subscriber is not reasonably available for a Service Call to correct the Service Interruption within the seventy-two (72) hour period.
- (F) Grantee shall meet the standard in Section 4(E) of this Attachment A for ninety percent (90%) of the Service Calls it completes, as measured on a Quarterly basis.
- (G) Grantee shall provide Grantor with a report within forty-five (45) days following the end of each calendar quarter, noting the percentage of Service Calls completed within the seventy-two (72) hour period, not including Service Calls where the Subscriber was reasonably unavailable for a Service Call within the seventy-two (72) hour period as set forth in this Section 4.G. Subject to consumer privacy requirements, underlying activity will be made available to Grantor for review upon reasonable request. At the Grantee's option, the above measurements and reporting may be changed from calendar quarters to billing or accounting quarters one time during the term of this Agreement. The Grantee shall notify the Grantor of such a change at least thirty (30) days in advance.
- (H) At Grantee's option, the above measurements may be changed for calendar quarters to billing or accounting quarters one time during the term of this Agreement. Grantee shall notify Grantor of such a change at least thirty (30) days in advance.
- (I) Under Normal Operating Conditions, Grantee shall provide a credit upon Subscriber request when all Channels received by that Subscriber experience the loss of picture or sound for a period of four (4) consecutive hours or more. The credit shall equal, at a minimum, a proportionate amount of the affected Subscriber(s) current monthly bill. In order to qualify for the credit, the Subscriber must promptly report the problem and allow Grantee to verify the problem if requested by Grantee. If Subscriber availability is required for repair, a credit will not be provided for such time, if any, that the Subscriber is not reasonably available.

- (J) Under Normal Operating Conditions, if a Significant Outage affects all Video Programming Cable Services for more than twenty-four (24) consecutive hours, Grantee shall issue a credit upon request to the affected Subscribers in the amount equal to their monthly recurring charges for the proportionate time the Cable Service was out, or a credit upon request to the affected Subscribers in the amount equal to the charge for the basic plus enhanced basic level of service for the proportionate time the Cable Service was out, whichever is technically feasible or, if both are technically feasible, as determined by Grantee, provided such determination is non-discriminatory. Such credit shall be reflected on Subscriber billing statements within the next available billing cycle following the outage.

## 5. **Subscriber Complaints Referred by Grantor**

Under Normal Operating Conditions, Grantee shall begin investigating Subscriber complaints referred by Grantor within twenty-four (24) hours. Grantee shall notify Grantor of those matters that require more than seventy-two (72) hours to resolve, but Grantee must make all necessary efforts to resolve those complaints within ten (10) business days of the initial complaint. Grantor may require Grantee to provide reasonable documentation to substantiate the request for additional time to resolve the problem. Grantee shall inform Grantor in writing, which may be by an electronic mail message, of how and when referred complaints have been resolved within a reasonable time after resolution. For purposes of this Section 5 of this Attachment A, "resolve" means that Grantee shall perform those actions, which, in the normal course of business, are necessary to investigate the Subscriber's complaint and advise the Subscriber of the results of that investigation.

## 6. **Billing**

- (A) Subscriber bills must be itemized to describe Cable Services purchased by Subscribers and related equipment charges. Bills shall clearly delineate activity during the billing period, including optional charges, rebates, credits, and aggregate late charges. Grantee shall without limitation as to additional line items, be allowed to itemize as separate line items, Franchise fees, taxes, PEG capital fees, and/or other governmental-imposed fees. Grantee shall maintain records of the date and place of mailing of bills.
- (B) Every Subscriber with a current account balance sending payment directly to Grantee shall be given at least twenty (20) days from the date statements are mailed to the Subscriber until the payment due date.
- (C) A specific due date shall be listed on the bill of every Subscriber whose account is current. Delinquent accounts may receive a bill which lists the due date as upon receipt; however, the current portion of that bill shall not be considered past due except in accordance with Section 6(B) of this Attachment A.
- (D) Any Subscriber who, in good faith, disputes all or part of any bill shall have the option of withholding the disputed amount without disconnect or late fee being assessed until the dispute is resolved, provided that:
- (1) The Subscriber pays all undisputed charges;
  - (2) The Subscriber provides notification of the dispute to Grantee within five (5) days prior to the due date; and

- (3) The Subscriber cooperates in determining the accuracy and/or appropriateness of the charges in dispute.
- (4) It shall be within Grantee's sole discretion to determine when the dispute has been resolved.
- (E) Under Normal Operating Conditions, Grantee shall initiate investigation and resolution of all billing complaints received from Subscribers within five (5) business days of receipt of the complaint. Final resolution shall not be unreasonably delayed.
- (F) Grantee shall provide a telephone number and address clearly and prominently on the bill for Subscribers to contact Grantee.
- (G) Grantee shall forward a copy of any rate-related or customer service-related billing inserts or other mailings related to Cable Service, but not promotional materials, sent to Subscribers, to Grantor.
- (H) Grantee shall provide all Subscribers with the option of paying for Cable Service by check or an automatic payment option where the amount of the bill is automatically deducted from a checking account designated by the Subscriber. Grantee may in the future, at its discretion, permit payment by using a major credit card on a preauthorized basis. Based on credit history, at the option of Grantee, the payment alternative may be limited.

**7. Deposits, Refunds and Credits**

- (A) Grantee may require refundable deposits from Subscribers 1) with a poor credit or poor payment history, 2) who refuse to provide credit history information to Grantee, or 3) who rent Subscriber equipment from Grantee, so long as such deposits are applied on a non-discriminatory basis. The deposit Grantee may charge Subscribers with poor credit or poor payment history or who refuse to provide credit information may not exceed an amount equal to an average Subscriber's monthly charge multiplied by six (6). The maximum deposit Grantee may charge for Subscriber equipment is the cost of the equipment which Grantee would need to purchase to replace the equipment rented to the Subscriber.
- (B) Grantee shall refund or credit the Subscriber for the amount of the deposit collected for equipment, which is unrelated to poor credit or poor payment history, after one (1) year and provided the Subscriber has demonstrated good payment history during this period. Grantee shall pay interest on other deposits if required by law.
- (C) Under Normal Operating Conditions, refund checks will be issued within the next available billing cycle following the resolution of the event giving rise to the refund, (e.g. equipment return and final bill payment).
- (D) Credits for Cable Service will be issued no later than the Subscriber's next available billing cycle, following the determination that a credit is warranted, and the credit is approved and processed. Such approval and processing shall not be unreasonably delayed.

- (E) Bills shall be considered paid when appropriate payment is received by Grantee or its authorized agent. Appropriate time considerations shall be included in Grantee's collection procedures to assure that payments due have been received before late notices or termination notices are sent.

**8. Rates, Fees and Charges**

- (A) Grantee shall not, except to the extent expressly permitted by law, impose any fee or charge for Service Calls to a Subscriber's premises to perform any repair or maintenance work related to Grantee equipment necessary to receive Cable Service, except where such problem is caused by a negligent or wrongful act of the Subscriber (including, but not limited to a situation in which the Subscriber reconnects Grantee equipment incorrectly) or by the failure of the Subscriber to take reasonable precautions to protect Grantee's equipment (for example, a dog chew).
- (B) Grantee shall provide reasonable notice to Subscribers of the possible assessment of a late fee on bills or by separate notice. Such late fees are subject to ORS 646.649.
- (C) All of Grantee's rates and charges shall comply with applicable law. Grantee shall maintain a complete current schedule of rates and charges for Cable Services on file with the Grantor throughout the term of this Agreement.

**9. Disconnection/Denial of Service**

- (A) Grantee shall not terminate Cable Service for nonpayment of a delinquent account unless Grantee mails a notice of the delinquency and impending termination prior to the proposed final termination. The notice shall be mailed to the Subscriber to whom the Cable Service is billed. The notice of delinquency and impending termination may be part of a billing statement.
- (B) Cable Service terminated in error must be restored without charge within twenty-four (24) hours of notice. If a Subscriber was billed for the period during which Cable Service was terminated in error, a credit shall be issued to the Subscriber if the Cable Service Interruption was reported by the Subscriber.
- (C) Nothing in these standards shall limit the right of Grantee to deny Cable Service for non-payment of previously provided Cable Services, refusal to pay any required deposit, theft of Cable Service, damage to Grantee's equipment, abusive and/or threatening behavior toward Grantee's employees or representatives, or refusal to provide credit history information or refusal to allow Grantee to validate the identity, credit history and credit worthiness via an external credit agency.
- (D) Charges for Cable Service will be discontinued at the time of the requested termination of service by the Subscriber, except equipment charges may be applied until equipment has been returned. No period of notice prior to requested termination of service can be required of Subscribers by Grantee. No charge shall be imposed upon the Subscriber for or related to total disconnection of Cable Service or for any Cable Service delivered after the effective date of the disconnect request, unless there is a delay in returning Grantee equipment or early termination charges apply pursuant to the Subscriber's service contract. If the

Subscriber fails to specify an effective date for disconnection, the Subscriber shall not be responsible for Cable Services received after the day following the date the disconnect request is received by Grantee. For purposes of this subsection 9( D) of this Attachment A, the term "disconnect" shall include Subscribers who elect to cease receiving Cable Service from Grantee and to receive Cable Service or other multi-channel video service from another Person or entity.

#### 10. **Communications with Subscribers**

- (A) All Grantee personnel, contractors and subcontractors contacting Subscribers or potential Subscribers outside the office of Grantee shall wear a clearly visible identification card bearing their name and photograph. Grantee shall make reasonable efforts to account for all identification cards at all times. In addition, all Grantee representatives shall wear appropriate clothing while working at a Subscriber's premises. Every service vehicle of Grantee and its contractors or subcontractors shall be clearly identified as such to the public. Specifically, Grantee vehicles shall have Grantee's logo plainly visible. The vehicles of those contractors and subcontractors working for Grantee shall have the contractor's / subcontractor's name plus markings (such as a magnetic door sign) indicating they are under contract to Grantee.
- (B) All contact with a Subscriber or potential Subscriber by a Person representing Grantee shall be conducted in a courteous manner.
- (C) Grantee shall send annual notices to all Subscribers informing them that any complaints or inquiries not satisfactorily handled by Grantee may be referred to Grantor. A copy of the annual notice required under this subsection 6.10( C) of this Attachment A will be given to Grantor at least fifteen (15) days prior to distribution to Subscribers.
- (D) Grantee shall provide the name, mailing address, and phone number of Grantor on all Cable Service bills in accordance with 47 C.F.R. §76.952(a).
- (E) All notices identified in this Section 10 shall be by either:
  - (1) A separate document included with a billing statement or included on the portion of the monthly bill that is to be retained by the Subscriber; or
  - (2) A separate electronic notification.
- (F) Grantee shall provide reasonable notice to Subscribers and Grantor of any pricing changes or additional changes (excluding sales discounts, new products or offers) and, subject to the forgoing, any changes in Cable Services, including Channel line-ups. Such notice must be given to Subscribers a minimum of thirty (30) days in advance of such changes if within the control of Grantee. If the change is not within Grantee's control, Grantee shall provide an explanation to Grantor of the reason and expected length of delay. Grantee shall provide a copy of the notice to Grantor including how and where the notice was given to Subscribers.
- (G) Grantee shall provide information to all Subscribers about each of the following items at the time of installation of Cable Services, annually to all Subscribers, at any time upon request, and, subject to Section 10( E ), at least thirty (30) days prior

to making significant changes in the information required by this Section if within the control of Grantee:

- (1) Products and Cable Service offered;
- (2) Prices and options for Cable Services and condition of subscription to Cable Services. Prices shall include those for Cable Service options, equipment rentals, program guides, installation, downgrades, late fees and other fees charged by Grantee related to Cable Service;
- (3) Installation and maintenance policies including, when applicable, information regarding the Subscriber's in-home wiring rights during the period Cable Service is being provided;
- (4) Channel positions of Cable Services offered on the Cable System;
- (5) Complaint procedures, including the name, address, and telephone number of Grantor, but with a notice advising the Subscriber to initially contact Grantee about all complaints and questions;
- (6) Procedures for requesting Cable Service credit;
- (7) The availability of a parental control device;
- (8) Grantee practices and procedures for protecting against invasion of privacy; and
- (9) The address and telephone number of Grantee's office to which complaints may be reported.

A copy of notices required in this Section 10(G) will be given to Grantor at least fifteen (15) days prior to distribution to Subscribers if the reason for notice is due to a change that is within the control of Grantee and as soon as possible if not with the control of Grantee.

- (H) Notices of changes in rates shall indicate the Cable Service new rates and old rates, if applicable.
- (I) Notices of changes of Cable Services and/or Channel locations shall include a description of the new Cable Service, the specific Channel location, and the hours of operation of the Cable Service if the Cable Service is only offered on a part-time basis. In addition, should the Channel location, hours of operation, or existence of other Cable Services be affected by the introduction of a new Cable Service, such information must be included in the notice.
- (J) Every notice of termination of Cable Service shall include the following information:
  - (1) The name and address of the Subscriber whose account is delinquent;
  - (2) The amount of the delinquency for all services billed;

- (3) The date by which payment is required in order to avoid termination of Cable Service; and
  - (4) The telephone number for Grantee where the Subscriber can receive additional information about their account and discuss the pending termination.
- (K) Grantee will comply with privacy rights of Subscribers in accordance with federal, state, and local law, including 47 U.S.C. §551.

**Attachment B**  
**COMMISSION FRANCHISE STATISTICS - QUARTERLY REPORT**  
**Due By: April 15, July 15, October 15 and January 15**

To: \_\_\_\_\_ From: \_\_\_\_\_

TELEPHONE ANSWERING ACTIVITY	1 <sup>st</sup> Qtr Total	2 <sup>nd</sup> Qtr Total	3 <sup>rd</sup> Qtr Total	4 <sup>th</sup> Qtr Total
TOTAL CALLS ANS'D W/IN 30 SECS.				
AVERAGE HOLD TIME (measured in seconds)				
% ANS W/IN 30 SECS.				
% ABANDONED				
% LINES AVAILABLE				
<b>SUBSCRIBERS</b>				
TOTAL SUBSCRIBERS				
EBU REPORTING #				
HOMES PASSED				
DIGITAL (including EBUs)				
TOTAL TRAD. PAYS				
(HBO, Showtime, The Movie Channel, Cinemax)				
TOTAL DISCO's				
TECH DISCO's				
NON-PAY DISCO's				
<b>CONSTRUCTION ACTIVITY</b>				
NEW HOMES PASSED				
MARKETABLE PASSINGS				
<b>TECHNICAL ACTIVITY</b>				
SERVICE CALLS				
OUTAGES				
TOTAL TIME OUT FOR OUTAGES				
AVERAGE DURATION OF OUTAGES				

Equivalent Billing Unit: Commercial and bulk account revenues that may be adjusted below or above the standard (basic + expanded) cable rate are either counted as greater than a full subscriber or less than a full subscriber by dividing the actual revenues for bulk and commercial accounts by the standard cable rate. Example: If an apartment unit is being charged 50% off the standard rate and there are 500 customers, the EBU number is 250.

**Confidential and Proprietary- Comcast**  
Information is confidential under Oregon Public Records Law as it is a compilation of information which is not patented, which is known only to certain individuals within the company and is used in the business it conducts, having actual or potential commercial value, and which gives its user an opportunity to obtain a business advantage over competitors who do not know or use it



**Attachment C I  
EXISTING LIVE ORINATION SITES**

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**Beaverton City Hall**  
12725 SW Millikan Way  
Beaverton, OR 97005

**Beaverton Police/Courts Headquarters**  
4755 SW Griffith Drive  
Beaverton, OR 97076

**Washington County Public Services Bldg.**  
155 N. First Ave.  
Hillsboro, OR 97123

**Hillsboro Civic Center**  
150 E. Main St.  
Hillsboro, OR 97123

**Lake Oswego City Hall**  
380 "A" Ave  
Lake Oswego, OR 97034

**Tigard City Hall**  
13125 SW Hall Blvd  
Tigard, OR 97223

**Forest Grove Auditorium**  
1915 Main St.  
Forest Grove, OR 97116

**Pacific University**  
2043 College Way  
Forest Grove, OR 97116

**West Linn City Hall**  
22500 Salamo Road  
West Linn, OR 97068

**West Linn-Wilsonville School District 3JT**  
22210 SW Stafford Road  
Tualatin, OR 97062

**Clackamas Community College**  
19600 Molalla Avenue  
Oregon City, OR 97045

**- Attachment C II  
New Public Meeting Sites -**

**Cornelius City Hall**  
1310 N. Adair  
Cornelius, OR 97113

**PCC Rock Creek – Event Center**  
17705 NW Springville Rd.  
Portland, OR 97229

**Tualatin Hospital Auditorium**  
335 SE 8th Ave.  
Hillsboro, OR 97123

**Tualatin Valley Water District Board Room**  
1850 SW 170th Ave.  
Beaverton, OR 97006

**COH Brookwood Library Auditorium/Community Meeting Room**  
2850 Brookwood Parkway  
Hillsboro, OR 97124

**- New Community Event Sites -**

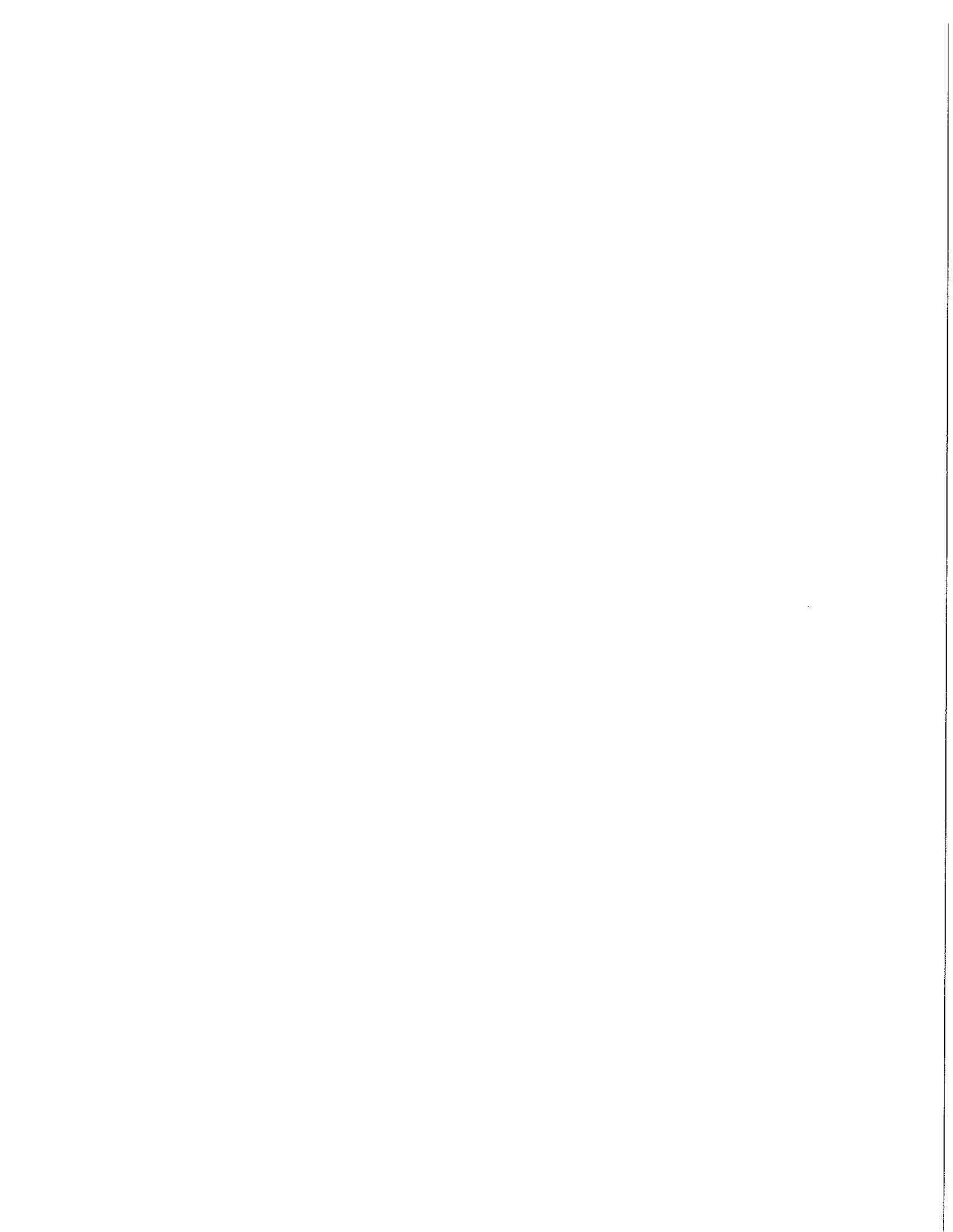
**COH Civic Center Courtyard**  
150 E. Main St.  
Hillsboro, OR 97123

**Attachment C III  
Future Public Sites –**

**Beaverton Performing Arts Center**

**Tualatin Council Building**

**Attachment D**  
**MASTER SERVICE AGREEMENT AND ATTACHMENTS**



## COMCAST ENTERPRISE SERVICES MASTER SERVICES AGREEMENT (MSA)

MSA ID#: OR-401816-ETorg	MSA Term: 60 months	Account Name: MACC
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### CUSTOMER INFORMATION

Primary Contact: Bruce Crest	<u>Primary Contact Address Information</u>
Title:	Address 1:
Phone: (503) 645-7365	Address 2:
Cell:	City:
Fax:	State:
Email: bruce.crest@maccor.org	Zip Code:

This Master Service Agreement ("Agreement") sets forth the terms and conditions under which Comcast Cable Communications Management, LLC and its operating affiliates ("Comcast") will provide communications and other services ("Services") to the above Customer. The Agreement consists of this fully executed Master Service Agreement Cover Page ("Cover Page"), the Enterprise Services General Terms and Conditions ("General Terms and Conditions"), any written amendments to the Agreement executed by both parties ("Amendments"), the Product-Specific Attachment for the applicable Services ("PSA(s)") and each Sales Order accepted hereunder ("Sales Orders"). In the event of any inconsistency among these documents, precedence will be as follows: (1) this Cover Page (2) General Terms and Conditions, (3) PSA(s), and (4) Sales Orders. This Agreement shall be legally binding when signed by both parties and shall continue in effect until the expiration date of any Service Term specified in a Sales Order referencing the Agreement, unless terminated earlier in accordance with the Agreement.

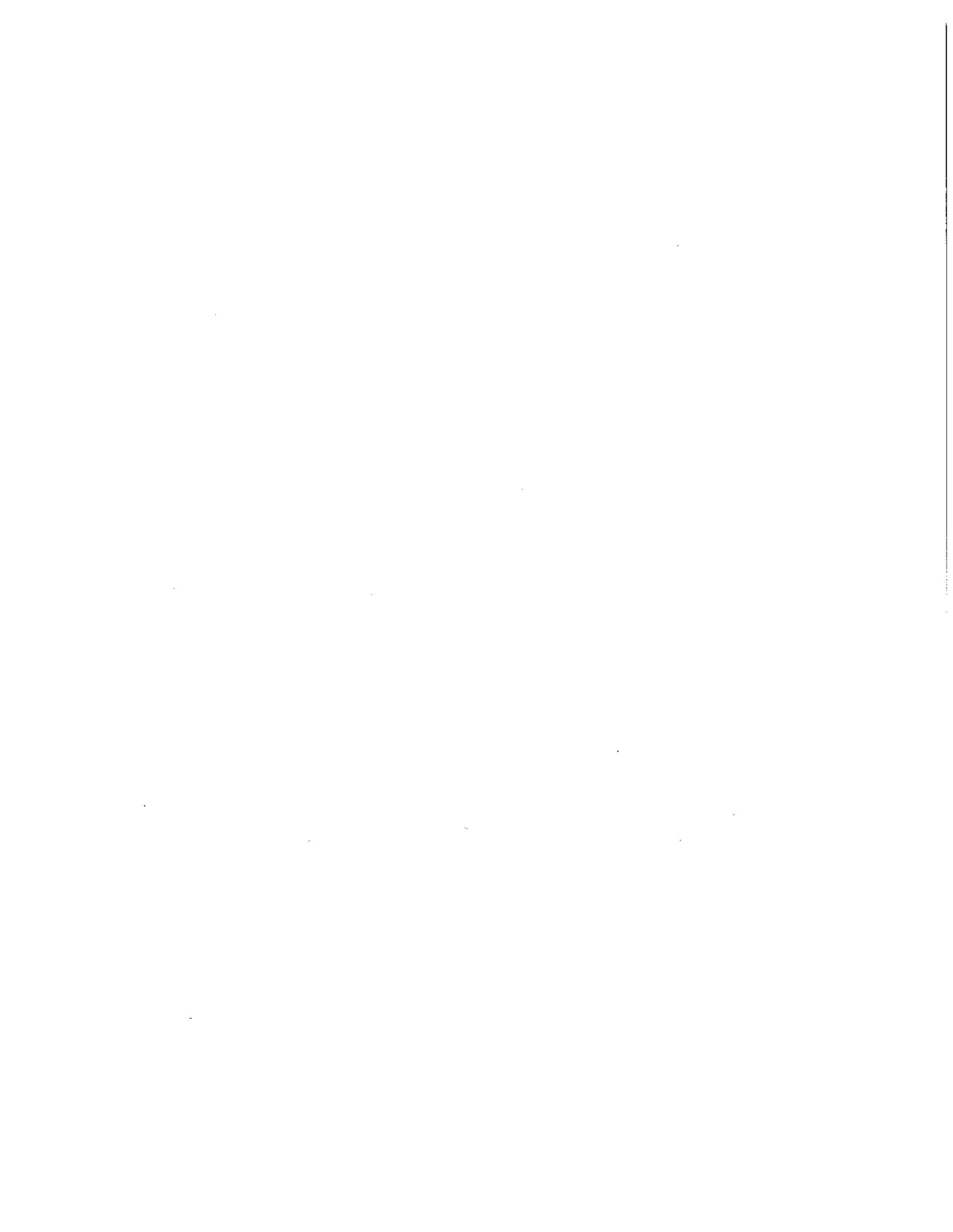
The Customer referenced above may submit Sales Orders to Comcast during the Term of this Agreement ("MSA Term"). After the expiration of the initial MSA Term, Comcast may continue to accept Sales Orders from Customer under the Agreement, or require the parties to execute a new MSA.

The Agreement shall terminate in accordance with the General Terms and Conditions. The General Terms and Conditions and PSAs are located at <http://business.comcast.com/enterprise-terms-of-service/index.aspx> (or any successor URL). Use of the Services is also subject to the High-Speed Internet for Business Acceptable Use Policy ("AUP") located at <http://business.comcast.com/customer-notifications/acceptable-use-policy> (or any successor URL), and the High-Speed Internet for Business Privacy Policy ("Privacy Policy") located at <http://business.comcast.com/customer-notifications/customer-privacy-statement> (or any successor URL). Comcast may update the General Terms and Conditions, PSAs, AUP and Privacy Policy from time to time upon posting to the Comcast website.

Services are only available to commercial customers in wired and serviceable areas in participating Comcast systems (and may not be transferred). Minimum Service Terms are required for most Services and early termination fees may apply. Service Terms are identified in each Sales Order, and early termination fees are identified in the applicable Product Specific Attachments.

BY SIGNING BELOW, CUSTOMER AGREES TO THE TERMS AND CONDITIONS OF THIS AGREEMENT.

CUSTOMER SIGNATURE (by authorized representative)	
Signature:	
Name:	
Title:	
Date:	
COMCAST USE ONLY (by authorized representative)	
Signature:	Sales Rep: Eric Torgeson
Name:	Sales Rep Email: <a href="mailto:eric_torgeson@cable.comcast.com">eric_torgeson@cable.comcast.com</a>
Title:	Region: Portland
Date:	Division: West



**FIRST AMENDMENT**

**to**

**Comcast Enterprise Services Master Services Agreement No. OR-401816-ETorg**

**This First Amendment** (“Amendment”) is concurrently entered into on \_\_\_\_\_ (“Effective Date”) in conjunction with the Comcast Enterprise Services Master Services Agreement No. OR-401816-etorg (“Agreement”) by and between Comcast Cable Communications Management, LLC (“Comcast”) and \_\_\_\_\_ (“Customer”). In the event of an explicit conflict between this Amendment and the Agreement, the terms and conditions of this Amendment shall take precedence in the interpretation of the explicit matter in question. Unless otherwise set forth herein, all capitalized terms set forth herein shall have the same meaning as set forth in the Agreement.

**Whereas**, the Parties desire to amend the Agreement by this writing to reflect the amended or additional terms and conditions to which the Parties have agreed to;

**Now, therefore**, in consideration of the mutual covenants, promises, and consideration set forth in this Amendment, the Parties agree as follows:

1. The Definition for “Confidential Information” as set forth in the Enterprise Services General Terms and Conditions (“General Terms and Conditions”) is hereby modified to read as follows:

“Confidential Information: To the extent permitted by law, all information regarding either Party’s business which has been marked or is otherwise communicated as being “proprietary” or “confidential” or which reasonably should be known by the receiving party to be proprietary or confidential information. Confidential Information shall not include, even if marked, the Agreement, rate information, discount information, network operation information (about outages and planned maintenance) and invoices, as well as the Parties’ communications regarding such items.”

2. Article 1 of the General Terms and Conditions is hereby modified to read as follows:

“Comcast may change or modify its acceptable use policies and privacy policies from time to time (“Revisions”) by posting such Revisions to the Comcast Website. The Revisions are effective upon posting to the Website. Customer will receive notice of the Revisions in the next applicable monthly invoice. Customer shall have sixty (60) calendar days from the invoice notice of such Revisions to provide Comcast with written notice that the Revisions adversely affect Customer’s use of the Service(s). If after notice Comcast is unable to reasonably mitigate the Revision’s impact on such Services, then Customer may terminate the impacted Service(s) without further obligation to Comcast beyond the termination date, including Termination Charges, if any. This shall be Customer’s sole and exclusive remedy.”

3. Article 9.1 of the General Terms and Conditions is hereby modified to read as follows:

“Disclosure and Use. To the extent permitted by law, all Confidential Information disclosed by either Party shall be kept by the receiving party in strict confidence and shall not be disclosed to any third party without the disclosing party’s express written consent. Notwithstanding the foregoing, such information may be disclosed (i) to the receiving party’s employees, affiliates, and agents who have a need to know for the purpose of performing this Agreement, using the Services, rendering the Services, and marketing related products and services (provided that in all cases the receiving party shall take appropriate measures prior to disclosure to its employees, affiliates, and agents to assure against unauthorized use or disclosure); or (ii) as otherwise authorized by this Agreement. Each Party agrees to treat all Confidential Information of the other in the same manner as it treats its own proprietary information, but in no case using a degree of care less than a reasonable degree of care. Notwithstanding anything to the contrary in this Agreement, all of Customer’s obligations under this Agreement are subject to the Oregon Public Records Laws, ORS 192.410-192.505. Customer may disclose Confidential Information to the extent disclosure is required by Oregon Public Records Laws, court order or government order.”

4. Article 9.3 of the General Terms and Conditions is hereby modified to reads as follows:

**“Publicity.** The Agreement provides no right to use any Party’s or its affiliates’ trademarks, service marks, or trade names, or to otherwise refer to the other Party in any marketing, promotional, or advertising materials or activities. Neither Party shall issue any publication or press release relating to the terms and conditions of any contractual relationship between Comcast and Customer, except as permitted by the Agreement or otherwise consented to in writing by the other Party.”

5. Article 11.15 is hereby added to the General Terms and Conditions to read as follows:

**“Non-Appropriation of Funds.** In the event Customer is unable to secure funds or if funds are not appropriated by the applicable local or state agency for performance during any fiscal period of the term of a Sales Order, such Sales Order may be terminated (“Termination”) by the Customer upon written notification to Comcast, to include a copy of the non-appropriation of funds notification, as of the beginning of the fiscal year for which funds are not appropriated or otherwise secured. In the event Customer terminates a Sales Order under this “Non-Appropriation of Funds” provision, neither Party shall have any further obligation to the other Party, including any applicable Termination Charges (whether in the PSA(s) or Sales Orders) excepting Customer shall be responsible for the payment of any and all unpaid charges for Services rendered and for Comcast equipment, and, any and all unpaid construction charges accounted for in the applicable Sales Order, all of which are to be paid by Customer to Company within thirty (30) days from the Company provided invoice date. Customer hereby agrees to notify Comcast in writing as soon as it has knowledge that funds are not available for the continuation of the performance as set forth in the Sales Order, for any fiscal period under the applicable Sales Order Term.”

6. The “Service Level Agreement (SLA)” provision set forth in Schedule A-2 of the Comcast Enterprise Services Product-Specific Attachment for Ethernet Transport Services (“ETS PSA”) is hereby modified to read as follows:

**“Company's liability for any Service Interruption (individually or collectively, "Liability"), shall be limited to the amounts set forth in the Tables below. For the purposes of calculating credit for any such Liability, the Liability period begins when the Customer reports to Company an interruption in the portion of the Service, provided that the Liability is reported by Customer during the duration of the Liability, and, a trouble ticket is opened; the Liability shall be deemed resolved upon closing of the same trouble ticket or the termination of the interruption, if sooner, less any time Company is awaiting additional information or premises testing from the Customer. In no event shall the total amount of credit issued to Customer's account on a per-month basis exceed 50% of the total monthly recurring charge ("MRC") associated with the impacted portion of the Service set forth in the Sales Order. Service Interruptions will not be aggregated for purposes of determining credit allowances. To qualify, Customer must request the Credit from Comcast within thirty (30) days of the interruption. Customer will not be entitled to any additional credits for Service Interruptions. Comcast shall not be liable for any Liability caused by force majeure events, Planned Service Interruptions or Customer actions, omission or equipment. The foregoing notwithstanding, in accordance with this SLA provision, upon Customer opening a trouble ticket, Comcast will provide credits for any verifiable degradation in Services, (to include non-performance against transit delay, jitter, or packet loss).”**

7. Paragraph 2b of the SLA is hereby modified to read as follows:

**“b. Maintenance.** Comcast’s standard maintenance window for On-Net Services is Sunday to Saturday from 12:00am to 6:00am local time. Scheduled maintenance for On-Net Services is performed during the maintenance window and will be coordinated between Comcast and the Customer. Comcast provides a minimum forty eight (48) hour notice for non-service impacting maintenance. Comcast provides a minimum of seven (7) days’ notice for On-Net Service impacting planned maintenance. Emergency maintenance is performed as needed without advance notice to Customer. Maintenance for Off-Net Services shall be performed in accordance with the applicable third party service provider rules. Therefore, Off-Net Service may be performed without advance notice to Customer.”

8. The following provision is hereby added and incorporated into the ETS PSA to read as follows:

“Customer may elect to reduce the contracted bandwidth at up to 5% of the total Service Location(s), or, terminate Services at up to three (3) total Service Location(s), whichever is greater, without incurring any Termination Charges, penalties or price modifications.”

9. The rates set forth in Exhibit A to this First Amendment shall apply to this Agreement.

**IN WITNESS WHEREOF**, the Parties hereto have executed this Amendment as of the day and year written below and the persons signing covenant and warrant that they are duly authorized to sign for and on behalf of the respective Parties. Except as otherwise modified by this Amendment, all other terms and conditions set forth in the Agreement shall remain in full force and effect.

**Comcast Cable Communications Management, LLC**

Signature:		Signature:	
Printed Name:		Printed Name:	
Title:		Title:	
Date:		Date:	

2858224v2

Ethernet Network Services - Port and Bandwidth						
Bandwidth	1 Year		3 Year		5 Year	
	Monthly	Install	Monthly	Install	Monthly	Install
10Mbps	\$300.00	\$1,500.00	\$300.00	\$0.00	\$300.00	\$0.00
100Mbps	\$621.60	\$1,500.00	\$480.00	\$0.00	\$360.00	\$0.00
200Mbps	\$884.10	\$1,500.00	\$684.00	\$0.00	\$513.00	\$0.00
300Mbps	\$957.95	\$1,500.00	\$741.00	\$0.00	\$555.75	\$0.00
400Mbps	\$1,027.95	\$1,500.00	\$795.00	\$0.00	\$596.25	\$0.00
500Mbps	\$1,101.80	\$1,500.00	\$852.00	\$0.00	\$639.00	\$0.00
600Mbps	\$1,171.80	\$1,500.00	\$906.00	\$0.00	\$679.50	\$0.00
700Mbps	\$1,245.65	\$1,500.00	\$963.00	\$0.00	\$722.25	\$0.00
800Mbps	\$1,315.65	\$1,500.00	\$1,017.00	\$0.00	\$762.75	\$0.00
900Mbps	\$1,389.85	\$1,500.00	\$1,074.00	\$0.00	\$805.50	\$0.00
1Gbps	\$1,459.85	\$1,500.00	\$1,128.00	\$0.00	\$846.00	\$0.00
2Gbps	\$2,067.10	\$1,500.00	\$1,587.00	\$0.00	\$1,190.25	\$0.00
3Gbps	\$2,374.05	\$1,500.00	\$1,824.00	\$0.00	\$1,368.00	\$0.00
4Gbps	\$2,755.20	\$1,500.00	\$2,118.00	\$0.00	\$1,588.50	\$0.00
5Gbps	\$3,021.90	\$1,500.00	\$2,331.00	\$0.00	\$1,748.25	\$0.00
6Gbps	\$3,225.95	\$1,500.00	\$2,481.00	\$0.00	\$1,860.75	\$0.00
7Gbps	\$3,749.20	\$1,500.00	\$2,892.00	\$0.00	\$2,169.00	\$0.00
8Gbps	\$4,647.30	\$1,500.00	\$3,585.00	\$0.00	\$2,693.75	\$0.00
9Gbps	\$5,763.45	\$1,500.00	\$4,446.00	\$0.00	\$3,334.50	\$0.00
10Gbps	\$7,935.20	\$1,500.00	\$6,114.00	\$0.00	\$4,585.50	\$0.00

All Pricing Stated Will Include Premium Service Levels For All Circuits

Ethernet Virtual Private Line - Spoke - Port and Bandwidth						
Bandwidth	1 Year		3 Year		5 Year	
	Monthly	Install	Monthly	Install	Monthly	Install
10Mbps	\$300.00	\$1,500.00	\$300.00	\$0.00	\$300.00	\$0.00
100Mbps	\$621.60	\$1,500.00	\$480.00	\$0.00	\$360.00	\$0.00
200Mbps	\$884.10	\$1,500.00	\$684.00	\$0.00	\$513.00	\$0.00
300Mbps	\$957.95	\$1,500.00	\$741.00	\$0.00	\$555.75	\$0.00
400Mbps	\$1,027.95	\$1,500.00	\$795.00	\$0.00	\$596.25	\$0.00
500Mbps	\$1,101.80	\$1,500.00	\$852.00	\$0.00	\$639.00	\$0.00
600Mbps	\$1,171.80	\$1,500.00	\$906.00	\$0.00	\$679.50	\$0.00
700Mbps	\$1,245.65	\$1,500.00	\$963.00	\$0.00	\$722.25	\$0.00
800Mbps	\$1,315.65	\$1,500.00	\$1,017.00	\$0.00	\$762.75	\$0.00
900Mbps	\$1,389.85	\$1,500.00	\$1,074.00	\$0.00	\$805.50	\$0.00
1Gbps	\$1,459.85	\$1,500.00	\$1,128.00	\$0.00	\$846.00	\$0.00
2Gbps	\$2,067.10	\$1,500.00	\$1,587.00	\$0.00	\$1,190.25	\$0.00
3Gbps	\$2,374.05	\$1,500.00	\$1,824.00	\$0.00	\$1,368.00	\$0.00
4Gbps	\$2,755.20	\$1,500.00	\$2,118.00	\$0.00	\$1,588.50	\$0.00
5Gbps	\$3,021.90	\$1,500.00	\$2,331.00	\$0.00	\$1,748.25	\$0.00
6Gbps	\$3,225.95	\$1,500.00	\$2,481.00	\$0.00	\$1,860.75	\$0.00
7Gbps	\$3,749.20	\$1,500.00	\$2,892.00	\$0.00	\$2,169.00	\$0.00
8Gbps	\$4,647.30	\$1,500.00	\$3,585.00	\$0.00	\$2,693.75	\$0.00
9Gbps	\$5,763.45	\$1,500.00	\$4,446.00	\$0.00	\$3,334.50	\$0.00
10Gbps	\$7,935.20	\$1,500.00	\$6,114.00	\$0.00	\$4,585.50	\$0.00

Ethernet Virtual Private Line - Hub Site - Port only						
Port Speed	1 Year		3 Year		5 Year	
	Monthly	Install	Monthly	Install	Monthly	Install
10/100Mbps	\$100.00	\$1,500.00	\$75.00	\$0.00	\$50.00	\$0.00
1Gbps	\$250.25	\$1,500.00	\$195.00	\$0.00	\$146.25	\$0.00
10Gbps	\$787.50	\$1,500.00	\$600.00	\$0.00	\$450.00	\$0.00

Ethernet Private Line - 2 Ports and Bandwidth			
	1 Year	3 Year	5 Year

Exhibit A to Attachment D (II)

Bandwidth	Monthly	Install	Monthly	Install	Monthly	Install
10Mbps	\$400.00	\$1,500.00	\$350.00	\$0.00	\$300.00	\$0.00
100Mbps	\$625.10	\$1,500.00	\$483.00	\$0.00	\$362.25	\$0.00
200Mbps	\$1,052.80	\$1,500.00	\$816.00	\$0.00	\$612.00	\$0.00
300Mbps	\$1,095.50	\$1,500.00	\$849.00	\$0.00	\$636.75	\$0.00
400Mbps	\$1,138.20	\$1,500.00	\$882.00	\$0.00	\$661.50	\$0.00
500Mbps	\$1,180.90	\$1,500.00	\$915.00	\$0.00	\$686.25	\$0.00
600Mbps	\$1,223.95	\$1,500.00	\$948.00	\$0.00	\$711.00	\$0.00
700Mbps	\$1,266.65	\$1,500.00	\$981.00	\$0.00	\$735.75	\$0.00
800Mbps	\$1,309.35	\$1,500.00	\$1,014.00	\$0.00	\$760.50	\$0.00
900Mbps	\$1,352.05	\$1,500.00	\$1,047.00	\$0.00	\$785.25	\$0.00
1Gbps	\$1,398.95	\$1,500.00	\$1,083.00	\$0.00	\$812.25	\$0.00
2Gbps	\$2,819.60	\$1,500.00	\$2,160.00	\$0.00	\$1,620.00	\$0.00
3Gbps	\$3,192.70	\$1,500.00	\$2,448.00	\$0.00	\$1,836.00	\$0.00
4Gbps	\$3,675.00	\$1,500.00	\$2,820.00	\$0.00	\$2,115.00	\$0.00
5Gbps	\$4,347.70	\$1,500.00	\$3,339.00	\$0.00	\$2,504.25	\$0.00
6Gbps	\$5,288.85	\$1,500.00	\$4,065.00	\$0.00	\$3,048.75	\$0.00
7Gbps	\$6,218.45	\$1,500.00	\$4,782.00	\$0.00	\$3,336.50	\$0.00
8Gbps	\$7,194.60	\$1,500.00	\$5,535.00	\$0.00	\$4,151.25	\$0.00
9Gbps	\$8,205.40	\$1,500.00	\$6,315.00	\$0.00	\$4,736.25	\$0.00
10Gbps	\$9,135.00	\$1,500.00	\$7,032.00	\$0.00	\$5,274.00	\$0.00
<b>Ethernet Private Line - 2 Ports and Bandwidth via EoHFC (Coax)</b>						
4Mbps	\$293.30	\$1,000.00	\$266.00	\$500.00	\$239.40	\$0.00
6Mbps	\$363.60	\$1,000.00	\$329.00	\$500.00	\$296.10	\$0.00
8Mbps	\$400.00	\$1,000.00	\$350.00	\$500.00	\$300.00	\$0.00

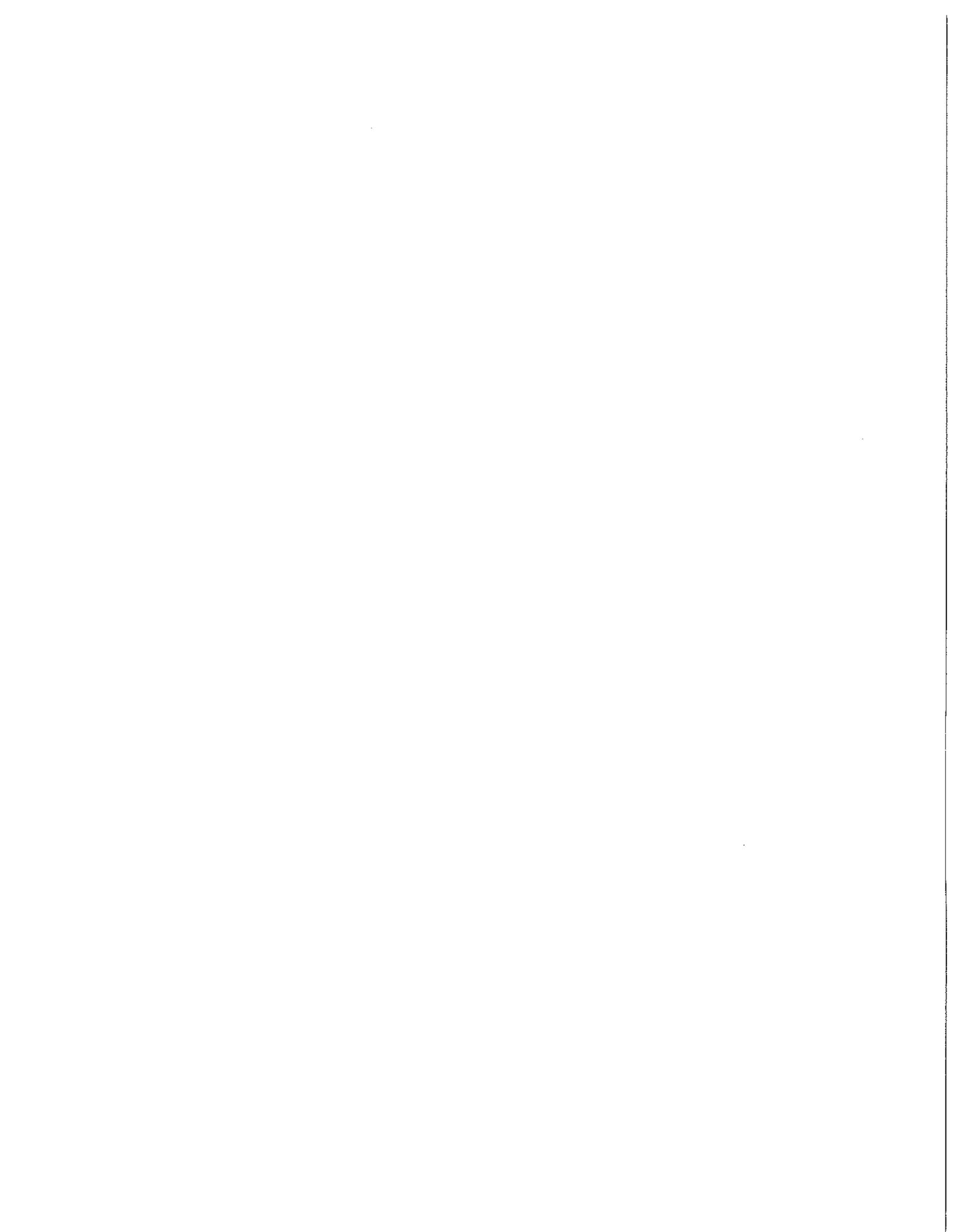
All Pricing Stated Will Include Premium Service Levels For All Circuits

**NOTES:**

- ◆ No charge for installation and construction for current PCN lit sites as of 3/1/15 if 3 or 5 year terms are selected for all sites per contract.
- ◆ Installation charge required for current PCN sites as of 3/1/15 with selection of 1 year term
- ◆ For new sites not identified in current PCN invoicing, the following installation charges apply:
  - 10 to 500 Mb -
    - Installation charges will be on an Individual Case Basis
  - 500 Mb to 1000 Mb -
    - no charge for construction costs for under 500 ft.
    - 50% of construction costs charged for 500-1000 ft.
    - 100% of construction costs for 1000 ft or more.
  - 1000 Mb or greater bandwidth -
    - no construction costs for under 1000 ft.
    - 50% of construction costs charged for greater than 1000 ft.
- ◆ All Ethernet Network Interfaces included in the pricing tables are commensurate with subscribed bandwidth. (e.g. 1000M EVC w/ 1000M ENI)
- ◆ By MEF design, an Ethernet Virtual Private Line's service multiplexed hub bandwidth equals the aggregate of its remote sites
- ◆ Selection of an upgraded Ethernet Network interface adds the Monthly Rate listed below to the MRC for any given interface

Default Physical Interface	Upgraded Physical Interface	Additional Monthly Rate		
		1 year	3 year	5 year
100BaseTX	1000BaseT 1000BaseSX 1000BaseLX	\$192.50	\$150.00	\$112.50
1000BaseT 1000BaseSX 1000BaseLX	10GBaseSR 10GBaseLR	\$537.25	\$405.00	\$303.75

- ◆ Pricing as proposed above requires purchase of all sites and does not include any local, state or federal taxes, fees or other charges. Individual sites may be purchased separately but will require a new pricing proposal. Tax exemption certificates
- ◆ Taxes, Surcharges, and Other Similar Charges (Miscellaneous)  
Description: Taxes, surcharges, and other similar charges refer generally to additional fees that are a necessary component of the cost of a product or service.
- ◆ Eligibility: Federal taxes, state taxes, and other similar, reasonable charges incurred in obtaining eligible Telecommunications Services, Internet Access, and Internal Connections are eligible. Such eligible charges include reasonable administrative recovery by a service provider for participation in the Universal Service Support mechanism. Administrative cost added by parties other than the service provider, are not eligible.



**COMCAST ENTERPRISE SERVICES  
GENERAL TERMS AND CONDITIONS**

**VERSION: 1.2**

**DEFINITIONS**

**Affiliate:** Any entity that controls, is controlled by or is under common control with Comcast.

**Agreement, Enterprise Services Master Services Agreement or MSA:** Consists of the Enterprise Master Services Agreement Cover Page executed by the Customer and accepted by Comcast, these Enterprise Services General Terms and Conditions ("General Terms and Conditions"), the then current Product-Specific Attachment for each ordered Service ("PSA"), any written amendments to the Agreement executed by both Parties including any supplemental terms and conditions ("Amendment(s)"), and each Sales Order accepted by Comcast under the Agreement.

**Amendment(s):** Any written amendment to the Agreement, executed by both Parties, including any supplemental terms and conditions.

**Comcast:** The operating company affiliate or subsidiary of Comcast Cable Communications Management, LLC that provides the Services under the Enterprise Services Master Service Agreement. References to Comcast in the Limitation of Liability, Disclaimer of Warranties and Indemnification Articles shall also include its directors, officers, employees, agents, Affiliates, suppliers, licensors, successors, and assigns, as the case may be.

**Comcast Website or Website:** The Comcast website where the General Terms and Conditions, PSAs and other Comcast security and privacy policies applicable to the Agreement will be posted. The current URL for the Website is <http://business.comcast.com/enterprise-terms-of-service>. Comcast may update the Website documents and/or URL from time to time.

**Comcast Equipment:** Any and all facilities, equipment or devices provided by Comcast or its authorized contractors at the Service Location(s) that are used to deliver any of the Services including, but not limited to, all terminals, wires, modems, lines, circuits, ports, routers, gateways, switches, channel service units, data service units, cabinets, and racks. Notwithstanding the above, inside telephone wiring within the Service Location, whether or not installed by Comcast, shall not be considered Comcast Equipment.

**Confidential Information:** All information regarding either Party's business which has been marked or is otherwise communicated as being "proprietary" or "confidential," or which reasonably should be known by the receiving party to be proprietary or confidential information. Without limiting the generality of the foregoing, Confidential Information shall include, even if not marked, the Agreement, all Licensed

Software, promotional materials, proposals, quotes, rate information, discount information, subscriber information, network upgrade information and schedules, network operation information (including without limitation information about outages and planned maintenance) and invoices, as well as the Parties' communications regarding such items.

**Customer:** The company, corporation, or other entity named on the Enterprise Services Master Service Agreement Cover Page and a Sales Order.

**Customer-Provided Equipment (CE):** Any and all facilities, equipment or devices supplied by Customer for use in connection with the Services.

**Demarcation Point:** The point of interconnection between the Network and Customer's provided equipment located at a Service Location. In some cases the Demarcation Point shall be the User to Network Interface (UNI) port on Comcast Equipment at a Service Location.

**General Terms and Conditions:** These Enterprise Services General Terms and Conditions.

**Licensed Software:** Computer software or code provided by Comcast or required to use the Services, including without limitation, associated documentation, and all updates thereto.

**Network:** Consists of the Comcast Equipment, facilities, fiber optic cable associated with electronics and other equipment used to provide the Services.

**Party:** A reference to Comcast or the Customer; and in the plural, a reference to both companies.

**Product Specific Attachment(s) (PSA):** The additional terms and conditions applicable to Services ordered by Customer under the Agreement.

**Revenue Commitment:** A commitment by Customer to purchase a minimum volume of Service during an agreed term, as set forth in a Sales Order.

**Sales Order:** A request for Comcast to provide the Services to a Service Location(s) submitted by Customer to Comcast (a) on a then-current Comcast form designated for that purpose or (b) if available, through a Comcast electronic order processing system designated for that purpose.

**Service(s):** A service provided by Comcast pursuant to a Sales Order. All Services provided under the Agreement are for commercial use only. Services available under this Agreement are identified on the Website.

**Service Commencement Date:** The date(s) on which Comcast first makes Service available for use by Customer. A single Sales Order containing multiple Service Locations or Services may have multiple Service Commencement Dates.

**Service Location(s):** The Customer location(s) where Comcast provides the Services, to the extent the Customer owns, leases, or otherwise controls such location(s).

**Service Term:** The duration of time (commencing on the Service Commencement Date) for which Services are ordered, as specified in a Sales Order.

**Tariff:** A federal or state Comcast tariff and the successor documents of general applicability that replace such tariff in the event of detariffing.

**Termination Charges:** Charges that may be imposed by Comcast if, prior to the end of the applicable Service Term (a) Comcast terminates Services for cause or (b) Customer terminates Services without cause. Termination Charges are as set forth in each PSA, and are in addition to any other rights and remedies under the Agreement.

## ARTICLE 1. CHANGES TO THE AGREEMENT TERMS

Comcast may change or modify the Agreement, and any related policies from time to time ("Revisions") by posting such Revisions to the Comcast Website. The Revisions are effective upon posting to the Website. Customer will receive notice of the Revisions in the next applicable monthly invoice. Customer shall have thirty (30) calendar days from the invoice notice of such Revisions to provide Comcast with written notice that the Revisions adversely affect Customer's use of the Service(s). If after notice Comcast is able to verify such adverse affect but is unable to reasonably mitigate the Revision's impact on such Services, then Customer may terminate the impacted Service(s) without further obligation to Comcast beyond the termination date, including Termination Charges, if any. This shall be Customer's sole and exclusive remedy.

## ARTICLE 2. DELIVERY OF SERVICE

**2.1 Orders.** Customer shall submit to Comcast a properly completed Sales Order to initiate Service to a Service Location(s). A Sales Order shall become binding on the Parties when (i) it is specifically accepted by Comcast either electronically or in writing, (ii) Comcast begins providing the Service described in the Sales Order or (iii) Comcast begins Custom Installation (as defined in Article 2.7) for delivery of the Services described in the Sales Order, whichever is earlier. When a Sales Order becomes effective it shall be deemed part of, and shall be subject to, the Agreement.

**2.2 Access.** In order to deliver certain Services to Customer, Comcast may require access, right-of-way, conduit, and/or common room space ("Access"), both within and/or outside each Service Location. Customer shall provide an adequate environmentally controlled space and such electricity as may be required for installation, operation, and

maintenance of the Comcast Equipment used to provide the Services within the Service Location(s). Customer shall be responsible for securing, and maintaining on an initial and ongoing basis during the applicable Service Term and/or Renewal Term, such Access within each Service Location unless Comcast has secured such access prior to this Agreement. In the event that Customer, fails to secure or maintain such Access within a particular Service Location, Comcast may cancel or terminate Service at such particular Service Location, without further liability, upon written notice to Customer. In such event, if Comcast has incurred any costs or expense in installing or preparing to install the Service that it otherwise would not have incurred, a charge equal to those costs and expenses shall apply to Customer's final invoice for that particular Service Location. If Comcast is unable to secure or maintain Access outside a particular Service Location, which Access is needed to provide Services to such Service Location, Customer or Comcast may cancel or terminate Service at such particular Service Location, without further liability beyond the termination date, upon a minimum thirty (30) days' prior written notice to the other party. In such event, if Comcast has incurred any costs or expense in installing or preparing to install the Service that it otherwise would not have incurred, Comcast shall be responsible for such costs or expenses. Any other failure on the part of Customer to be ready to receive Service, or any refusal on the part of Customer to receive Service, shall not relieve Customer of its obligation to pay charges for any Service that is otherwise available for use.

**2.3 Hazardous Materials.** If the presence of asbestos or other hazardous materials exists or is detected at a Service Location or within the building where the Service Location is located, Comcast may immediately stop providing Services until such a time as such materials are removed. Alternatively Customer may notify Comcast to install the applicable portion of the Service in areas of any such Service Location not containing such hazardous material. Any additional expense incurred by Comcast as a result of encountering hazardous materials, including but not limited to, any additional equipment shall be borne by Customer. Customer shall use reasonable efforts to maintain its property and Service Locations in a manner that preserves the integrity of the Services.

**2.4 Comcast Equipment.** At any time Comcast may remove or change Comcast Equipment in its sole discretion in connection with providing the Services. Customer shall not move, rearrange, disconnect, remove, attempt to repair, or otherwise tamper with any Comcast Equipment or permit others to do so, and shall not use the Comcast Equipment for any purpose other than that authorized by the Agreement. Comcast shall maintain Comcast Equipment in good operating condition during the term of this Agreement; provided, however, that such maintenance shall be at Comcast's expense only to the extent that it is related to and/or resulting from the ordinary and proper use of the Comcast Equipment. Customer is responsible for damage to, or loss of, Comcast Equipment caused by its acts or omissions, and its noncompliance with this Article, or by fire, theft or other casualty at the Service Location(s), unless caused by the gross negligence or willful misconduct of Comcast.

**2.5 Ownership, Impairment and Removal of Network.**

The Network is and shall remain the property of Comcast regardless of whether installed within or upon the Service Location(s) and whether installed overhead, above, or underground and shall not be considered a fixture or an addition to the land or the Service Location(s) located thereon. Customer agrees that it shall take no action that directly or indirectly impairs Comcast's title to the Network, or any portion thereof, or exposes Comcast to any claim, lien, encumbrance, or legal process, except as otherwise agreed in writing by the Parties. Nothing in this Agreement shall preclude Comcast from using the Network for services provided to other Comcast customers. For a period of twelve (12) months following Comcast's discontinuance of Service to the Service Location(s), Comcast retains the right to remove the Network including, but not limited to, that portion of the Network that is located in the Service Location. To the extent Comcast removes such portion of the Network it shall be responsible for returning the Service Location(s) to its prior condition, reasonable wear and tear excepted.

**2.6 Customer-Provided Equipment ("CE").** Comcast shall have no obligation to install, operate, or maintain CE. Customer shall have sole responsibility for providing maintenance, repair, operation and replacement of all CE, inside telephone wiring and other Customer equipment and facilities on the Customer's side of the Demarcation Point. Neither Comcast nor its employees, Affiliates, agents or contractors will be liable for any damage, loss, or destruction to CE, unless caused by the gross negligence or willful misconduct of Comcast. CE shall at all times be compatible with the Network as determined by Comcast in its sole discretion. In addition to any other service charges that may be imposed from time to time, Customer shall be responsible for the payment of service charges for visits by Comcast's employees or agents to a Service Location when the service difficulty or trouble report results from the use of CE or facilities provided by any party other than Comcast.

**2.7 Engineering Review.** Each Sales Order submitted by Customer may be subject to an engineering review. The engineering review will determine whether and to what extent the Network must be extended, built or upgraded ("Custom Installation") in order to provide the ordered Services at the requested Service Location(s). Comcast will provide Customer written notification in the event Service installation at any Service Location will require an additional non-recurring installation fee ("Custom Installation Fee"). Custom Installation Fees may also be referred to as Construction Charges on a Sales Order or Invoice. Customer will have five (5) days from receipt of such notice to reject the Custom Installation Fee and terminate, without further liability, the Sales Order with respect to the affected Service Location(s). For certain Services, the Engineering Review will be conducted prior to Sales Order submission. In such case, Customer will have accepted the designated Custom Installation Fee upon submission of the applicable Sales Order.

**2.8 Service Acceptance.** Except as may otherwise be identified in the applicable PSA, the Service Commencement Date shall be the date Comcast completes installation and connection of the necessary facilities and equipment to provide the Service at a Service Location.

**2.9 Administrative Website.** Comcast may furnish Customer with one or more user identifications and/or passwords for use on the Administrative Website. Customer shall be responsible for the confidentiality and use of such user identifications and/or passwords and shall immediately notify Comcast if there has been an unauthorized release, use or other compromise of any user identification or password. In addition, Customer agrees that its authorized users shall keep confidential and not distribute any information or other materials made available by the Administrative Website. Customer shall be solely responsible for all use of the Administrative Website, and Comcast shall be entitled to rely on all Customer uses of and submissions to the Administrative Website as authorized by Customer. Comcast shall not be liable for any loss, cost, expense or other liability arising out of any Customer use of the Administrative Website or any information on the Administrative Website. Comcast may change or discontinue the Administrative Website, or Customer's right to use the Administrative Website, at any time. Additional terms and policies may apply to Customer's use of the Administrative Website. These terms and policies will be posted on the site.

**ARTICLE 3. BILLING AND PAYMENT**

**3.1 Charges.** Except as otherwise provided in the applicable PSA, Customer shall pay Comcast one hundred percent (100%) of the Custom Installation Fee prior to the installation of Service. Customer further agrees to pay all charges associated with the Services, as set forth or referenced in the applicable PSA, Sales Order(s) or invoice from Comcast. These charges may include, but are not limited to standard and custom non-recurring installation charges, monthly recurring service charges, usage charges including without limitation charges for the use of Comcast Equipment, per-call charges, pay-per-view charges, charges for service calls, maintenance and repair charges, and applicable federal, state, and local taxes, fees, surcharges and recoupments (however designated). Some Services such as measured and per-call charges, pay-per-view movies or events, and interactive television (as explained in the applicable PSA) may be invoiced after the Service has been provided to Customer. Except as otherwise indicated herein or in the applicable PSA(s) monthly recurring charges for Ethernet, Video and Internet Services that are identified on a Sales Order shall not increase during the Service Term. Except as otherwise indicated herein or in the Sales Order(s), Voice Service pricing, charges and fees can be found in the applicable PSA.

**3.2 Third-Party Charges.** Customer may incur charges from third party service providers that are separate and apart from, or based on the amounts charged by Comcast. These may include, without limitation, charges resulting from wireless services including roaming charges, accessing on-line services, calls to parties who charge for their telephone based

services, purchasing or subscribing to other offerings via the Internet or interactive options on certain Video services, or otherwise. Customer agrees that all such charges, including all applicable taxes, are Customer's sole responsibility. In addition, Customer is solely responsible for protecting the security of credit card information provided to others in connection with such transactions.

**3.3 Payment of Bills.** Except as otherwise indicated herein or in a PSA, Comcast will invoice Customer in advance on a monthly basis for all monthly recurring charges and fees arising under the Agreement. All other charges will be billed monthly in arrears, including without limitation certain usage based charges and third party pass through fees. Payment is due upon presentation of an invoice. Payment will be considered timely made to Comcast if received within thirty (30) days after the invoice date. Any charges not paid to Comcast within such period will be considered past due. If a Service Commencement Date is not the first day of a billing period, Customer's first monthly invoice shall include any pro-rated charges for the Services, from the date of installation to the start of the next billing period. In certain cases, Comcast may agree to provide billing services on behalf of third parties, as the agent of the third party. Any such third-party charges shall be payable pursuant to any contract or other arrangement between the third party and Customer and/or Comcast. Comcast shall not be responsible for any dispute regarding these charges between Customer and such third party. Customer must address all such disputes directly with the third party.

**3.4 Partial Payment.** Partial payment of any bill will be applied to the Customer's outstanding charges in amounts and proportions solely determined by Comcast. No acceptance of partial payment(s) by Comcast shall constitute a waiver of any rights to collect the full balance owed under the Agreement.

**3.5 Credit Approval and Deposits.** Initial and ongoing delivery of Services may be subject to credit approval. Customer shall provide Comcast with credit information requested by Comcast. Customer authorizes Comcast to make inquiries and to receive information about Customer's credit history from others and to enter this information in Customer's records. Customer represents and warrants that all credit information that it provides to Comcast will be true and correct. Comcast, in its sole discretion, may deny the Services based upon an unsatisfactory credit history. Additionally, subject to applicable regulations, Comcast may require Customer to make a deposit (in an amount not to exceed an estimated two months charge for the Services) as a condition to Comcast's provision of the Services, or as a condition to Comcast's continuation of the Services. The deposit will not, unless explicitly required by law, bear interest and shall be held by Comcast as security for payment of Customer's charges. Comcast may apply the deposit to any delinquent Customer charges upon written notice to Customer. If Comcast uses any or all of the deposit to pay an account delinquency, Customer will replenish the deposit by that amount within five (5) days of its receipt of written notice from Comcast. If the provision of Service to Customer is terminated, or if Comcast determines in its sole discretion that

such deposit is no longer necessary, then the amount of the deposit (plus any required deposit interest) will be credited to Customer's account or will be refunded to Customer, as determined by Comcast.

**3.6 Taxes and Fees.** Except to the extent Customer provides a valid tax exemption certificate prior to the delivery of Service, Customer shall be responsible for the payment of any and all applicable local, state, and federal taxes or fees (however designated). Customer also will be responsible to pay any Service fees, payment obligations and taxes that become applicable retroactively.

**3.7 Other Government-Related Costs and Fees.** Comcast reserves the right to invoice Customer for any fees or payment obligations in connection with the Services imposed by governmental or quasi-governmental bodies in connection with the sale, installation, use, or provision of the Services, including, without limitation, applicable franchise fees, right of way fees and Universal Service Fund charges (if any), regardless of whether Comcast or its Affiliates pay the fees directly or are required by an order, rule, or regulation of a taxing jurisdiction to collect them from Customer. Taxes and other government-related fees and surcharges may be changed with or without notice. In the event that any newly adopted law, rule, regulation or judgment increases Comcast's costs of providing Services, Customer shall pay Comcast's additional costs of providing Services under the new law, rule, regulation or judgment.

**3.8 Disputed Invoice.** If Customer disputes any portion of an invoice by the due date, Customer must pay fifty percent (50%) of the disputed charges, in addition to the undisputed portion of the invoice and submit a written claim, including all documentation substantiating Customer's claim, to Comcast for the disputed amount of the invoice by the invoice due date. The Parties shall negotiate in good faith to resolve any billing dispute. Comcast will refund/credit all valid disputes resolved in Customer's favor as of the date the disputed charges first appeared on the Customer's invoice.

**3.9 Past-Due Amounts.** Any payment not made when due will be subject to a late charge of 1.5% per month or the highest rate allowed by law on the unpaid invoice, whichever is lower. If Customer's account is delinquent, Comcast may refer the account to a collection agency or attorney that may pursue collection of the past due amount and/or any Comcast Equipment which Customer fails to return in accordance with the Agreement. If Comcast is required to use a collection agency or attorney to collect any amount owed by Customer or any unreturned Comcast Equipment, Customer agrees to pay all reasonable costs of collection or other action. The remedies set forth herein are in addition to and not in limitation of any other rights and remedies available to Comcast under the Agreement or at law or in equity.

**3.10 Rejected Payments.** Except to the extent otherwise prohibited by law, Customer will be assessed a service charge up to the full amount permitted under applicable law for any check or other instrument used to pay for the Services that has been rejected by the bank or other financial institution.

**3.11 Fraudulent Use of Services.** Customer is responsible for all charges attributable to Customer with respect to the Service(s), even if incurred as the result of fraudulent or unauthorized use of the Service. Comcast may, but is not obligated to, detect or report unauthorized or fraudulent use of Services to Customer. Comcast reserves the right to restrict, suspend or discontinue providing any Service in the event of fraudulent use of Customer's Service.

#### **ARTICLE 4. TERM; REVENUE COMMITMENT**

**4.1 Agreement Term.** Upon execution of the Agreement, Customer shall be allowed to submit Sales Orders to Comcast during the term referenced on the Master Service Agreement Cover Page ("MSA Term"). After the expiration of the initial MSA Term, Comcast may continue to accept Sales Orders from Customer under the Agreement, or require the Parties to execute a new agreement. This Agreement shall continue in effect until the expiration or termination date of the last Sales Order entered under the Agreement, unless terminated earlier in accordance with the Agreement.

**4.2 Sales Order Term/Revenue Commitment.** The applicable Service Term and Revenue Commitment (if any) shall be set forth in the Sales Order. Unless otherwise stated in these terms and conditions or the applicable PSA, if a Sales Order does not specify a term of service, the Service Term shall be one (1) year from the Service Commencement Date. In the event Customer fails to satisfy a Revenue Commitment, Customer will be billed a shortfall charge pursuant to the terms of the applicable PSA.

**4.3 Sales Order Renewal.** Upon the expiration of the Service Term, and unless otherwise agreed to by the Parties in the Sales Order, each Sales Order shall automatically renew for successive periods of one (1) year each ("Renewal Term(s)"), unless otherwise stated in these terms and conditions or prior notice of non-renewal is delivered by either Party to the other at least thirty (30) days before the expiration of the Service Term or the then current Renewal Term. Effective at any time after the end of the Service Term and from time to time thereafter, Comcast may, modify the charges for Ethernet, Internet and/or Video Services subject to thirty (30) days prior written notice to Customer. Customer will have thirty (30) days from receipt of such notice to cancel the applicable Service without further liability. Should Customer fail to cancel within this timeframe, Customer will be deemed to have accepted the modified Service pricing.

#### **ARTICLE 5. TERMINATION WITHOUT FAULT; DEFAULT**

**5.1 Termination for Convenience.** Notwithstanding any other term or provision in this Agreement, Customer shall have the right, in its sole discretion, to terminate any or all Sales Order(s) at any time during the Service Term(s), upon thirty (30) days prior written notice to Comcast and subject to payment to Comcast of all outstanding amounts due for the

Services, any and all applicable Termination Charges, and the return of all applicable Comcast Equipment. Comcast may terminate the Agreement if Customer does not take any Service under a Sales Order for twelve (12) consecutive months or longer.

**5.2 Termination for Cause.** If either Party breaches any material term of the Agreement, other than a payment term, and the breach continues un-remedied for thirty (30) days after written notice of default, the other Party may terminate for cause any Sales Order materially affected by the breach. If Customer is in breach of a payment obligation (including failure to pay a required deposit) and fails to make payment in full within ten (10) days after receipt of written notice of default, Comcast may, at its option, terminate the Agreement, terminate the affected Sales Orders, suspend Service under the affected Sales Orders, and/or require a deposit, advance payment, or other satisfactory assurances in connection with any or all Sales Orders as a condition of continuing to provide Service; except that Comcast will not take any such action as a result of Customer's non-payment of a charge subject to a timely billing dispute, unless Comcast has reviewed the dispute and determined in good faith that the charge is correct. A Sales Order may be terminated by either Party immediately upon written notice if the other Party has become insolvent or involved in liquidation or termination of its business, or adjudicated bankrupt, or been involved in an assignment for the benefit of its creditors. Termination by either Party of a Sales Order does not waive any other rights or remedies that it may have under this Agreement. The non-defaulting Party shall be entitled to all available legal and equitable remedies for such breach.

#### **5.3 Effect of Expiration/Termination of a Sales Order.**

Upon the expiration or termination of a Sales Order for any reason:

- A. Comcast shall disconnect the applicable Service;
- B. Comcast may delete all applicable data, files, electronic messages, or other information stored on Comcast's servers or systems;
- C. If Customer has terminated the Sales Order prior to the expiration of the Service Term for convenience, or if Comcast has terminated the Sales Order prior to the expiration of the Service Term as a result of material breach by Customer, Comcast may assess and collect from Customer applicable Termination Charges (if any);
- D. Customer shall, permit Comcast to retrieve from the applicable Service Location any and all Comcast Equipment. If Customer fails to permit such retrieval or if the retrieved Comcast Equipment has been damaged and/or destroyed other than by Comcast or its agents, normal wear and tear excepted, Comcast may invoice Customer for the manufacturer's list price of the relevant Comcast Equipment, or in the event of minor damage to the retrieved Comcast Equipment, the cost of repair, which amounts shall be immediately due and payable; and

E. Customer's right to use applicable Licensed Software shall automatically terminate, and Customer shall be obligated to return all Licensed Software to Comcast.

5.4 **Resumption of Service.** If a Service has been discontinued by Comcast for cause and Customer requests that the Service be restored, Comcast shall have the sole and absolute discretion to restore such Service. At Comcast's option, deposits, advanced payments, nonrecurring charges, and/or an extended Service Term may apply to restoration of Service.

5.5 **Regulatory and Legal Changes.** The Parties acknowledge that the respective rights and obligations of each Party as set forth in this Agreement upon its execution are based on applicable law and regulations as they exist on the date of execution of this Agreement. The Parties agree that in the event of any subsequent decision by a legislative, regulatory or judicial body, including any regulatory or judicial order, rule, regulation, decision in any arbitration or other dispute resolution or other legal or regulatory action that materially affects the provisions or ability to provide Services on economic terms of the Agreement, Comcast may, by providing written notice to the Customer, require that the affected provisions of the Agreement be renegotiated in good faith. If Customer refuses to enter such renegotiations, or the Parties can't reach resolution on new Agreement terms, Comcast may, in its sole discretion, terminate this Agreement, in whole or in part, upon sixty (60) days written notice to Customer.

**ARTICLE 6. LIMITATION OF LIABILITY;  
DISCLAIMER OF WARRANTIES; WARNINGS**

**6.1 Limitation of Liability.**

A, **THE AGGREGATE LIABILITY OF COMCAST FOR ANY AND ALL LOSSES, DAMAGES AND CAUSES ARISING OUT OF THE AGREEMENT, INCLUDING, BUT NOT LIMITED TO, THE PERFORMANCE OF SERVICE, AND NOT OTHERWISE LIMITED HEREUNDER, WHETHER IN CONTRACT, TORT, OR OTHERWISE, SHALL NOT EXCEED DIRECT DAMAGES EQUAL TO THE SUM TOTAL OF PAYMENTS MADE BY CUSTOMER TO COMCAST DURING THE THREE (3) MONTHS IMMEDIATELY PRECEDING THE EVENT FOR WHICH DAMAGES ARE CLAIMED. THIS LIMITATION SHALL NOT APPLY TO COMCAST'S INDEMNIFICATION OBLIGATIONS AND CLAIMS FOR DAMAGE TO PROPERTY AND/OR PERSONAL INJURIES (INCLUDING DEATH) ARISING OUT OF THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF COMCAST WHILE ON THE CUSTOMER SERVICE LOCATION.**

B. **NEITHER PARTY SHALL BE LIABLE TO THE OTHER FOR ANY INCIDENTAL, INDIRECT, SPECIAL, COVER, PUNITIVE OR CONSEQUENTIAL DAMAGES, WHETHER OR NOT FORESEEABLE, OF ANY KIND INCLUDING BUT NOT LIMITED TO ANY**

**LOSS REVENUE, LOSS OF USE, LOSS OF BUSINESS, OR LOSS OF PROFIT WHETHER SUCH ALLEGED LIABILITY ARISES IN CONTRACT OR TORT HOWEVER, THAT NOTHING HEREIN IS INTENDED TO LIMIT CUSTOMER'S LIABILITY FOR AMOUNTS OWED FOR THE SERVICES, FOR ANY EQUIPMENT OR SOFTWARE PROVIDED BY COMCAST OR FOR TERMINATION CHARGES.**

**6.2 Disclaimer of Warranties.**

A. Services shall be provided pursuant to the terms and conditions in the applicable PSA and Service Level Agreement, and are in lieu of all other warranties, express, implied or statutory, including, but not limited to, the implied warranties of merchantability, fitness for a particular purpose, title, and non-infringement. **TO THE MAXIMUM EXTENT ALLOWED BY LAW, COMCAST EXPRESSLY DISCLAIMS ALL SUCH EXPRESS, IMPLIED AND STATUTORY WARRANTIES.**

B. Without limiting the generality of the foregoing, and except as otherwise identified in a PSA or Service Level Agreement, Comcast does not warrant that the Services, Comcast Equipment, or Licensed Software will be uninterrupted, error-free, or free of latency or delay, or that the Services, Comcast Equipment, or Licensed Software will meet customer's requirements, or that the Services, Comcast Equipment, or Licensed Software will prevent unauthorized access by third parties.

C. In no event shall Comcast, be liable for any loss, damage or claim arising out of or related to: (i) stored, transmitted, or recorded data, files, or software; (ii) any act or omission of Customer, its users or third parties; (iii) interoperability, interaction or interconnection of the Services with applications, equipment, services or networks provided by Customer or third parties; or (iv) loss or destruction of any Customer hardware, software, files or data resulting from any virus or other harmful feature or from any attempt to remove it. Customer is advised to back up all data, files and software prior to the installation of Service and at regular intervals thereafter.

6.3 **Disruption of Service.** Notwithstanding the performance standards identified in a PSA, the Services are not fail-safe and are not designed or intended for use in situations requiring fail-safe performance or in which an error or interruption in the Services could lead to severe injury to business, persons, property or environment ("High Risk Activities"). These High Risk Activities may include, without limitation, vital business or personal communications, or activities where absolutely accurate data or information is required.

6.4 Customer's sole and exclusive remedies are expressly set forth in the Agreement. Certain of the above exclusions may not apply if the state in which a Service is provided does not allow the exclusion or limitation of implied warranties or does not allow the limitation or exclusion of incidental or consequential damages. In those states, the liability of Comcast is limited to the maximum extent permitted by law.

## **ARTICLE 7. INDEMNIFICATION**

**7.1 Comcast's Indemnification Obligations.** Comcast shall indemnify, defend, and hold harmless Customer and its parent company, affiliates, employees, directors, officers, and agents from and against all claims, demands, actions, causes of actions, damages, liabilities, losses, and expenses (including reasonable attorneys' fees) ("Claims") incurred as a result of: infringement of U.S. patent or copyright relating to the Comcast Equipment or Comcast Licensed Software hereunder; damage to tangible personal property or real property, and personal injuries (including death) arising out of the gross negligence or willful misconduct of Comcast while working on the Customer Service Location.

**7.2 Customer's Indemnification Obligations.** Customer shall indemnify, defend, and hold harmless Comcast from any and all Claims arising on account of or in connection with Customer's use or sharing of the Service provided under the Agreement, including with respect to: libel, slander, infringement of copyright, or unauthorized use of trademark, trade name, or service mark arising out of communications via the Service; for patent infringement arising from Customer's combining or connection of CE to use the Service; for damage arising out of the gross negligence or willful misconduct of Customer with respect to users of the Service.

**7.3 Indemnification Procedures.** The Indemnifying Party agrees to defend the Indemnified Party for any loss, injury, liability, claim or demand ("Actions") that is the subject of this Article 7. The Indemnified Party agrees to notify the Indemnifying Party promptly, in writing, of any Actions, threatened or actual, and to cooperate in every reasonable way to facilitate the defense or settlement of such Actions. The Indemnifying Party shall assume the defense of any Action with counsel reasonably satisfactory to the Indemnified Party. The Indemnified Party may employ its own counsel in any such case, and shall pay such counsel's fees and expenses. The Indemnifying Party shall have the right to settle any claim for which indemnification is available; provided, however, that to the extent that such settlement requires the Indemnified Party to take or refrain from taking any action or purports to obligate the Indemnified Party, then the Indemnifying Party shall not settle such claim without the prior written consent of the Indemnified Party, which consent shall not be unreasonably withheld, conditioned or delayed.

## **ARTICLE 8. SOFTWARE & SERVICES**

**8.1 License.** If and to the extent that Customer requires the use of Licensed Software in order to use the Service supplied under any Sales Order, Customer shall have a personal, nonexclusive, nontransferable, and limited license to use such Licensed Software in object code only and solely to the extent necessary to use the applicable Service during the corresponding Service Term. All Licensed Software provided to Customer, and each revised version thereof, is licensed (not sold) to Customer by Comcast only for use in conjunction with the Service. Customer may not claim title to, or an ownership interest in, any Licensed Software (or any derivations or improvements thereto), and Customer shall execute any documentation reasonably required by Comcast,

including, without limitation, end-user license agreements for the Licensed Software. Comcast and its suppliers shall retain ownership of the Licensed Software, and no rights are granted to Customer other than a license to use the Licensed Software under the terms expressly set forth in this Agreement.

**8.2 Restrictions.** Customer agrees that it shall not: (i) copy the Licensed Software (or any upgrades thereto or related written materials) except for emergency back-up purposes or as permitted by the express written consent of Comcast; (ii) reverse engineer, decompile, or disassemble the Licensed Software; (iii) sell, lease, license, or sublicense the Licensed Software; or (iv) create, write, or develop any derivative software or any other software program based on the Licensed Software.

**8.3 Updates.** Customer acknowledges that the use of Service may periodically require updates and/or changes to certain Licensed Software resident in the Comcast Equipment or CE. If Comcast has agreed to provide updates and changes, such updates and changes may be performed remotely or on-site by Comcast, at Comcast's sole option. Customer hereby consents to, and shall provide free access for, such updates deemed reasonably necessary by Comcast. If Customer fails to agree to such updates, Comcast will be excused from the applicable Service Level Agreement and other performance credits, and any and all liability and indemnification obligations regarding the applicable Service.

**8.4 Export Law and Regulation.** Customer acknowledges that any products, software, and technical information (including, but not limited to, services and training) provided pursuant to the Agreement may be subject to U.S. export laws and regulations. Customer agrees that it will not use, distribute, transfer, or transmit the products, software, or technical information (even if incorporated into other products) except in compliance with U.S. export regulations. If requested by Comcast, Customer also agrees to sign written assurances and other export-related documents as may be required for Comcast to comply with U.S. export regulations.

**8.5 Ownership of Telephone Numbers and Addresses.** Customer acknowledges that use of certain Services does not give it any ownership or other rights in any telephone number or Internet/on-line addresses provided, including but not limited to Internet Protocol ("IP") addresses, e-mail addresses and web addresses.

**8.6 Intellectual Property Rights in the Services.** Title and intellectual property rights to the Services are owned by Comcast, its agents, suppliers or affiliates or their licensors or otherwise by the owners of such material. The copying, redistribution, bundling or publication of the Services, in whole or in part, without express prior written consent from Comcast or other owner of such material, is prohibited.

## **ARTICLE 9. CONFIDENTIAL INFORMATION AND PRIVACY**

**9.1 Disclosure and Use.** All Confidential Information disclosed by either Party shall be kept by the receiving party in

strict confidence and shall not be disclosed to any third party without the disclosing party's express written consent. Notwithstanding the foregoing, such information may be disclosed (i) to the receiving party's employees, affiliates, and agents who have a need to know for the purpose of performing this Agreement, using the Services, rendering the Services, and marketing related products and services (provided that in all cases the receiving party shall take appropriate measures prior to disclosure to its employees, affiliates, and agents to assure against unauthorized use or disclosure); or (ii) as otherwise authorized by this Agreement. Each Party agrees to treat all Confidential Information of the other in the same manner as it treats its own proprietary information, but in no case using a degree of care less than a reasonable degree of care.

**9.2 Exceptions.** Notwithstanding the foregoing, each Party's confidentiality obligations hereunder shall not apply to information that: (i) is already known to the receiving party without a pre-existing restriction as to disclosure; (ii) is or becomes publicly available without fault of the receiving party; (iii) is rightfully obtained by the receiving party from a third party without restriction as to disclosure, or is approved for release by written authorization of the disclosing party; (iv) is developed independently by the receiving party without use of the disclosing party's Confidential Information; or (v) is required to be disclosed by law or regulation.

**9.3 Publicity.** The Agreement provides no right to use any Party's or its affiliates' trademarks, service marks, or trade names, or to otherwise refer to the other Party in any marketing, promotional, or advertising materials or activities. Neither Party shall issue any publication or press release relating to, or otherwise disclose the existence of, the terms and conditions of any contractual relationship between Comcast and Customer, except as permitted by the Agreement or otherwise consented to in writing by the other Party.

**9.4 Passwords.** Comcast may furnish Customer with user identifications and passwords for use in conjunction with certain Services, including, without limitation, for access to certain non-public Comcast website materials. Customer understands and agrees that such information shall be subject to Comcast's access policies and procedures located on Comcast's Web Site.

**9.5 Remedies.** Notwithstanding any other Article of this Agreement, the non-breaching Party shall be entitled to seek equitable relief to protect its interests pursuant to this Article 9, including, but not limited to, injunctive relief.

**9.6 Monitoring of Services.** Except as otherwise expressly set forth in a PSA, Comcast assumes no obligation to pre-screen or monitor Customer's use of the Service, including without limitation postings and/or transmission. However, Customer acknowledges and agrees that Comcast and its agents shall have the right to pre-screen and monitor such use from time to time and to use and disclose such results to the extent necessary to operate the Service properly, to ensure compliance with applicable use policies, to protect the rights and/or property of Comcast, or in emergencies when physical safety is at issue, and that Comcast may disclose the

same to the extent necessary to satisfy any law, regulation, or governmental request. Comcast shall have no liability or responsibility for content received or distributed by Customer or its users through the Service, and Customer shall indemnify, defend, and hold Comcast and its directors, officers, employees, agents, subsidiaries, affiliates, successors, and assigns harmless from any and all claims, damages, and expenses whatsoever (including reasonable attorneys' fees) arising from such content attributable to Customer or its users. For the avoidance of doubt, the monitoring of data described in this Section 9.6 refers to aggregate data and types of traffic (protocol, upstream/downstream utilization, etc.). Comcast does not have access to the content of encrypted data transmitted across Comcast networks.

**9.7 Survival of Confidentiality Obligations.** The obligations of confidentiality and limitation of use described in this Article 9 shall survive the expiration and termination of the Agreement for a period of two (2) years (or such longer period as may be required by law).

## **ARTICLE 10. USE OF SERVICE; USE AND PRIVACY POLICIES**

**10.1 Prohibited Uses and Comcast Use Policies.** Customer is prohibited from using, or permitting the use of, any Service (i) for any purpose in violation of any law, rule, regulation, or policy of any government authority; (ii) in violation of any Use Policy (as defined below); (iii) for any use as to which Customer has not obtained all required government approvals, authorizations, licenses, consents, and permits; or (iv) to interfere unreasonably with the use of Comcast service by others or the operation of the Network. Customer is responsible for assuring that any and all of its users comply with the provisions of the Agreement. Comcast reserves the right to act immediately and without notice to terminate or suspend the Services and/or to remove from the Services any information transmitted by or to Customer or users, if Comcast determines that such use is prohibited as identified herein, or information does not conform with the requirements set or Comcast reasonably believes that such use or information may violate any laws, regulations, or written and electronic instructions for use. Furthermore, to the extent applicable, Services shall be subject to Comcast's acceptable use policies ("Use Policies") that may limit use. The Use Policies and other security policies concerning the Services are posted on the Website, and are incorporated into this Agreement by reference. Comcast may update the Use Policies from time to time, and such updates shall be deemed effective immediately upon posting, with or without actual notice to Customer. Comcast's action or inaction in enforcing acceptable use shall not constitute review or approval of Customer's or any other users' use or information.

**10.2 Privacy Policy.** In addition to the provisions of Article 9, Comcast's commercial privacy policy applies to Comcast's handling of Customer confidential information. Comcast's privacy policy is available on the Website.

**10.3 Privacy Note Regarding Information Provided to Third Parties.** Comcast is not responsible for any information provided by Customer to third parties. Such information is not subject to the privacy provisions of this Agreement. Customer assumes all privacy and other risks associated with providing personally identifiable information to third parties via the Services.

**10.4 Prohibition on Resale.** Customer may not sell, resell, sublease, assign, license, sublicense, share, provide, or otherwise utilize in conjunction with a third party (including, without limitation, in any joint venture or as part of any outsourcing activity) the Services or any component thereof.

**10.5 Violation.** Any breach of this Article 10 shall be deemed a material breach of this Agreement. In the event of such material breach, Comcast shall have the right to restrict, suspend, or terminate immediately any or all Sales Orders, without liability on the part of Comcast, and then to notify Customer of the action that Comcast has taken and the reason for such action, in addition to any and all other rights and remedies under this Agreement.

#### **ARTICLE 11. MISCELLANEOUS TERMS**

**11.1 Force Majeure.** Neither Party (and in the case of Comcast, Comcast affiliates and subsidiaries) shall be liable to the other Party for any delay, failure in performance, loss, or damage to the extent caused by force majeure conditions such as acts of God, fire, explosion, power blackout, cable cut, acts of regulatory or governmental agencies, unavailability of right-of-way or materials, or other causes beyond the Party's reasonable control, except that Customer's obligation to pay for Services provided under the Agreement shall not be excused. Changes in economic, business or competitive condition shall not be considered force majeure events.

**11.2 Assignment or Transfer.** Customer shall not assign any right, obligation or duty, in whole or in part, nor of any other interest hereunder, without the prior written consent of Comcast, which shall not be unreasonably withheld. All obligations and duties of either Party under this Agreement shall be binding on all successors in interest and assigns of such Party. Nothing herein is intended to limit Comcast's use of third-party consultants and contractors to perform Services under a Sales Order.

**11.3 Notices.** Any notice sent pursuant to the Agreement shall be deemed given and effective when sent by facsimile (confirmed by first-class mail), or when delivered by overnight express or other express delivery service, in each case as follows: (i) with respect to Customer, to the address set forth on any Sales Order; or (ii) with respect to Comcast, to: Vice President/Enterprise Sales, One Comcast Center, 1701 JFK Blvd., Philadelphia, PA 19103, with a copy to Cable Law Department, One Comcast Center, 50<sup>th</sup> Floor, 1701 JFK Blvd., Philadelphia, PA 19103. Each Party shall notify the other Party in writing of any changes in its address listed on any Sales Order.

**11.4 Entire Understanding.** The Agreement, together with any applicable Tariffs, constitutes the entire understanding of the Parties related to the subject matter hereof. The Agreement supersedes all prior agreements, proposals, representations, statements, or understandings, whether written or oral, concerning the Services or the Parties' rights or obligations relating to Services. Any prior representations, promises, inducements, or statements of intent regarding the Services that are not embodied in the Agreement are of no effect. No subsequent agreement among the Parties concerning Service shall be effective or binding unless it is made in writing by authorized representatives of the Parties. Terms or conditions contained in any Sales Order, or restrictive endorsements or other statements on any form of payment, shall be void and of no force or effect.

**11.5 Tariffs.** Notwithstanding anything to the contrary in the Agreement, Comcast may elect or be required to file with regulatory agencies tariffs for certain Services. In such event, the terms set forth in the Agreement may, under applicable law, be superseded by the terms and conditions of the Tariffs. Without limiting the generality of the foregoing, in the event of any inconsistency with respect to rates, the rates and other terms set forth in the applicable Sales Order shall be treated as individual case based arrangements to the maximum extent permitted by law, and Comcast shall take such steps as are required by law to make the rates and other terms enforceable. If Comcast voluntarily or involuntarily cancels or withdraws a Tariff under which a Service is provided to Customer, the Service will thereafter be provided pursuant to the Agreement and the terms and conditions contained in the Tariff immediately prior to its cancellation or withdrawal. In the event that Comcast is required by a governmental authority to modify a Tariff under which Service is provided to Customer in a manner that is material and adverse to either Party, the affected Party may terminate the applicable Sales Order upon a minimum thirty (30) days' prior written notice to the other Party, without further liability.

**11.6 Construction.** In the event that any portion of the Agreement is held to be invalid or unenforceable, the Parties shall replace the invalid or unenforceable portion with another provision that, as nearly as possible, reflects the original intention of the Parties, and the remainder of the Agreement shall remain in full force and effect.

**11.7 Survival.** The rights and obligations of either Party that by their nature would continue beyond the termination or expiration of a Sales Order shall survive termination or expiration of the Sales Order.

**11.8 Choice of Law.** The domestic law of the state in which the Service is provided shall govern the construction, interpretation, and performance of this Agreement, except to the extent superseded by federal law.

**11.9 No Third Party Beneficiaries.** This Agreement does not expressly or implicitly provide any third party (including users) with any remedy, claim, liability, reimbursement, cause of action, or other right or privilege.

Attachment D (III)

**11.10 Parties' Authority to Contract.** The persons whose signatures appear below are duly authorized to enter into the Agreement on behalf of the Parties name therein.

**11.11 No Waiver; Etc.** No failure by either Party to enforce any right(s) hereunder shall constitute a waiver of such right(s). This Agreement may be executed in counterpart copies.

**11.12 Independent Contractors.** The Parties to this Agreement are independent contractors. Neither Party is an agent, representative, or partner of the other Party. Neither Party shall have any right, power, or authority to enter into any agreement for, or on behalf of, or incur any obligation or liability of, or to otherwise bind, the other Party. This

Agreement shall not be interpreted or construed to create an association, agency, joint venture, or partnership between the Parties or to impose any liability attributable to such a relationship upon either Party.

**11.13 Article Headings.** The article headings used herein are for reference only and shall not limit or control any term or provision of this Agreement or the interpretation or construction thereof.

**11.14 Compliance with Laws.** Each of the Parties agrees to comply with all applicable local, state and federal laws and regulations and ordinances in the performance of its respective obligations under this Agreement.

**COMCAST ENTERPRISE SERVICES  
PRODUCT-SPECIFIC ATTACHMENT  
ETHERNET TRANSPORT SERVICES**

**ATTACHMENT IDENTIFIER: Ethernet Transport, Version 1.5**

The following additional terms and conditions are applicable to Sales Orders for Comcast's Ethernet Transport Services:

**DEFINITIONS**

Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the General Terms and Conditions.

"**Estimated Availability Date**" means the target date for delivery of Service.

"**Interconnection Facilities**" means transmission capacity provided by Comcast, Customer or a third-party supplier to extend the Comcast Equipment from a Comcast terminal to any other location (e.g., a local loop provided by a local exchange company or other communications company).

"**Off-Net**" means geographical locations that are outside of Comcast's service area and/or geographical locations that are within Comcast's service area generally, but are not readily accessible by Comcast Network facilities. All Off-Net Services are provided by third-party service providers.

"**On-Net**" means geographical locations where Comcast currently provides Services through its Comcast Network. On-Net Services may be provisioned over a fiber optic network, or via a hybrid fiber coax network ("On-Net HFC"), as available through Comcast.

"**Services**" means Ethernet Transport Services.

**ARTICLE 1. SERVICES**

This attachment shall apply to Ethernet Transport Services. A further description of these Services is set forth in Schedule A-1. hereto which is incorporated herein by reference.

**ARTICLE 2. PROVIDER**

On-Net Service shall be provided by Comcast Business Communications, LLC.

On-Net Service provided over the On-Net HFC and Off-Net Services are available in a number of Comcast markets. For information on service availability, call 866-429-0152.

**ARTICLE 3. REGULATORY APPROVAL; TRAFFIC MIX**

Comcast's pricing for Service may be subject to FCC, public service commission or other regulatory approval. Further, Customer represents that its use of Service hereunder will be jurisdictionally interstate. Customer agrees to indemnify and hold Comcast harmless from any claims by third parties resulting from or arising out of Customer's failure to properly represent or certify the jurisdictional nature of its use of Service.

**ARTICLE 4. CUSTOM INSTALLATION FEE**

Once Comcast accepts a Sales Order for Service, Comcast will invoice Customer for all Custom Installation Fee(s). Customer will pay the Custom Installation Fee(s) within thirty (30) days of the invoice date unless a payment schedule is specified in the applicable Service Order.

**ARTICLE 5. PROVISIONING INTERVAL**

Following its acceptance of a Sales Order, Comcast shall notify Customer of the Estimated Availability Date applicable to that Sales Order. Comcast shall use commercially reasonable efforts to provision the Service on or before the Estimated Availability Date; provided, however, that Comcast's failure to provision by said date shall not constitute a breach of the Agreement.

**ARTICLE 6. SERVICE COMMENCEMENT DATE**

Comcast shall inform Customer when Service is available and performing in accordance with the "Performance Standards" set forth in Schedule A-1 hereto ("Availability Notification"). Charges for Service shall begin to accrue as of the Service Commencement Date. The Service Commencement Date shall be earliest of: (A) the date on which Customer confirms receipt of and concurrence with the Availability Notification; (B) five (5) business days following the date of the Availability Notification, if Customer fails to notify Comcast that the Service does not comply materially with the specifications set forth in Schedule A-1 hereto; or (C) the date on which Customer first uses the Service.

**ARTICLE 7. TERMINATION CHARGES; PORTABILITY; UPGRADES**

7.1 The charges set forth or referenced in each Sales Order have been extended to Customer in reliance on the Service Term set forth therein. To the extent that a Service Term has not been expressly set forth in a Sales Order, the minimum Service Term for Services is twelve (12) months.

7.2 **Termination Charges for On-Net Services.**

A. In the event On-Net Service is terminated following Comcast's acceptance of the applicable Sales Order but prior to the Service Commencement Date, Customer shall pay Termination Charges equal to the costs and expenses incurred by Comcast in installing or preparing to install the On-Net Service plus twenty percent (20%).

B. In the event that On-Net Service is terminated on or following the Service Commencement Date but prior to the end of the applicable Service Term, Customer shall pay Termination Charges equal to a percentage of the monthly recurring charges remaining for the unexpired portion of the then-current Service Term, calculated as follows:

- i. 100% of the monthly recurring charges with respect to months 1-12 of the Service Term; plus
- ii. 80% of the monthly recurring charges with respect to months 13-24 of the Service Term; plus
- iii. 65% of the monthly recurring charges with respect to months 25 through the end of the Service Term; plus
- iv. 100% of any remaining, unpaid Custom Installation Fees.

Termination Charges shall be immediately due and payable upon cancellation or termination and shall be in addition to any and all accrued and unpaid charges for the Service rendered by Comcast through the date of cancellation or termination.

C. **Termination Charges for Off-Net Services.** In the event Customer terminates Off-Net Service following Comcast's acceptance of the applicable Sales Order but prior to the end of the applicable Service Term, Customer shall pay Termination Charges equal to 100% of the monthly recurring charges remaining through the end of the Service Term plus 100% of any remaining, unpaid Custom Installation Fees. Customer shall, pursuant to Article 3.2 of the General Terms and Conditions, also pay any third-party charges, incurred by Comcast as a result of the early termination of service by the Customer.

7.3 **Exclusions.** Termination Charges shall not apply to Service terminated by Customer (a) as a result of Comcast's failure to provision Service within the intervals specified in Article 5 of this attachment or (b) as a result of Comcast's material and uncured breach in accordance with Article 5.2 of the General Terms and Conditions.

7.4 **Portability.** Customer may terminate an existing On-Net Service (an "Existing Service") and turn up a replacement On-Net Service (i.e., having different termination points on Comcast's network) (a "Replacement Service") without incurring Termination Charges with respect to the Existing Service, provided that (a) the Replacement Service must have a Service Term equal to or greater than the remaining Service Term of the Existing Service; (b) the Replacement Service must have monthly recurring charges equal to or greater than the monthly recurring charges for the Existing Service; (c) Customer submits a Sales Order to Comcast for the Replacement Service within ninety (90) days after termination of the Existing Service and that order is accepted by Comcast; (d) Customer reimburses Comcast for any and all installation charges that were waived with respect to the Existing Service; and (e) Customer pays the actual costs incurred by Comcast in installing and provisioning the Replacement Service.

7.5 **Upgrades.** Customer may upgrade the speed or capacity of an Existing Service without incurring Termination Charges, provided that (A) the upgraded Service (the "Upgraded Service") must assume the remaining Service Term of the Existing Service; (B) the Upgraded Service must have the same points of termination on Comcast's network as the Existing Service; (C) Customer submits a Sales Order to Comcast for the Upgraded Service and that order is accepted by Comcast; (D) Customer pays Comcast's applicable nonrecurring charges for the upgrade; and (E) Customer agrees to pay the applicable monthly recurring charges for the Upgraded Service commencing with the upgrade. Upgrades to Off-Net Services are subject to the applicable third party service provider rules and availability. Comcast has no obligation to upgrade Customer's Off-Net Service.

#### **ARTICLE 8. ADDITIONAL INFORMATION**

As necessary for the interconnection of the Service with services provided by others, Comcast may request (as applicable), and Customer will provide to Comcast, circuit facility assignment information, firm order commitment information, and design layout records necessary to enable Comcast to make the necessary cross-connection between the Service and Customer's other service provider(s). Comcast may charge Customer nonrecurring and monthly recurring cross-connect charges to make such connections.

#### **ARTICLE 9. TECHNICAL SPECIFICATIONS AND PERFORMANCE STANDARDS; SERVICE LEVEL AGREEMENT**

The technical specifications and performance standards applicable to the Service are set forth in Schedule A-1 hereto. The service level agreement applicable to the Service is set forth in a Schedule A-2 hereto.

**COMCAST ENTERPRISE SERVICES  
PRODUCT-SPECIFIC ATTACHMENT  
ETHERNET TRANSPORT SERVICES**

**SCHEDULE A-1  
SERVICE DESCRIPTIONS, TECHNICAL SPECIFICATIONS AND PERFORMANCE STANDARDS  
COMCAST ETHERNET TRANSPORT SERVICES**

**Ethernet Transport Version 1.5**

Comcast's Ethernet Transport Services ("Service(s)") will be provided in accordance with the service descriptions, technical specifications and performance standards set forth below:

**Definitions**

1. Latency. Latency, also known as Frame Delay, is defined as the maximum delay measured for a portion of successfully delivered service frames over a 30 day period.
2. Jitter. Jitter, also known as Frame Delay Variation, is defined as the short-term variations measured for a portion of successfully delivered service frames over a 30 day period.
3. Packet Loss. Packet Loss, also known as Frame Loss, is the difference between the number of service frames transmitted at the ingress UNI and the total number of service frames received at the egress UNI over a 30 day period.

**Service Descriptions**

1. **Ethernet Network Service (ENS)**. ENS enables customers to connect physically distributed locations across a Metropolitan Area Network (MAN) or Wide Area Network (WAN) as if they are on the same Local Area Network (LAN). The service provides VLAN transparency enabling customers to implement their own VLANs without any coordination with Comcast. ENS offers three Classes of Service (CoS), as described below. The service is offered with 10/100Mbps, 1Gbps or 10Gbps Ethernet User-to-Network Interfaces (UNI) and is available in increments starting at 1Mbps. The ENS Service is not available over On-Net HFC.
2. **Ethernet Private Line (EPL)**. EPL service enables customers to connect their Customer Premises Equipment (CPE) using an Ethernet interface. EPL service enables customers to use any VLANs or Ethernet control protocol across the service without coordination with Comcast. EPL service provides one Ethernet Virtual Connection (EVC) between two customer locations. EPL offers three Classes of Service (CoS), as described below. EPL service is offered with 10/100Mbps, 1Gbps, or 10 Gbps Ethernet User-to-Network Interfaces (UNI) and is available in speed increments starting at 1Mbps.
3. **Ethernet Virtual Private Line (EVPL)**. EVPL service provides an Ethernet Virtual Connection (EVC) between two customer locations similar to Ethernet Private Line service but supports the added flexibility to multiplex multiple services (EVCs) on a single UNI at a customer's hub or aggregation site. The service multiplexing capability is not available at sites served by the Comcast On-Net HFC. EVPL offers three Classes of Service (CoS), as described below. CoS options enable customers to select the CoS that best meets their applications' performance requirements. The service is offered with 10/100Mbps, 1Gbps, or 10 Gbps Ethernet User-to-Network Interfaces (UNI) and is available in speed increments starting at 1Mbps.

**4. Off-Net Service Limitations.** The above categories of Service are available as Off-Net Services, with the following limitations:

- Only available with Basic CoS;
- 10Gbps Ethernet UNIs are not available with Off-Net Services;
- Service multiplexing capability is not available on Off-Net EVPL UNIs;
- When ordering 10/100Mbps Off-Net Ethernet UNIs, speed increments may only be ordered in increments of 10 Mbps, up to a maximum size of 90Mbps; when ordering 1 Gbps Off-Net Ethernet UNIs, speed increments may only be ordered in increments of 100Mbps, up to a maximum size of 900Mbps

#### Ethernet Virtual Circuit (EVC) Area Types

Comcast Ethernet Transport Services are available both within and between certain major metropolitan areas throughout the United States. Each EVC is assigned an EVC Area Type based upon the locations of respective A and Z locations.

- a. Metro. EVC enables connectivity between customer locations within a Comcast defined Metro.
- b. Regional. EVC enables connectivity between customer locations that are in different Comcast defined Metro's, but within Comcast defined geographic Regions.
- c. Continental. EVC enables connectivity between customer locations that are in different Comcast defined geographic Regions.

#### Technical Specifications and Performance Standards for Services

**1. User-to-Network Interface.** The Services provides the bidirectional, full duplex transmission of Ethernet frames using a standard IEEE 802.3 Ethernet interface. Figure 1 provides a list of available UNI physical interfaces and their available Committed Information Rate (CIR) bandwidth increments and Committed Burst Sizes (CBS). CIR increments of less than 10 Mbps are not available in conjunction with Off-Net Services.

UNI Speed	UNI Physical Interface	CIR Increments	CBS (bytes)
10 Mbps	10BaseT	1 Mbps	25,000
100 Mbps	100BaseT	10 Mbps	250,000
1 Gbps	1000BaseT or 1000BaseSX	100 Mbps	2,500,000
10 Gbps	10GBase-SR or 10GBase-LR	1000 Mbps	25,000,000

Figure 1: Available UNI interface types and CBS values for different CIR Increments

**2. Class of Service (CoS) Options.** As set forth in Figure 2, Comcast Ethernet Transport Services are available with three different classes of service. The CoS options allow for differentiated service performance levels for different types of network traffic. CoS is used to prioritize customer mission-critical traffic from lesser priority traffic in the network. The customer must specify a CIR for each CoS to indicate how much bandwidth should be assigned to each CoS. The performance metrics associated with each CoS are set forth in Attachment A-1.1 to the Product-Specific Attachment for Ethernet Service.

EVC Area Type	On-Net Fiber	On-Net HFC	Off-Net
Metro	Basic, Priority & Premium	Basic & Priority	Basic
Regional	Basic, Priority & Premium	Basic	Basic
Continental	Basic, Priority & Premium	Basic	Basic

Figure 2: Available CoS options by Access Type and EVC Area Type

3. **CoS Identification and Marking.** If a customer only implements a single CoS solution, they are not required to mark their packets using 802.1p CoS values. All packets, tagged or untagged, will be mapped into the subscribed CoS. If a customer implements a multi-CoS solution or for EVPL ports with service multiplexing, they must mark all packets using C-tag 802.1p CoS values as specified in Figure 3 to ensure the service will provide the intended CoS performance objectives specified in Figure 2. For multi-CoS solutions, untagged packets will be treated as if they are marked with a 0. Packets with other 802.1p values are mapped to the lowest subscribed CoS. In this case, C-tag VLAN ID values are not relevant as long as they are tagged with a VLAN ID in the range 1 to 4094. For EVPL ports with service multiplexing, untagged packets will be discarded and C-tag VLAN ID values are used to map traffic to applicable EVC's.

CoS	802.1p
Premium	5
Priority	2-3
Basic	0-1

Figure 3: CoS Marking

4. **Traffic Management.** Comcast's network traffic-policing policies restrict traffic flows to the subscribed CIR for each service class. If the customer-transmitted bandwidth rate for any CoS exceeds the subscription rate (CIR) and burst size (CBS), Comcast will discard the non-conformant packets. For packets marked with a non-conformant CoS marking, the service will transmit them using the Basic service class without altering the customer's CoS markings. Traffic management policies associated with Off-Net Services will conform to the policies enforced by the third-party service provider.

5. **Maximum Frame Size.** Services delivered On-Net support a Maximum Transmission Unit (MTU) packet size of 1600 bytes to support untagged or 802.1Q tagged packet sizes. Jumbo Frame sizes can be supported on an Individual Case Basis (ICB). For Services delivered On-Net HFC, frame sizes may not exceed 1518 MTU size (1522 with a single VLAN tag). All frames that exceed specifications shall be dropped. For Off-Net Services, MTU may vary by third-party provider.

6. **Customer Traffic Transparency.** All fields within customers Ethernet frames (unicast, multicast and broadcast, except L2CP) from the first bit of payload are preserved and transparently transported over UNI to UNI, as long as they are mapped into the EVC.

7. **Ethernet Service Frame Disposition.** Different types of Ethernet frames are processed differently by the Service. Frames may pass unconditionally through the network or may be limited as in the case of broadcast, unknown unicast and multicast frames to ensure acceptable service performance. Refer to Figure 7 for Comcast's service frame disposition for each service frame type.

Service Frame Type	EPL Frame Delivery	EVPL Frame Delivery	ENS Frame Delivery
Unicast	All frames delivered unconditionally	Frames delivered conditionally	All frames delivered unconditionally
Multicast	All frames delivered unconditionally	Frames delivered conditionally	Frames delivered conditionally
Broadcast	All frames delivered	Frames delivered	Frames delivered

	unconditionally	conditionally	conditionally
--	-----------------	---------------	---------------

Figure 7: Service Frame Delivery Disposition

**COMCAST ENTERPRISE SERVICES  
PRODUCT-SPECIFIC ATTACHMENT  
ETHERNET TRANSPORT SERVICES**

**SCHEDULE A-2  
SERVICE LEVEL AGREEMENT**

**Ethernet Transport Version 1.5**

Comcast’s Ethernet Transport Services is backed by the following Service Level Agreement (“SLA”):

**Definitions:**

Capitalized terms not otherwise defined herein shall have the meaning ascribed to them in the Ethernet Transport Services PSA or the General Terms and Conditions.

“Planned Service Interruption” means any Service Interruption caused by planned work such as scheduled maintenance or planned enhancements or upgrades to the network.

“Service Interruption” means a complete loss of signal that renders the Service unusable.

**Service Level Agreement (SLA)**

Company’s liability for any Service Interruption (individually or collectively, “Liability”), shall be limited to the amounts set forth in the Tables below. For the purposes of calculating credit for any such Liability, the Liability period begins when the Customer reports to Company an interruption in the portion of the Service, provided that the Liability is reported by Customer during the duration of the Liability, and, a trouble ticket is opened; the Liability shall be deemed resolved upon closing of the same trouble ticket or the termination of the interruption, if sooner, less any time Company is awaiting additional information or premises testing from the Customer. In no event shall the total amount of credit issued to Customer’s account on a per-month basis exceed 50% of the total monthly recurring charge (“MRC”) associated with the impacted portion of the Service set forth in the Sales Order. Service Interruptions will not be aggregated for purposes of determining credit allowances. To qualify, Customer must request the Credit from Comcast within thirty (30) days of the interruption. Customer will not be entitled to any additional credits for Service Interruptions. Comcast shall not be liable for any Liability caused by force majeure events, Planned Service Interruptions or Customer actions, omission or equipment.

**TABLE 1: SLA for On-Net Services provided over a fiber optic network (99.99% Availability)**

Length of Service Interruption:	Amount of Credit:
Less than 4 minutes	None
At least 4 minutes but less than 4 hours	5% of Total MRC
At least 4 hours but less than 8 hours	10% of Total MRC
At least 8 hours but less than 12 hours	20% of Total MRC
At least 12 hours but less than 16 hours	30% of Total MRC
At least 16 hours but less than 24 hours	40% of Total MRC
At least 24 hours or greater	50% of Total MRC

TABLE 2: SLA for On-Net Services provided over On-Net HFC (99.9% Availability)

Length of Service Interruption:	Amount of Credit:
Less than 40 minutes	None
At least 40 minutes but less than 4 hours	5% of Total MRC
At least 4 hours but less than 8 hours	10% of Total MRC
At least 8 hours but less than 12 hours	20% of Total MRC
At least 12 hours but less than 16 hours	30% of Total MRC
At least 16 hours but less than 24 hours	40% of Total MRC
At least 24 hours or greater	50% of Total MRC

TABLE 3: SLA for Off-Net Services (99.95% Availability)

Length of Service Interruption:	Amount of Credit:
Less than 20 minutes	None
At least 20 minutes but less than 4 hours	5% of Total MRC
At least 4 hours but less than 8 hours	10% of Total MRC
At least 8 hours but less than 12 hours	20% of Total MRC
At least 12 hours but less than 16 hours	30% of Total MRC
At least 16 hours but less than 24 hours	40% of Total MRC
At least 24 hours or greater	50% of Total MRC

THE TOTAL CREDIT ALLOWANCES PER MONTH IS CAPPED AT 50% OF THAT MONTH'S MRC FOR THE INTERRUPTED PORTIONS OF SERVICE. SEPARATELY OCCURRING SERVICE INTERRUPTIONS ARE NOT AGGREGATED FOR THE PURPOSES OF DETERMINING CREDIT ALLOWANCES.

#### On-Net Service Monitoring, Technical Support and Maintenance

1. Network Monitoring. Comcast monitors On-Net Services on a 24x7x365 basis.

2. **Technical Support.** Comcast provides a toll-free trouble reporting telephone number to the Enterprise Technical Support (ETS) center that operates on a 24x7x365 basis. Comcast provides technical support for service related inquiries. Technical support will not offer consulting or advice on issues relating to CPE or other equipment not provided by Comcast.

- a. Escalation. Reported troubles are escalated within the Comcast Business Services Network Operations Center (BNOC) to meet the response/restoration interval described below (Response and Restoration Standards). Service issues are escalated within the Comcast BNOC as follows: to a Supervisor at the end of the applicable time interval plus one (1) hour; to a Manager at the end of the applicable time interval plus two (2) hours, and to a Director at the end of the applicable time interval plus four (4) hours.
- b. Maintenance. Comcast's standard maintenance window for On-Net Services is Sunday to Saturday from 12:00am to 6:00am local time. Scheduled maintenance for On-Net Services is performed during the maintenance window and will be coordinated between Comcast and the Customer. Comcast provides a minimum forty eight (48) hour notice for non-service impacting maintenance. Comcast provides a minimum of seven (7) days' notice for On-Net Service impacting planned maintenance. Emergency maintenance is performed as needed without advance notice to Customer. Maintenance for Off-Net Services shall be performed in accordance with the applicable third party service provider rules. Therefore, Off-Net Service may be performed without advance notice to Customer.

3. Comcast provides certain Comcast Equipment for provisioning its services and the delivery of the UNI, which will reside on the Customer-side of the Demarcation Point. Comcast will retain ownership and management responsibility for this Comcast Equipment. This Comcast Equipment must only be used for delivering Services. Customers are required to shape their egress traffic to the Committed Information Rate ("CIR") identified in the Sales Order. Comcast will be excused from paying SLA credits if the Service Interruption is the result of Customer's failure to shape their traffic to the contracted CIR or utilizing Comcast Equipment for non-Comcast provided services.

**Performance Standards**

"Performance Standards" are set forth in Schedule A-1 to the Product-Specific Attachment for Ethernet Service.

**Response and Restoration Standards**

Comcast has the following response and restoration objectives:

CATEGORY	TIME INTERVAL	MEASUREMENT	REMEDIES
<i>Mean Time to Respond Telephonically to Call</i>	15 minutes	Averaged Over A Month	Escalation (see above)
<i>Mean Time to Restore On-Net Comcast Equipment</i>	4 hours	Averaged Over A Month	Escalation (see above)
<i>Mean Time to Restore Off-Net Equipment</i>	6 hours	Averaged Over A Month	Escalation (see above)
<i>Mean Time to Restore On-Net Services</i>	6 hours	Averaged Over A Month	Escalation (see above)
<i>Mean Time to Restore Off-Net Services</i>	9 hours	Averaged Over A Month	Escalation (see above)

## Attachment D (IV)

Customer shall bear any expense incurred, e.g., dispatch/labor costs, where a Service Interruption is found to be the fault of Customer, its end users, agents, representatives or third-party suppliers.

### Emergency Blocking

The parties agree that if either party hereto, in its reasonable sole discretion, determines that an emergency action is necessary to protect its own network, the party may, after engaging in reasonable and good faith efforts to notify the other party of the need to block, block any transmission path over its network by the other party where transmissions do not meet material standard industry requirements. The parties further agree that none of their respective obligations to one another under the Agreement will be affected by any such blockage except that the party affected by such blockage will be relieved of all obligations to make payments for charges relating to the circuit(s) which is so blocked and that no party will have any obligation to the other party for any claim, judgment or liability resulting from such blockage.

### Remedy Processes

All claims and rights arising under this Service Level Agreement must be exercised by Customer in writing within thirty (30) days of the event that gave rise to the claim or right. The Customer must submit the following information to the Customer's Comcast account representative with any and all claims for credit allowances: (a) Organization name; (b) Customer account number; and (c) basis of credit allowance claim (including date and time, if applicable). Comcast will acknowledge and review all claims promptly and will inform the Customer by electronic mail or other correspondence whether a credit allowance will be issued or the claim rejected, with the reasons specified for the rejection.

### Exceptions to Credit Allowances

A Service Interruption shall not qualify for the remedies set forth herein if such Service Interruption is related to, associated with, or caused by: scheduled maintenance events; Customer actions or inactions; Customer-provided power or equipment; any third party not contracted through Comcast, including, without limitation, Customer's users, third-party network providers, any power, equipment or services provided by third parties; or an event of force majeure as defined in the Agreement.

### Other Limitations

The remedies set forth in this Service Level Agreement shall be Customer's sole and exclusive remedies for any Service Interruption, outage, unavailability, delay, or other degradation, or any Comcast failure to meet the service objectives.

**COMCAST ENTERPRISE SERVICES  
PRODUCT-SPECIFIC ATTACHMENT  
ETHERNET TRANSPORT SERVICES**

**Attachment A-1.1  
PERFORMANCE OBJECTIVES  
COMCAST ETHERNET TRANSPORT SERVICES**

**Ethernet Transport Version 1.5**

Comcast Ethernet Transport Services are available both within and between major metropolitan areas throughout the United States. The performance objectives associated with traffic flows between any two customer sites are dependent upon the locations of respective A and Z sites.

**Access Types**

1. **On-Net Access.** If On-Net A and Z sites reside within the same Market, Performance Tier 1 objectives will apply. If the sites are in different markets, another Performance Tier will apply. Applicable Performance Tier will appear on/with respective Comcast Sales Order Form.
2. **Off-Net Access.** In addition to On-Net Access, Comcast enables Off-Net Access to Ethernet Transport Services via multiple third party providers. The Performance Tier for Off-Net Access is based upon the location of the Off-Net site, the location of the Network to Network Interface (NNI) between Comcast and the third party provider and the performance commitment from the third party provider. Comcast will specify applicable Performance Tier on the Comcast Sales Order Form for applicable Off-Net site. Standard Off-Net Access will have an assigned home market and will include the same performance metrics associated with On-Net connectivity within the respective market and between markets. Extended Off-Net Access provides customer with network connectivity, but at a higher performance Tier. Applicable Performance Tier will appear on/with respective Comcast Sales Order Form.

**Performance Tiers**

**1. Performance Measurement**

Comcast collects continuous in-band performance measurements for its Ethernet Transport Services. All latency, Jitter and Packet Loss Performance Metrics are based upon sample one-way measurements taken during a calendar month.

**2. Performance Tier 1 (PT1) Objectives – Within Market**

Performance Metric	Class of Service (CoS)		
	Basic	Priority	Premium
Latency (Network Delay)	45ms	23ms	12ms
Jitter (Network Delay Variation)	20ms	10ms	2ms
Packet Loss	<1%	<0.01%	<0.001%

## 3. Performance Tier 2 (PT2) Objectives

Performance Metric	Class of Service (CoS)		
	Basic	Priority	Premium
Latency (Network Delay)	80ms	45ms	23ms
Jitter (Network Delay Variation)	25ms	15ms	5ms
Packet Loss	<1%	<.02%	<.01%

## 4. Performance Tier 3 (PT3) Objectives

Performance Metric	Class of Service (CoS)		
	Basic	Priority	Premium
Latency (Network Delay)	100ms	80ms	45ms
Jitter (Network Delay Variation)	30ms	20ms	10ms
Packet Loss	<1%	<.04%	<.02%

## 5. Performance Tier 4 (PT4) Objectives

Performance Metric	Class of Service (CoS)		
	Basic	Priority	Premium
Latency (Network Delay)	120ms	100ms	80ms
Jitter (Network Delay Variation)	35ms	25ms	15ms
Packet Loss	<1%	<.05%	<.04%

**(COMCAST LETTERHEAD)  
SIDE LETTER MACC RENEWAL**

July 1, 2015

Metropolitan Area Communications Commission  
15201 NW Greenbrier Parkway, C-1  
Beaverton, OR 97006

Dear \_\_\_\_\_:

The purpose of this letter agreement is to set forth commitments between Comcast of Oregon II, Inc. ("Comcast") and the communities participating in the Metropolitan Area Communications Commission ("Commission") that are in addition to the obligations contained in the Cable Television Franchise Agreement between Comcast and the Commission to take effect on July 1, 2015 (hereinafter the "Franchise"). These items set forth herein: 1) have been negotiated in good faith and mutually agreed to by the parties as part of the informal franchise renewal process pursuant to 47 U.S.C. 546(h); 2) are provided by Comcast in consideration of the grant of the Franchise by the Commission; and 3) specifically relate to unique community needs that exist in the communities participating in the Commission.

**CAN and PCC** If Comcast discontinues carriage of CAN channel 27 or PCC channel 11 on all of Comcast's cable systems located in the Portland Oregon Designated Market Area, Comcast may also discontinue carriage of these channels on the cable system in the Franchise Area, as the term Franchise Area is defined in the Franchise.

**PEG Capital Funds** Under Section 13 of the Franchise, Comcast is required to provide support for the capital requirements for PEG access and the institutional network activities of the Commission and its member communities under Section 12 of the Franchise. These activities under the prior franchise included uses of the Public Communications Network ("PCN") by certain identified communities. Without determining whether these uses constitute "capital" or "operating" expenditures for Franchise compliance purposes, and subject to the indemnity provisions of the Franchise, Comcast agrees to not pursue any action against the Commission or its member communities asserting that Commission expenditures for these identified uses violate Sections 13.1 and 13.3 of the Franchise to the extent such uses are consistent with Commission and individual community practices as of the effective date of the Franchise.

**MOU Superseded** Comcast and the Commission entered into a Memorandum of Understanding dated February 12, 2003 ("MOU") that sets forth additional terms and condition for the PCN, including the provision, without cost, of certain fiber optic links. Because the PCN has been replaced with a Managed Service Agreement ("MSA") under Section 12 of the Franchise, Comcast and the Commission agree that the Franchise supersedes the terms and conditions of the MOU and that the parties' rights and obligations under the MOU will end on the effective date of the Franchise.

**Fiber Links** Comcast agrees to continue providing the current two (2) fiber optic links to and from the Lake Oswego/MACC ISP (which ends at the Tigard Hub – 15245 SW 74th Avenue, Tigard, OR 97224) and the HIC/MACC ISP (which ends at the Beaverton Headend – 1750 NW 173rd Avenue, Beaverton, OR 97006) without charge for the term of the Franchise. For purposes of this section only, the term “without charge” also means that Comcast shall not offset, deduct or otherwise credit against any past, present or future franchise fee payments payable under the Franchise its costs in providing the two (2) fiber optic links described above. The Commission will pay for the remaining six (6) fiber optic links previously provided by Comcast under the MOU at the rates and according to the terms set forth in the MSA, which cost shall be equal to the Rate Card in Exhibit A to Attachment D of the Franchise and shall not exceed \$40,000 annually if these fibers are contracted for a five (5) year term for such links. If fewer than six (6) fiber links are required to interconnect due to design changes, the Commissions’ costs shall be reduced accordingly. In accordance with the terms of the previous paragraph on PEG capital funds, and subject to the indemnity provisions of the Franchise, Comcast will not pursue any action against the Commission or its member communities if PEG capital funds are used to pay for these fiber optic links.

The terms and conditions of this letter agreement are binding upon the Commission and its member communities and Comcast and their successors and assigns. Enforcement of the terms of this letter agreement shall be consistent with the enforcement procedures set forth in the Franchise.

**COMCAST OF OREGON II, INC.**

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

Its: \_\_\_\_\_

Acknowledged and agreed to this \_\_\_\_ day of \_\_\_\_\_, 2015.

**METROPOLITAN AREA COMMUNICATIONS COMMISSION**

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

Its: \_\_\_\_\_

# COMCAST CABLE TV FRANCHISE RECOMMENDATION TO THE CITY OF TIGARD

Prepared by the Metropolitan Area Communications Commission  
June 2015

On June 10, 2015, the Board of Commissioners of the Metropolitan Area Communications Commission (MACC) recommended, by a unanimous vote, that your City and the other fourteen MACC member jurisdictions grant Comcast of Oregon II, Inc. (Comcast) a 10-year renewal of the company's cable television franchise (see Exhibit A, MACC Recommending Resolution). A copy of the recommended franchise agreement and a Comparison of that agreement to the current Comcast franchise are enclosed with this report (see Exhibits B and C).

MACC staff and representatives of Comcast will be available at your meeting to answer any questions.

By the terms of the MACC Intergovernmental Agreement, to which your jurisdiction is a party, every affected MACC jurisdiction must adopt the franchise, as recommended, to renew the Comcast franchise – if one jurisdiction votes no, it vetoes the franchise for the others.

**The Recommended Agreement** – The recommended ten year franchise agreement retains the important financial, service and regulatory benefits that the member jurisdictions have relied on for the past 17 years of the existing franchise. It also includes technology updates for Tualatin Valley Community Televisions (TVCTV) programming such as high-definition equipment and transmission, as well as lower and guaranteed costs for the our jurisdictions' use of broadband network services provided by the Public Communication Network (PCN). The franchise is structured to make it comparable to the 2007 Frontier Franchise where applicable to maintain level playing field conditions, including updated customer services requirements.

## **BACKGROUND**

The City has been served by Comcast since 2002 under a franchise originally granted to AT&T Broadband in 1999. That franchise expired in 2014, but has been extended by action of MACC and the member jurisdictions twice.

Federal law (47 USC §546) sets out a three-year structure for (1) determining the area's cable related needs and interests (the "Needs Assessment") and (2) negotiating a renewed cable franchise. In the Spring of 2011, MACC, on behalf of its fifteen member jurisdictions, began a process to renew the cable television franchise of Comcast's local franchise holder, Comcast of Tualatin Valley, Inc. Federal law provides for a cable operator's continued use of the right of way as long as it meets certain requirements.<sup>1</sup>

Negotiations began in February 2013 and concluded on May 29, 2015.

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<sup>1</sup> 47 USC §546

## Highlights of the Franchise

Term. The recommended Franchise Agreement will run ten years, from July 1, 2015 through June 30, 2025. The current Comcast franchise will remain in effect as necessary through the franchise adoption process.

Gross Revenue Definition. The Gross Revenue definition is used to determine the basis on which a five percent Franchise Fee is paid. (Five percent is the maximum allowed under federal law.) The franchise definition is **substantively unchanged** from the current Comcast franchise. Comcast will continue to pay on each of the revenue streams the company receives from the use of its Cable System – except for the revenue gained from Comcast’s Institutional Network (PCN) services (see *Institutional Network* below). This revenue will no longer be included as part of the company’s “Gross Revenue.” The result is an approximate 1.5% reduction in revenue, based on 2014 revenue.

Competition. The Comcast franchise was negotiated to maintain a level playing field environment for the increasingly competitive cable television market. The Verizon cable franchise (which was purchased by **Frontier Communications**, provides cable service in eleven member jurisdictions) was granted in 2007. The recommended Comcast franchise includes Frontier’s updated customer service standards and other provisions to ensure the companies are operating under the same regulatory environment as much as possible. In addition, the franchise has a provision that allows for possible amendments should new technology or a new regulatory environment present itself. See the Franchise Comparison for more details.

PEG Access. All key PEG commitments are continued or improved in the recommended Franchise Agreement. MACC will continue to provide Public and Government Access, including the city and county meeting coverage provided by TVCTV. One **High Definition (HD) PEG channel** will be added to the Comcast channel lineup beginning this Fall. Additional HD PEG channels will continue to be added until all channels are in HD (at the time when all Basic channels are carried in HD). **Standard Definition (SD) channels** will continue to be simultaneously carried (until SD is no longer available) to ensure all subscribers have access to this programming.

Institutional Network (PCN). The PCN, MACC and Comcast’s public data network, is the largest single change in the new Franchise Agreement. The Franchise provides Comcast with the ability to provide these **services through an Affiliate** (Metro-E). This change allows Comcast to have more individualized business-based relationships with the 20 jurisdictional and special district PCN customers. In return, PCN customers will have access to **significantly lower (averaging 25%) and steady (rates will no longer be subject to annual increases) costs**, as well as more options for levels of service.

PEG/PCN Fund. MACC currently receives \$1.00 per subscriber per month from Comcast (a cost the company passes on to its subscribers), adding up to about \$1,200,000 per year. This revenue supports PEG Access equipment needs and the operational and equipment expenses of PCN users. The new franchise agreement decreases the fee, and thus subscriber’s cost, from \$1.00 per month to 80¢ per month. However, MACC’s net revenue is offset through the addition

of approximately 25,000 Comcast subscribers in West Linn and portions of unincorporated Washington County – a result of uniting three separate Comcast franchises currently administered by MACC into this new Comcast franchise.\*

MACC staff is comfortable that this Fund will continue to provide for a viable and strong PEG program and all of the critical support PCN Users have come to rely on for the last 17 years.

Customer Service. MACC was successful in establishing **standard Customer Service requirements** for all cable operators in the MACC jurisdictions, including:

- Telephone Availability requirements;
- Installation and Service requirements;
- Billing requirements and outage credits;
- Customer Complaint procedures;
- Notices to customers for channel lineup and rate changes; and
- Dozens of additional reliability, notice and information requirements.

Franchise Violations and Remedies. The Commission's ability to levy fines against Comcast is **capped** in this Franchise Agreement, at \$75,000 per year, comparable to the level in the Frontier franchise. The Commission has not levied fines against Comcast that exceed this amount for more than ten years.

## **PUBLIC COMMENT**

MACC advertised the Commission meeting and solicited public comments in local area newspapers, as well as on the [maccor.org](http://maccor.org) website in March and June.

## **CONCLUSION**

Your MACC representative, along with the other MACC Commissioners, has recommended the Comcast Franchise Agreement as an excellent agreement that will serve the interests of cable subscribers for the next ten years. This recommended Franchise Agreement retains the basic elements and long-term benefits of the cable television franchises on which the Member Jurisdictions have come to rely — financial stability, the ability to meaningfully respond to customer service deficiencies, superior PEG Access programming and support, and the guarantee of an institutional network that meets the current and future needs of the area at a reduced cost for users.

A reminder: All 15 MACC Jurisdictions must approve the Franchise Agreement for it to become effective.

Attachment: Exhibit A – MACC Recommending Resolution 2015-05  
Exhibit B – Recommended Comcast Franchise Agreement  
Exhibit C – Comparison of the 1999 franchise to the 2015 franchise  
Exhibit D – MACC Questions & Answers about the Recommended Franchise

\* Note that similar PEG/PCN Fund provisions of the West Linn and a second unincorporated Washington County franchise expired along with those franchise requirements from 2005 through 2007, and will now be reinstated at this lower amount. MACC will respond to any customer inquiries.

**METROPOLITAN AREA COMMUNICATIONS COMMISSION**

**RESOLUTION 2015-05**

**A RESOLUTION RECOMMENDING THE MEMBER JURISDICTIONS OF THE METROPOLITAN AREA COMMUNICATIONS COMMISSION GRANT COMCAST OF OREGON II, INC. A CABLE SERVICES FRANCHISE**

**WHEREAS**, in 1980 the Metropolitan Area Communications Commission (hereinafter MACC) was formed by Intergovernmental Cooperation Agreement, amended in 2002 and now an Intergovernmental Agreement (hereinafter IGA) to work cooperatively and jointly on communications issues, in particular the franchising of cable services and the common administration and regulation of such franchises;

**WHEREAS**, today the member jurisdictions of MACC consist of Washington County and the cities of Banks, Beaverton, Cornelius, Durham, Forest Grove, Gaston, Hillsboro, King City, Lake Oswego, North Plains, Rivergrove, Tigard, Tualatin, and West Linn;

**WHEREAS**, the IGA authorizes MACC and its jurisdictions to grant one or more nonexclusive franchises to construct, operate, and maintain a cable system within the combined boundaries of the member jurisdictions;

**WHEREAS**, the IGA requires that each member jurisdiction formally approve any joint cable services franchise agreements, or any amendment or renewal of such agreements;

**WHEREAS**, MACC and/or its member jurisdictions have previously granted cable franchises to TCI Cablevision of the Tualatin Valley, Inc., in 1999, and to TCI Cablevision of Oregon, Inc. in 1995 (to serve West Linn and a portion of Washington County) and those franchises are now held by Comcast of Tualatin Valley, or Comcast of Oregon II, Inc., the grantee's lawful successors in interest;

**WHEREAS**, on March 9, 2011, Comcast requested that its franchise agreement with MACC and its member jurisdictions be renewed;

**WHEREAS**, staff began holding informal negotiations sessions with Comcast in February 2013;

**WHEREAS**, the Commission, at its December 11, 2013 meeting, ratified the Executive Committee's action of November 22, 2013, directing staff to initiate the Formal Renewal Process as set out in Section 626 of the Cable Act on behalf of the Commission;

**WHEREAS**, while the Formal Renewal Process moved forward, MACC met informally with representatives of Comcast to resolve outstanding differences in the terms of a renewed

franchise, which meetings have resulted in a proposed cable services franchise acceptable to MACC and Comcast; and,

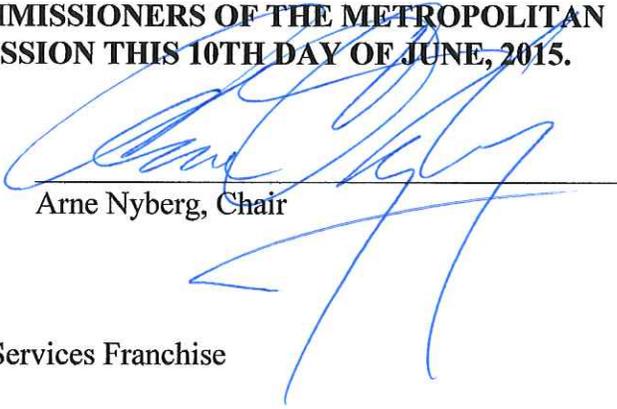
**WHEREAS**, MACC has provided adequate notice and opportunities for public comment on the proposed new cable services franchise including public hearings held on March 18, 2015 and June 10, 2015; and,

**WHEREAS**, the MACC Board of Commissioners finds the proposed new cable franchise reflects the cable-related community needs of the member jurisdictions, and that Comcast has the legal, technical, and financial qualifications to own and operate the proposed cable services system, and therefore recommends to its member jurisdictions that they grant the franchise to Comcast of Oregon II, Inc;

**NOW, THEREFORE BE IT RESOLVED BY THE BOARD OF COMMISSIONERS OF THE METROPOLITAN AREA COMMUNICATIONS COMMISSION THAT:**

1. MACC recommends to its member jurisdictions that they grant Comcast a cable services franchise substantially in the form attached hereto as Exhibit A (“Franchise”).
2. In accordance with the requirements of the IGA, the member jurisdictions’ grant of the Franchise shall be contingent on the affirmative vote of each member jurisdiction’s governing body.
3. The MACC Administrator is hereby authorized to execute the Franchise on behalf of the member jurisdictions only after MACC staff’s determination that Comcast has fulfilled the Franchise acceptance provisions contained in the Franchise and that each member jurisdiction has approved the Franchise.
4. This resolution shall be effective from and after its adoption.

**ADOPTED BY THE BOARD OF COMMISSIONERS OF THE METROPOLITAN AREA COMMUNICATIONS COMMISSION THIS 10TH DAY OF JUNE, 2015.**

  
\_\_\_\_\_  
Arne Nyberg, Chair

Attachment: Exhibit A - Comcast Cable Services Franchise

**Comcast Cable Franchise  
Questions and Answers**  
Prepared by MACC  
July 2015

**Q1: What is MACC?**

A: Your jurisdiction is a member of the Metropolitan Area Communications Commission – a fifteen member joint powers organization. MACC was created in 1980 to provide a centralized agency to prepare for, negotiate and administer cable television franchises. On behalf of the member jurisdictions, in accordance with its Intergovernmental Agreement (IGA), MACC provides the daily management of the area’s cable franchises (Comcast and Frontier), including:

- Finance - Franchise fee collection, audits, insurance and bonds
- Centralized Customer Service Regulation – all complaint calls should come to MACC
- TVCTV’s Public and Government Access programming services – a division of MACC
- General administration and compliance with Federal cable television franchising rules
- Coordination of the Public Communications Network (PCN)

**Q2: How does MACC operate?**

A: Each member jurisdiction is an equal partner in MACC. Jurisdictions appoint a MACC Commissioner who participates, reviews and recommends new and renewed cable television franchises along with other administrative chores. When MACC recommends a cable franchise, the MACC IGA requires that every member jurisdiction approve the franchise in order to make it effective. Each MACC jurisdiction, from the smallest (Gaston) to the largest (Washington County) has one vote.

**Q3: How are cable television franchise negotiations different than other negotiations?**

A: Incumbent Cable Operators, such as Comcast, have the right to renew their franchise through negotiation. While there are certain limiting federal laws and requirements, a company already in the Right of Way has rights to continue service unless it has failed to perform, or it will not meet the demonstrated needs of the communities it serves.

Federal law provides a lengthy and somewhat costly three-year renewal window. By combining resources in MACC, the renewal process is more affordable and effective for the member jurisdictions. MACC began preparations for franchise negotiation in 2011 and began negotiations in 2013. Negotiations took 28 months to complete.

**Q4: What benefits does the Comcast franchise provide my jurisdiction?**

A: The primary benefits are financial, reduced-cost connectivity and customer service regulation:

- The 5% franchise fee paid by Comcast provides about \$6.5million to the member jurisdictions each year. The Franchise provides for continued fee review and audit functions by MACC.
- PCN service costs are reduced - small jurisdictions retain complimentary PCN connectivity.
- Public Meeting coverage through TVCTV is secured, and upgraded to High Definition (HD).
- The PEG/PCN Fee (currently \$1/month) is reduced to 80¢/month.
- Complementary TV service will still be provided to public buildings.

**Q5: What is non-negotiable in a cable television franchise?**

A: Federal Law restricts local governments from negotiating:

- Rates for service or equipment.
- Programming – either including or excluding any particular channel.
- The type of technology a cable operator uses to transmit its signals.
- Franchise provisions re: Comcast’s Internet services.
- And, the amount of the franchise fee is capped under the Cable Act at 5% of Gross Revenue.

**Q6: How does this franchise address competition issues?**

A: In every way possible, Comcast and MACC tried to ensure a level playing field in the recommended franchise. Cable television is an increasingly competitive environment, with new options and providers every day. Since the law is moving slower than the technology, cable companies, including Comcast, are insisting on a process to address unknown competitive situations.

This was one of the most difficult areas to resolve in negotiations. However, MACC has negotiated a limited commitment that addresses Comcast’s concerns without undermining the rights and authority of the member jurisdictions.

**Q6: When will the new Franchise be effective?**

A: Once MACC certifies that all 15 MACC jurisdictions have approved the new Comcast Agreement, probably in early September, the new Comcast Franchise will be retroactively effective back to July 1, 2015

For additional questions about the renewal process, contact **Fred Christ**, MACC Administrator at **503-645-7365 x206** or at [fchrist@maccor.org](mailto:fchrist@maccor.org). MACC’s website is at: [www.maccor.org](http://www.maccor.org)

COMCAST CURRENT and PROPOSED FRANCHISE COMPARISON  
Metropolitan Area Communications Commission  
June 10, 2015

FRANCHISE PROVISION	Today's COMCAST	§	July 2015 COMCAST	§
<b>Term</b>	15 years (the standard in 1999)	2.3	10 years (current national standard)	2.3
<b>ROW AUTHORITY</b>				
<b>Police Powers and Right of Way Use</b>	Comcast must abide by all generally applicable Codes in each member jurisdiction.	2 & 10	No change.	2 & 10
<b>Competition</b>	Competitor's franchise must be "reasonably comparable...in order that one operator not be granted an unfair competitive advantage...". MACC makes that determination, which may be adjudicated.	2.6	<p><b>If</b> competitor's franchise has terms that are perceived to be less demanding on these points:</p> <ul style="list-style-type: none"> <li>• 5% franchise fee</li> <li>• PEG funding</li> <li>• PEG channels</li> <li>• Customer Service standards</li> <li>• Complimentary services</li> </ul> <p><b>Then</b>, this process could be initiated by Comcast: (1) discussion with MACC to mitigate the Comcast franchise, and then, if not resolved, (2) court review, or (3) a reduction in the franchise term to not more than 30 months.</p> <p>Step 3 would result in a new negotiated franchise through the renewal procedures of the Cable Act.</p> <p><u>Only applies to the specific jurisdiction(s)</u> where a competitor's franchise is granted and challenged by Comcast.</p>	2.6

<b>FRANCHISE PROVISION</b>	<b>Today's COMCAST</b>	<b>§</b>	<b>July 2015 COMCAST</b>	<b>§</b>
<b>FINANCE</b>				
<b>Franchise fees</b>	5% of gross revenues	3.1	No change	3.1
<b>Gross Revenue Definition</b>	<p>Among the most aggressive Gross Revenue definitions in the country.</p> <p>MACC collected approximately \$6.6M in CY 2014</p>	1.18	<p>MACC retained its broad definition of Gross Revenue – the application of a 5% fee on all revenue attributable to Cable Services. Still better standard than most franchises and all area franchises.</p> <p>If the revenue base is the same, MACC collections in CY2015 would be: \$6.5M, a 1.5% drop. (No longer includes PCN revenue due to changes in PCN management.)</p>	1.24
<b>Audit authority</b>	<p>Authority to audit once each 12 months;</p> <p>If franchise fees are underpaid by 3% or more, Comcast pays the total cost of the audit</p>	3.6	<p>Retained all data submission requirements.</p> <p>No changes in the timing of, or the way MACC conducts audits.</p> <p>If underpaid 4% or more, company pays the total cost of the audit up to \$15,000. Comparable to Frontier.</p>	3.6
<b>Insurance Limits</b>	<p>General Liability: \$2 million            Broadcasters Liab: \$1 million            Auto BI/PD: \$2 million            Employers Liab: \$2 million</p>	5.1	<p>General Liability: \$3 million            Broadcasters Liab: \$1 million            Auto BI/PD: \$2 million            Employers Liab: \$2 million</p>	5.1

FRANCHISE PROVISION	Today's COMCAST	§	July 2015 COMCAST	§
<b>PEG PROGRAMMING</b>				
<b>PEG Channels</b>	6 channels required in MACC/Washington County franchises; 5 channels in West Linn franchise. There is potential for additional channels. MACC programs 4 Public & Government Channels.	9	5 channels required, but no change in current usage  A side agreement provides the potential to discontinue the CAN (11) and PCC (27) channels if all other metro areas systems do so. Public and Government channels are guaranteed.	9.2
<b>PEG/PCN Fee</b>	\$1.00 per subscriber /month  Requires a Competitive Grant Process.	9.7	Although the per subscriber fee, falls to \$0.80 per month, there is no reduction on the PEG/PCN Fund: Combining the three franchises requires Comcast to provide funding based on an additional 25,000 subscribers.  Commission will allocate funding following a review of current PEG/PCN Fund Policy early next Fiscal Year.	13
<b>HD Channels</b>	No HD channels	n/a	3 new HD channels implemented over 4 years.	9.4
<b>PEG Origination Points</b>	Seven Activated Origination Points	9.5	Eighteen Activated Origination Points – new sites for council meetings and other programming direct from jurisdiction sites.  Includes new Cornelius & Tualatin City Hall locations.	9.8

FRANCHISE PROVISION	Today's COMCAST	§	July 2015 COMCAST	§
<b>CUSTOMER SERVICE</b>	1999 standard Customer Service Requirements.	6	Comcast will abide by the Frontier customer service model, unifying the standards that apply to all cable operators in the MACC area.	Attc. A
<b>Telephone Answering</b>	90% of the calls answered within 30 seconds	6.3	No change	Attc. A-2
<b>Local office</b>	One center conveniently located in the franchise area to provide pick up/drop off equipment, bill payment, and complaints	6.2	No local office requirement, which matches Frontier requirement to pick up or drop off equipment free of charge (using Comcast representative home visit, prepaid mailer, or establishing a local business office). Note that Comcast, however, is opening additional offices in the MACC area.	Attc. A-6
<b>Fines</b>	<u>Telephone answering:</u> Failure to meet standard – \$10,000 first violation; \$20,000 2 <sup>nd</sup> violation; \$30,000 3 <sup>rd</sup> violation  Other Violations: \$250/day  No cap on total fines.	15	No change in current fine schedule, but now capped and proportional to Frontier's franchise – at \$75,000/year.	15

FRANCHISE PROVISION	Today's COMCAST	§	July 2015 COMCAST	§
<p><b>Institutional Network (PCN)</b></p>	<p>Upgrade of existing network, run by Comcast Cable with protections and services guaranteed by the MACC Franchise.</p> <p>Rates rise 3.5% per year.</p> <p>Current rates: \$250 - \$1150/mo.</p>	<p>11.2</p>	<p>Comcast is required by the Franchise to maintain and provide PCN network services. Most standards provided for in individual customer agreements.</p> <p>Rates guaranteed for 10 years:</p> <p>New rates: \$90 - \$850/month</p> <p>Approximately 25% or greater cost savings to member jurisdictions.</p> <p>Network-wide jurisdiction savings of \$150,000 - \$250,000 per year.</p>	<p>12 &amp; Attc. D</p>

AIS-2267

5.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 50 Minutes

**Agenda Title:** Appeal of Heritage Crossing Zone Change and Subdivision (ZON2015-00002 et. al.)

**Submitted By:** John Floyd, Community Development

**Item Type:** Public Hearing - Quasi-Judicial      **Meeting Type:** Council Business Meeting  
- Main

**Public Hearing:** Yes

**Publication Date:**

**Information**

**ISSUE**

Shall Council overturn the Planning Commission decision to deny the Heritage Crossing Zoning Map Amendment and Subdivision application?

**STAFF RECOMMENDATION / ACTION REQUEST**

Staff recommends Council uphold the Planning Commission denial of the Heritage Crossing Zoning Map Amendment and Subdivision application (ZON2015-00002, SUB2015-00001, VAR2015-00001), based on the facts, findings and conclusions contained in the final order dated May 28, 2015; and as determined through the public hearing process.

**KEY FACTS AND INFORMATION SUMMARY**

On May 18, the Tigard Planning Commission denied a request for a zoning map amendment and subdivision of approximately 9.10 acres of land at 15435 SW Hall Boulevard, commonly known as one of the Schmidt Farm properties. The requested map amendment would remove the existing R-12 zoning designation from this property, and replace it with with an R-7 designation. Both zones are considered "medium-density residential," but differ in allowed densities and housing types. The effect of the change would be to increase the minimum square footage per lot, and prohibit or restrict multi-family and attached housing on the site. Because the requested change in zoning does not require a change in the underlying Comprehensive Plan Map designation of "Medium Density Residential," the application is quasi-judicial in nature and must be decided within 120 days of the application being being deemed complete by the City.

The applicant has submitted a letter dated June 15, 2015 which details why they believe the Planning Commission erred in denying their project, and requests that Council reverse the decision. As the appeal body, Council must decide whether to uphold the Planning Commission's decision, or find that the Planning Commission erred and reverse the decision.

The central issue for Council is whether or not the application meets the approval criteria for a quasi-judicial zoning map amendment. In order to grant the appeal and approve the project, Council would have to determine that the application meets all three approval criteria for a quasi-judicial zone change (TDC18.380.030.B), not just one or two. To aid Council in its consideration of the appeal, staff has prepared the table below. The approval criteria are summarized in the left column. The right column summarizes the Planning Commissions findings for why the requested map amendment was denied.

<b>Approval Criteria for Map Amendment (TDC 18.380.030.B)</b>	<b>Planning Commission Findings</b>
Compliance with Comprehensive Plan policies	Insufficient evidence that the application complies with Comprehensive Plan policies pertaining to Land Use (Chapter 2), Environmental Quality (Chapter 6), Housing (Chapter 10), and Transportation (Chapter 12).
Compliance with the Tigard Development Code or other applicable code or ordinance;	Insufficient evidence that the application complies with Title 1 of the Urban Growth Management Functional Plan, which requires cities to maintain or increase housing capacity, particularly along Metro Designated Corridors such as Hall Boulevard.
Evidence of mistake or inconsistency in the zoning map, or evidence of change in the neighborhood or community	Insufficient evidence of substantial change in the neighborhood, or a mistake or inconsistency in the zoning map. There is a clear legislative record associated with the current zoning, which was applied in 1983 as part of the City's first State-acknowledged Comprehensive Plan, and the Planning Commission found no evidence of a mistake. On balance, the Planning Commission found there is more evidence of constancy over time than there is of change.

The Planning Commission considered both written and oral testimony prior to making their decision. Of most relevance to the denial is a letter from Metro, dated May 14, 2015. In the letter, Metro concurred with staff's recommendation for denial, citing the applicant's failure to demonstrate compliance with Title 1 (Section 3.07.120) of the Urban Growth Management Functional Plan. In particular, Metro noted that the application had not accounted for the loss of allowed housing types that would result by changing to a more restrictive zone. By focusing only on the net loss of units being lost as a result of the zone change, the application did not address impacts to the City's housing diversity, and the change would have more than "negligible effect" on the City's overall residential capacity when taking that into consideration. The Planning Commission also received testimony from the surrounding neighbors, both in support and opposition to the project, but in the end were not persuaded that the burden of proof had been made to support a zoning map amendment.

A copy of the Final Order of the Planning Commission is included with this AIS, accompanied by a copy of the appeal letter and a staff response to the appeal letter. A copy of the application and related record of the Planning Commission hearing is available electronically, on the City's website. As noted in the memorandum, staff recommends council uphold the Planning Commission denial in order to achieve development consistent with local and regional policies for infill development. These reasons include, but are not limited to the following:

- The map amendment would reduce the number of dwelling units on site from a high of 107 dwelling-units to a high of 56 dwelling-units.
- The map amendment would significantly reduce the amount of land available for attached housing. The City's 2013 Housing Strategies report found in general there is a need for less expensive ownership and rental units, that single-family attached is expected to meet 20% of the City's future housing need, and that attached housing types will become a higher proportion of housing in coming decades.
- The map amendment would be a less efficient use of land, as the site is one of the City's largest, least constrained, and best-served infill sites.
- The map amendment would potentially halve the number of households within close proximity to three schools.

- The map amendment would potentially halve the number of households adjacent to an existing bus stop, served by a significant bus line that is soon to be upgraded from 30 minute to 15 minute headways.
- The site is flat and rectangular in shape with existing street frontages, there is considerable flexibility in how the site could be designed to ensure compatibility with the neighbors.
- The Tigard Development Code anticipates and addresses potential compatibility issues between the residential zones through site and building design treatments. For example, new housing within Heritage Crossing would be required to maintain a 30 foot setback from the periphery of the project site (twice the normal setback distance).
- The applicant could address potential compatibility issues through flexible design strategies available to all residential development. These include lot size averaging, mixing the proposed housing types, and/or a Planned Development application to ensure development at the edge of the project site is more similar to existing development.

The final decision on the application, including any local appeals, must be made within 120 days of the application being deemed complete by the city, in accordance with Oregon Revised Statutes and the Tigard Community Development Code. The application was deemed complete on March 25, 2015, and, therefore, a decision must be made by July 23, 2015 unless the applicant grants an extension.

### **OTHER ALTERNATIVES**

Council could approve the project by directing staff to prepare findings of approval and associated conditions of approval necessary to implement the project in compliance with local, regional, state, and federal requirements.

### **COUNCIL GOALS, POLICIES, APPROVED MASTER PLANS**

N/A

### **DATES OF PREVIOUS COUNCIL CONSIDERATION**

N/A

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### **Attachments**

[Heritage Crossing - Planning Commission Final Order](#)

[Planning Commission Draft Minutes - May 18, 2015](#)

[Heritage Crossing - Appeal Letter](#)

[Staff Memorandum - Appeal Response](#)

[Link to Additional Materials](#)

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duplexes, at a minimum lot size of 10,000 square feet. Mobile home parks and subdivisions are also permitted outright. Some civic and institutional uses are also permitted conditionally.

**APPLICABLE  
REVIEW**

**CRITERIA:** Community Development Code Chapters 18.370.020.C.9, 18.380.030.C, and 18.430.040.A; and Metro Urban Growth Management Functional Plan Title 1

**SECTION II. PLANNING COMMISSION DECISION**

The Planning Commission finds the proposed application does not meet the applicable approval criteria of the Tigard Community Development Code. Therefore, the Planning Commission **DENIES** the requested Land Use Application.

**SECTION III. BACKGROUND INFORMATION**

**Site Description & Vicinity**

The project site is approximately 9.10 acres and rectangular in shape. A single-family home sits on the eastern edge of the site, with the remainder an undeveloped grass field. The site is relatively flat, with an 11-foot difference in elevation resulting from a gentle slope to the southeast. Vegetation on the site reflects the historical use of the property for hay production, with little tree cover and minimal landscaping around the existing home.

Natural resources on the site are limited to two palustrine emergent wetlands approximately 0.80 and 0.94 acres in size. According to the natural resource assessment submitted with the application, one wetland is hydrologically connected to Fanno Creek through a stormwater catch basin in the Hall Boulevard right of way. The other appears isolated due to upland conditions separating the two. Both are dominated by non-native plants. These wetlands are not classified as locally significant on Tigard's Wetland Inventory, and development within them does not require a sensitive lands permit from the City.

Adjacent development is predominantly single-family residential, built between 1985 and 1998, when this part of Tigard converted from forest and farmland to urban residential land uses. Zoning in the surrounding area is predominantly R-7 and R-12 with some R-4.5 to the southwest (see Attachment "A"). City records show a relatively consistent zoning for this site since annexation. Major dates are below:

- 1981 – Project site annexed into the City as part of the Durham Island Annexation and assigned an "R-5" zoning designation. See Council Resolution No. 81-93.
- 1983 – Zone change from R-5 to R-12 as part of the 1983 update of the City's Comprehensive Plan, Development Code, and Zoning Map. See Ordinance No. 83-52.

Primary road access is from Hall Boulevard, with approximately 550 feet of frontage along the eastern boundary. Hall Boulevard is a north-south arterial within the City under the jurisdiction of ODOT, and is also a Metro designated corridor on the Metro 2040 Growth Concept Map (see Attachment "B"). Neighborhood access is available from two local streets stubbed at the northern and western boundaries of the site.

Tri-Met bus line 76 serves the property, with a bus stop immediately adjacent to the project site at the intersection of Hall Boulevard and Ashford Street. The 76 line connects this property to major destinations in Washington County including the Beaverton Transit Center, Downtown Beaverton, the Washington Square Transit Center, the Hall/Nimbus station, the Tigard Transit Center, Bridgeport Village, and Legacy Meridian Park Hospital (see Attachment "C").

Non-residential land uses are also within close proximity of the project site. A neighborhood commercial center is located approximately 800 feet to the south, at the corner of Hall and Durham Street. Three school facilities (Tigard High School, Durham Elementary, and Templeton/Twality) are within 0.3 miles of

the project site and connected through contiguous sidewalk paths. Adjacent to Tigard High School and Durham Elementary is Cook Park, which at 79 acres, is the City's largest facility and the closest public park to the project site

**Proposal Description**

The applicant is requesting concurrent approval of a quasi-judicial zoning map amendment and a 53-lot subdivision for single-family homes. The zoning designation would change from R-12 to R-7; both are allowed under the existing Medium Density Residential Comprehensive Plan Designation, so the map change remains a quasi-judicial action by the Planning Commission. Existing street stubs would be extended into the site, and a new street entrance onto Hall Boulevard would be created. The project site represents the largest undeveloped lot within this zoning district, and approximately 27% of the available R-12 lands outside of the River Terrace area (2014 Buildable Lands Inventory).

The applicant is also requesting a special adjustment to street standards. The request is made to provide an alternate street section for the proposed local street extensions of SW Ashford Street and SW Applewood Avenue to match existing street sections to the north and west.

A comparison of the two zones, as applied to this project site, is below:

<b>DEVELOPMENT STANDARDS COMPARISON</b>			
<b>STANDARD</b>	<b>R-12 (existing)</b>		<b>R-7 (proposed)</b>
<b>Minimum Lot Size</b>	3,050 sq. ft. per unit		5,000 sq. ft. (Single Family) 10,000 sq. ft. (Duplex)
<b>Average Lot Width</b>	None		50 ft. (detached) 40 ft. (attached)
<b>Setbacks</b>	Multi-Family	Single-Family	
-Front Yard	20 ft.	15 ft.	15 ft.
-Garage	20 ft.	20 ft.	20 ft.
-Rear Yard	20 ft.	15 ft.	15 ft.
-Side Yard	10 ft.	5 ft.	5 ft.
-Side Facing Street	20 ft.	10 ft.	10 ft.
-Side or Rear Yard Abutting More Restrictive Zoning	30 ft.	30 ft.	30 ft.
<b>Maximum Height</b>	35 ft.		35 ft.
<b>Maximum Lot Coverage</b>	80%		80%
<b>Minimum Landscaping</b>	20%		20%

<b>DENSITY COMPARISON</b>			
<b>ZONE</b>	<b>R-12*</b>	<b>R-7**</b>	<b>R-7***</b>
<b>Proposed Density</b>	n/a	53	n/a
<b>Minimum Units</b>	80 (Single-Family) 86 (Multi-Family)	44	33
<b>Maximum Units</b>	101 (Single-Family) 107 (Multi-Family)	56	41

\* Estimated density based on 20 ft. right-of-way dedication for Hall Boulevard and formula set forth in TDC 18.715.020.A.3

\*\*Applicant's proposed calculations

\*\*\* Applicant's calculations corrected to include wetland removal from net buildable area, as discussed in findings pertaining to TDC section 18.715.020. Wetlands area not removed from the R-12 column as 18.715 allows density transfer in R-12 zone.

ALLOWED HOUSING TYPES		
	R-12	R-7
Single Unit – Detached	P	P
Single Unit – Attached	P	R <sup>9</sup> /C
Accessory Units	R	R
Duplexes	P	P
Multifamily	P	N
Manufactured	P	P

P=Permitted R=Restricted C=Conditional Use N=Not Permitted

<sup>9</sup>Permitted by right if no more than five units in a grouping; permitted conditionally if six or more units per grouping.

### **Staff Recommendation of Denial**

A staff recommendation for denial was presented because the application does not meet the approval criteria for a quasi-judicial zone change or maximum density standards in the R-7 zone.

- The applicant has not demonstrated compliance with all applicable Comprehensive Plan policies, particularly those pertaining to Chapter 2 (Land Use) and Chapter 10 (Housing);
- The applicant has not demonstrated compliance with all applicable implementing ordinances, in particular Title 1 of the Metro Urban Growth Management Functional Plan and maximum density standards set forth in TDC 18.715 (Density Calculations); and
- The applicant has not provided evidence of a change in the neighborhood or a mistake or inconsistency in the comprehensive plan or zoning map as applied to the project site.

Prior to and during application review, staff communicated concerns regarding the application on multiple occasions, including the following face-to-face meetings. At each of these meetings it was communicated that a recommendation of denial was likely.

- September 9, 2014: Pre-Application Conference with staff from Community Development and Public Works. Staff expressed concern regarding potential noncompliance with the Tigard Community Development Code, Tigard Comprehensive Plan, and the Metro Urban Growth Management Functional Plan. This concern was highlighted on Page 7 of the pre-application notes delivered at the meeting, included as Exhibit “D” of the applicant’s materials.
- November 5, 2014: Meeting between the applicant and staff from Community Development and the City Manager’s Office.
- March 31, 2015: Meeting between the applicant and staff from Community Development and Public Works.

## **SECTION IV. SUMMARY OF APPLICABLE CRITERIA**

The following summarizes the criteria applicable to this decision in the order in which they are addressed:

### **A. Applicable Development Standards**

- 18.370 Variances and Adjustments
- 18.380 Zoning Map and Text Amendments
- 18.430 Subdivisions
- 18.510 Residential Zoning Districts
- 18.705 Access, Egress and Circulation
- 18.715 Density Computations
- 18.725 Environmental Performance Standards
- 18.745 Landscaping and Screening
- 18.765 Off-Street Parking and Loading Requirements
- 18.775 Sensitive Lands
- 18.790 Urban Forestry Plan
- 18.795 Vision Clearance Areas
- 18.810 Street and Utility Improvement Standards

### **B. Impact Study**

## **SECTION V. APPLICABLE REVIEW CRITERIA AND FINDINGS**

### **TIGARD COMMUNITY DEVELOPMENT CODE**

#### **18.370: Variances and Adjustments**

##### **18.370.020 Adjustments**

#### **C. Special adjustments.**

9. **Adjustments for street improvement requirements (Chapter 18.810).** By means of a Type II procedure, as governed by Section 18.390.040, the director shall approve, approve with conditions, or deny a request for an adjustment to the street improvement requirements, based on findings that the following criterion is satisfied: Strict application of the standards will result in an unacceptably adverse impact on existing development, on the proposed development, or on natural features such as wetlands, bodies of water, significant habitat areas, steep slopes or existing mature trees. In approving an adjustment to the standards, the director shall determine that the potential adverse impacts exceed the public benefits of strict application of the standards.

Venture Properties is requesting a special adjustment to street standards. The request is made to provide an alternate street section for the proposed local street extensions of SW Ashford Street and SW Applewood Avenue to match existing street sections to the north and west. These streets were built as 32-foot curb-to-curb, with five foot curb-tight sidewalks, street trees on the outside of the sidewalks, and parking on one side of the street. Venture proposes to continue these street sections until they intersect with Schmidt Loop. Staff finds that a strict application of existing street standards would result in an awkward transition, could have potentially adverse consequences on users within the new and existing developments, and that strict application of the standards would not result in greater public benefits. This criterion is met.

Finding: Based on the analysis above, the Variances and Adjustments standards have been met.

#### **18.380: Zoning Map and Text Amendments**

## 18.380.030 Quasi-Judicial Amendments and Procedures to this Title and Map

**A. Quasi-judicial amendments. Quasi-judicial zoning map amendments shall be undertaken by means of a Type III-PC procedure, as governed by Section 18.390.050, using standards of approval contained in subsection D of this section. The approval authority shall be as follows:**

- 1. The commission shall decide zone change applications which do not involve comprehensive plan map amendments;**

The proposed zone change application to replace the R-12 zone with the R-7 zone does not involve a comprehensive plan map amendment, because the existing comprehensive plan designation of "Medium Density Residential" includes both the R-12 and R-7 zoning districts and would remain unchanged. Therefore, the Planning Commission shall make a decision on the proposed zone change application.

**C. Standards for making quasi-judicial decisions. A recommendation or a decision to approve, approve with conditions or to deny an application for a quasi-judicial amendment shall be based on all of the following standards:**

- 1. Demonstration of compliance with all applicable comprehensive plan policies and map designations.**

The proposed change in zoning from R-12 to R-7 is consistent with the Comprehensive Plan Map designation of "Medium Density Residential", but does not satisfy all applicable comprehensive plan policies. In particular, the proposal is inconsistent with Policies 2.1.2, 2.1.5, 2.1.14, 2.1.15, 6.1.3, 10.1.1, 10.1.2, 10.1.5, 10.2.5, 10.2.7, and 12.1.1 which are discussed in greater detail later in this report. This criterion is not met, and the proposal cannot be conditioned to satisfy this criterion.

- 2. Demonstration of compliance with all applicable standards of any provision of this code or other applicable implementing ordinance; and**

The proposed change in zoning does not satisfy all applicable standards of the Metro Urban Growth Management Functional Plan. Findings regarding this noncompliance are discussed later in this report. This criterion is not met, and cannot be conditioned to satisfy this criterion.

- 3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application.**

The application narrative states on page 16 that "the region has changed substantially since the R-12 zoning was first applied in 1983." The basis for this statement is that since 1983, adjacent lots have developed at R-7 levels, and that development consistent with the R-12 zone standards would be an "anomaly" and the present designation to be "spot zoning".

Staff finds that the applicant has not provided sufficient evidence of change in the neighborhood or community, nor has a mistake been identified that pertains directly to the project site. The evidence in the record demonstrates more consistency than change, as demonstrated in the following facts, which are discussed in greater detail below.

- The R-12 zoning designation was adopted and re-affirmed in multiple ordinances adopted by Council, including Ord. Nos. 83-24 and 83-52 as part of the adoption of the City's first state acknowledged comprehensive plan. There is no evidence of a mistake or inconsistency between the current zoning and that applied in 1983.
- The location criteria used to assign the R-12 density to this property in 1983 remain unchanged, and the current arrangement of land uses is neither an "anomaly" nor "spot zoning".
- The base zone lot sizes and development standards for medium density zones are substantially the same as adopted in 1983.

- The adopting maps of 1983 included a greater differential in density along the western boundary than exists today (R-7 existing versus R-4.5 in 1983), and despite a change in zoning along the northern and western boundaries, the average adjoining density has cumulatively increased on two sides. A copy of the zoning map adopted in Ordinance No. 83-52 is included as Attachment “D”.

The R-12 zoning was properly adopted and reaffirmed by Council in 1983, and the existing designation is not the result of a procedural or mapping error. The application for a zone change cannot be approved on the basis of a procedural or mapping error regarding the subject property.

The application does not support a finding of “spot zoning”. The Tigard Community Development Code does not define spot zoning, nor is it present in the relevant approval criteria. The term is generally used to describe the rezoning of a small lot or parcel of land to benefit a single owner, for a use incompatible with surrounding uses, and/or for a use not associated with the furthering of a public interest. The project site does not meet this description in that it is a large property approximately 80 times the size of adjacent lots, was zoned R-12 to further a public purpose, and whose R-12 designation continues to further the policies of the Tigard Comprehensive Plan, as demonstrated elsewhere in this report.

The current R-12 zoning was applied as part of the 1983 Comprehensive Plan Update that resulted in the adoption of the City’s first state acknowledged plan. This adoption process was finalized in City Ordinance No. 83-52 which formerly adopted the Comprehensive Plan Resource document (Volume 1); the Comprehensive Plan Findings, Policies, and Implementation Strategies document (Volume 2); and the Community Development Code and Zoning Map.

When Ordinance No. 83-52 was adopted, the project site and vicinity was largely undeveloped farm and forestland. Through citizen input and findings regarding the appropriate placement of density, zones capable of accommodating higher densities were placed along Hall Boulevard between Sattler Street and Durham Road. Key determinants in the R-12 designation were the presence of transit, adjacency to a minor arterial, the proximity of neighborhood commercial, and the relative lack of site constraints.

- The Resource Document adopted with the Comprehensive Plan documents Hall Boulevard’s status as a minor-arterial (page I-226), that Tri-Met Line 43 was an established route along this corridor (pages I-249 and I-250), and notes that “the Comprehensive Plan locates residential densities along, or in close proximity to, existing and potential transit corridors” (see Attachment “E”).
- Policy 8.2.2 in Volume 2 stated “The City shall encourage the expansion and use of public transit by: (a) locating land intensive uses in close proximity to transitways” (Attachment “E”).
- Policy 12.1.1 stated “The City shall provide for housing densities in accordance with: (a) the applicable plan policies [and] (b) the applicable locational criteria.” Included as Attachment “F”, the locational criteria for Medium Density Residential, and more specifically the assignment of a density range allowed within Medium Density Residential, were based on factors which have not changed since 1983. These include the following:
  - “The topography and natural features of the area and the degree of possible buffering from established low density residential areas.” [established as of 1983]
  - “The capacity of the services.”
  - “The distance from public transit.”
  - “The distance to neighborhood...commercial centers...”
  - “The distance from public open space”

These locational factors have not changed since 1983 as Hall Boulevard remains a state highway and local arterial. Tri-Met continues to operate a transit stop immediately adjacent to the project site, and a neighborhood commercial center and three school sites remain in walkable distance from the project site.

- Existing Comprehensive Plan Policies 2.1.5, 6.1.3, and 10.1.5 mirror the original locational criteria discussed above. There is no evidence of change in City policies regarding the placement of densities along transit corridors.

Applicable conditions in 1983 remain consistent and relevant today, as reflected in current Comprehensive Plan policies. Therefore, there is no evidence of change in locational criteria since the 1983 assignment of the R-12 density.

In 1983, the project site was designated R-12 as part of a continuous corridor along Hall Boulevard between Sattler and Durham Road. Lands to the west were designated R-4.5 due to the lower capacity of Sattler Road at that time. Two land use actions resulted in a change of zoning along the northern, western, and southern boundaries. These changes were made in response to changes to Sattler Road and problems with the R-12 zoning that have since been addressed.

	<b>1983</b>	<b>Existing</b>
<b>North</b>	R-12	R-7
<b>West</b>	R-4.5	R-7
<b>South</b>	R-12	R-7
<b>East</b>	R-7 / R-12	R-7 / R-12

In 1984, the property to the south was developed as part of the Hallberg (later renamed to Milmont Park) subdivision, approved under File S 5-84. At that time, Metro’s minimum density standards were not yet enacted and property owners could develop at significantly lower densities than allowed in the zone. It also appears that developers were having a hard time meeting setbacks for single-family homes in the R-12 zone, as the R-12 chapter had not yet been amended to differentiate between single-family and multi-family structures. At that time it appears to have been a practice of the City to change zoning designations to match actual development levels, as the final order states “Because it appears that the current proposal is close to meeting the R-7 zone standards, the Planning staff is requesting consideration of a zone change from R-12 to R-7”.

Given subsequent changes in the code to establish minimum density and facilitate single-family development through appropriate setback differentiation, the Tigard Community Development Code has been amended in a manner that would prohibit the downzoning of an R-12 zone based on the standards applicable in 1984.

In 1996, the properties to the North and West of the project site were rezoned from R-12 and R-4.5 into a uniform R-7 zoning designation (CPA960004/ZON 96-0003). Known as the Sattler Site, the final order was submitted as Exhibit “O” of the application. The change was predicated on two criterion and one additional important finding: evidence of a mistake in the record regarding the zoning designation, increased vehicular capacity on Sattler Road as a result of capital improvements, and an increase in density by one additional unit across the whole of the affected area. As a result, the cumulative density of housing adjacent to the project site was actually increased, and the scale of the density transition decreased as R-12 and R-7 are more similar than R-12 adjacent to R-4.5

Despite these changes in zoning, staff does not find a reason that R-12 adjacent to R-7 presents an inherent conflict or compatibility issue. Both zones are within the Comprehensive Plan Designation of Medium Density Residential. The application narrative states the R-12 zone is “no longer compatible with the surrounding community,” but provides no explanation or evidence regarding the nature of the compatibility issues. The Tigard Comprehensive Plan provides guidance on this issue by defining the term:

“Compatibility — The ability of adjacent and/or dissimilar land uses to coexist without aesthetic, environmental, and/or operational conflicts that would prevent persons to enjoy, occupy, or use their properties without interference. A variety of remedies to compatibility conflicts are normally provided in a jurisdiction’s land use program; including limited land use designation, buffering, screening, site and building design standards, transportation facility design, etc.”

The Tigard Community Development Code has required density transition standards since at least 1983 to facilitate orderly transition between densities and housing types. This includes the 30 foot setback from a less restrictive zone, then and now included in the R-12 and R-7 setback requirements, and TDC Chapter 18.720 (Design Compatibility Standards) where attached and multi-family housing is proposed.

As demonstrated in the evidence and analysis above, this criterion is not met and the application cannot be conditioned to meet this standard.

FINDING: Based on the analysis above, the approval criteria for a quasi-judicial zone change have not been met.

### **18.430: Subdivisions**

#### **18.430.040 Approval Criteria: Preliminary Plat**

**A. Approval criteria. The approval authority may approve, approve with conditions, or deny a preliminary plat based on the following approval criteria:**

- 1. The proposed preliminary plat complies with the applicable zoning ordinance and other applicable ordinances and regulations;**

The proposed plat is designed to meet R-7 standards. As discussed above in approval criteria for a zone change, the application has not satisfied the criterion for a quasi-judicial map amendment from R-12 to R-7. As discussed below in this report, the proposed subdivision exceeds maximum density allowed in this zone. Therefore, this criterion is not met.

- 2. The proposed plat name is not duplicative or otherwise satisfies the provisions of ORS Chapter 92;**

The name of “Heritage Crossing” has been reviewed and approved by the Washington County Surveyors office, as documented in Exhibit K. This criterion is met.

- 3. The streets and roads are laid out so as to conform to the plats of subdivisions and maps of major partitions already approved for adjoining property as to width, general direction and in all other respects unless the city determines it is in the public interest to modify the street or road pattern;**

As shown on the “Conceptual Future Street Connectivity Plan” in Exhibit A of the application materials, all existing roadway alignments and dedications are honored through Heritage Crossing. SW Ashford Street stubs into the west property line and has been extended along the existing line and grade. Similarly, SW Applewood Avenue stubs into the north property line and has been designed to extend into the site to match the existing line and grade. No changes to existing streets are proposed. This criterion is met.

- 4. An explanation has been provided for all common improvements.**

No common improvements are proposed except for public infrastructure. This criterion does not apply.

### **Chapter 18.510: Residential Zoning Districts**

#### **18.510.050 Development Standards**

**A. Compliance required. All development must comply with:**

- 1. All of the applicable development standards contained in the underlying zoning district, except where the applicant has obtained variances or adjustments in accordance with Chapters 18.370;**
- 2. All other applicable standards and requirements contained in this title.**

**B. Development standards. Development standards in residential zoning districts are contained in Table 18.510.2.**

The application proposes a single-family home subdivision intended to comply with standards applicable to the proposed R-7 zone, rather than the existing R-12 zone. The application provides a variety of lot sizes as permitted by the lot averaging provision of TDC 18.420.D, varying from 4,037 square feet to 9,129 square feet. The average lot size is 5,002 square feet which exceeds the minimum average lot size of 5,000 square feet. Only single-family detached homes are proposed, which is an allowed use in the R-7 zone per Table 18.510.1. The proposed setbacks match the R-7 standards as shown on the Building Setback Plan on

Sheet 4 the proposed plans. Average lot width does not apply when lot size averaging is used per DIR2013-00002. This criterion is met.

## **18.705: Access, Egress, and Circulation**

### **18.705.030 General Provisions**

#### **H. Access management.**

- 1. An access report shall be submitted with all new development proposals which verifies design of driveways and streets are safe by meeting adequate stacking needs, sight distance and deceleration standards as set by ODOT, Washington County, the City and AASHTO (depending on jurisdiction of facility).**

The applicant has submitted a Sight Distance Certification, dated January 7, 2015. Removal of vegetation is required to provide adequate site distance at the intersection of Ashford Street and Hall Boulevard.

The applicant shall provide intersection sight distance certification meeting ODOT standards.

The applicant has submitted a Traffic Impact Study prepared by Lancaster Engineering, dated January 7, 2015. The analysis was done for the proposed Heritage Crossing development located along the west side of Hall Boulevard and is proposed to provide 53 single family homes. Based on the analysis done by Lancaster the following is recommended:

- A northbound left-turn lane should be provided at the intersection of Ashford Street and Hall Boulevard.
- The existing access spacing between Ashford Street and Langtree on Hall Boulevard does not meet ODOT standards, however the spacing is adequate to accommodate left-turn movements.

Lancaster's analysis concludes that the proposed neighborhood development can occur while maintaining acceptable traffic operations and safety at the study intersections. The proposed zone change will result in a net reduction in site trips.

The applicant shall incorporate all of Lancaster's recommendations into their ODOT Permit application and City of Tigard PFI permit application for review and approval.

- 2. Driveways shall not be permitted to be placed in the influence area of collector or arterial street intersections. Influence area of intersections is that area where queues of traffic commonly form on approach to an intersection. The minimum driveway setback from a collector or arterial street intersection shall be 150 feet, measured from the right-of-way line of the intersecting street to the throat of the proposed driveway. The setback may be greater depending upon the influence area, as determined from City Engineer review of a traffic impact report submitted by the applicant's traffic engineer. In a case where a project has less than 150 feet of street frontage, the applicant must explore any option for shared access with the adjacent parcel. If shared access is not possible or practical, the driveway shall be placed as far from the intersection as possible.**

No driveways are proposed within 150 feet of SW Hall Boulevard. This criterion is met.

- 3. The minimum spacing of driveways and streets along a collector shall be 200 feet. The minimum spacing of driveways and streets along an arterial shall be 600 feet.**

Hall Boulevard is classified as an arterial street by Tigard. The proposed local street access of SW Ashford Lane is approximately 720 feet from the centerline of SW Sattler Street and 720 feet from SW Hamlet Street. The access is only 320 feet from SW Langtree Street on the east side of SW Hall Boulevard, but this is an existing access spacing established when SW Ashford Street and SW Langtree Street were constructed on the east side of SW Hall Boulevard. This criterion is met.

**4. The minimum spacing of local streets along a local street shall be 125 feet.**

All proposed local street intersections have a minimum separation of 125 feet curb to curb. This criterion is met.

**I. Minimum Access requirements for residential use.**

- 1. Vehicular access and egress for single-family...dwelling units on individual lots...shall not be less than as provided in Tables 18.705.1...**

Lots 14 and 15 have frontage on SW Hall Boulevard but take access from a 15 foot paved drive in a 20 foot wide access easement. This exceeds the standards of this section. Lots 4 and 30 are both flag lots; both flag poles have just over 15 feet of frontage on the public street, which meets this standard. However, the access widths stated in the response refer to partitions for two or less units. The application is for a subdivision and is addressed further below in 18.810.060.

- 2. Vehicular access to multifamily structures shall be brought to within 50 feet of the ground floor entrance or the ground floor landing of a stairway, ramp, or elevator leading to the dwelling units;**

The application does not propose a multi-family structure. This standard does not apply.

- 3. Private residential access drives shall be provided and maintained in accordance with the provisions of the Uniform Fire Code.**

Tualatin Valley Fire and Rescue has reviewed the project and in a letter dated April 23, 2015 endorsed the proposal predicated on conditions of approval set forth in the letter. Access drives shall be reviewed for conformance as part of normal building permit review.

- 4. Access drives in excess of 150 feet in length shall be provided with approved provisions for the turning around of fire apparatus by one of the following:**
  - a. A circular, paved surface having a minimum turn radius measured from center point to outside edge of 35 feet;**
  - b. A hammerhead-configured, paved surface with each leg of the hammerhead having a minimum depth of 40 feet and a minimum width of 20 feet;**
  - c. The maximum cross slope of a required turnaround is five percent.**

The only proposed access drive is 78 feet long. No access drives in excess of 150 feet are proposed. This criterion does not apply.

- 5. Vehicle turnouts, (providing a minimum total driveway width of 24 feet for a distance of at least 30 feet), may be required so as to reduce the need for excessive vehicular backing motions in situations where two vehicles traveling in opposite directions meet on driveways in excess of 200 feet in length.**

Lots 14 and 15 contain the only access drive which is only 78 feet in length. No turnouts are needed.

- 6. Where permitted, minimum width for driveway approaches to arterials or collector streets shall be no less than 20 feet so as to avoid traffic turning from the street having to wait for traffic exiting the site.**

No driveway access is proposed onto a collector or arterial street. Lots 14 through 21 will only have vehicle access from the local street to the west; this criterion does not apply.

## 18.715: Density Computations

### 18.715.020 Density Calculation

- A. Definition of net development area. Net development area, in acres, shall be determined by subtracting the following land area(s) from the total site acres:
1. All sensitive land areas:
    - a. Land within the 100-year floodplain,
    - b. Land or slopes exceeding 25%,
    - c. Drainage ways, and
    - d. Wetlands,
    - e. Optional: Significant tree groves or habitat areas, as designated on the City of Tigard “Significant Tree Grove Map” or “Significant Habitat Areas Map”;
  2. All land dedicated to the public for park purposes;
  3. All land dedicated for public rights-of-way. When actual information is not available, the following formulas may be used:
    - a. Single-family development: allocate 20% of gross acreage,
    - b. Multifamily development: allocate 15% of gross acreage or deduct the actual private drive area;
  4. All land proposed for private streets; and
  5. A lot of at least the size required by the applicable base zoning district, if an existing dwelling is to remain on the site.
- B. Calculating maximum number of residential units. To calculate the maximum number of residential units per net acre, divide the number of square feet in the net acres by the minimum number of square feet required for each lot in the applicable zoning district.
- C. Calculating minimum number of residential units. As required by Section 18.510.040, the minimum number of residential units per net acre shall be calculated by multiplying the maximum number of units determined in subsection B of this section by 80% (0.8).

The applicant’s narrative and associated plans (Sheet P03) do not address all of the sensitive land areas identified above. Specifically, 18.715.020.A.1 requires the applicant to subtract all sensitive land areas from the net development area, including all wetlands. As demonstrated on sheet P02 and CWS Service Provider letter 14-003153, there are two wetlands on the project site that total 75,894 square feet. Calculations provided in the application narrative address steep slopes (0 square feet) but do not include square footages for drainageways and wetlands.

	<b>Application Narrative</b>	<b>Revised Per Code</b>
<b>Gross Site Area</b>	396,523	396,523
<b>Right of Way Dedication</b>	-112,676	-112,676
<b>Wetlands</b>		-75,894
<b>Net Development Area</b>	283, 676	207,953
<b>Maximum Density</b>	56	41
<b>Minimum Density</b>	44	33

When wetland areas are subtracted from the net development area, the project exceeds maximum density by 12 units. This standard is not met.

### 18.715.030 Residential Density Transfer

#### A. Rules governing residential density transfer.

2. Wetlands. Units per acre calculated by subtracting land areas listed in 18.715.020.A.1.d from the gross acres may be transferred to the remaining buildable land areas on land zoned R-12, R-25, and R-40 subject to the following limitations:
  - a. The number of units which can be transferred is limited to the number of units which would have been allowed on the wetland area, if not for these regulations;

- b. The total number of units per site does not exceed the maximum number of units per gross acre permitted for the applicable comprehensive plan designation.**

The applicant does not request density transfer as they do not find the wetland areas to be applicable.

Staff notes that within the R-12 zone, up to 100% of the allowable density within the wetland area may be transferred to the remainder of the site. Because the application requests a change in zoning from R-12 to R-7, this density transfer provision is not available. This standard does not apply to the proposal.

### **18.745: Landscaping and Screening**

#### **18.745.040 Street Tree Standards**

**A. Street trees shall be required as part of the approval process for conditional use (Type III), downtown design review (Type II and III), minor land partition (Type II), planned development (Type III), site development review (Type II) and subdivision (Type II and III) permits.**

**B. The minimum number of required street trees shall be determined by dividing the linear amount of street frontage within or adjacent to the site (in feet) by 40 feet. When the result is a fraction, the minimum number of required street trees shall be determined by rounding to the nearest whole number.**

**C. Street trees required by this section shall be planted according to the street tree planting standards in the Urban Forestry Manual.**

**D. Street trees required by this section shall be provided adequate soil volumes according to the street tree soil volume standards in the Urban Forestry Manual.**

**E. Street trees required by this section shall be planted within the right-of-way whenever practicable according to the street tree planting standards in the Urban Forestry Manual. Street trees may be planted no more than six feet from the right-of-way according to the street tree planting standards in the Urban Forestry Manual when planting within the right-of-way is not practicable.**

**F. An existing tree may be used to meet the street tree standards provided that:**

- 1. The largest percentage of the tree trunk immediately above the trunk flare or root buttresses is either within the subject site or within the right-of-way immediately adjacent to the subject site;**
- 2. The tree would be permitted as a street tree according to the street tree planting and soil volume standards in the Urban Forestry Manual if it were newly planted; and**
- 3. The tree is shown as preserved in the tree preservation and removal site plan (per 18.790.030.A.2), tree canopy cover site plan (per 18.790.030.A.3) and supplemental report (per 18.790.030.A.4) of a concurrent urban forestry plan and is eligible for credit towards the effective tree canopy cover of the site.**

**G. In cases where it is not practicable to provide the minimum number of required street trees, the director may allow the applicant to remit payment into the urban forestry fund for tree planting and early establishment in an amount equivalent to the city's cost to plant and maintain a street tree for three years (per the street tree planting standards in the Urban Forestry Manual) for each tree below the minimum required.**

Street trees have been proposed as shown on Sheet 13. The project contains approximately 4,459 linear feet of street frontage. This would require a minimum of 111 street trees, and 93 street trees have been provided. The new Urban Forestry Plan requires street trees of a greater stature, and there is not room to provide the full 111 street trees per this code section. With the conflict in the standard, the more restrictive Urban Tree Code controls. Per Section 18.745.040.G, a fee-in-lieu will be required for the 18 trees that cannot fit on the property.

Street planting specifications have been outlined in the Supplemental Arborist Report. Soil volumes have been shown on the table of Sheet 14. Over 500 cubic yards of soil have been provided for all proposed trees and over 1,000 cubic yards have been provided for the one existing tree.

Through conditions of approval to ensure compliance with implementation standards, City street tree standards can be met.

## 18.745.050 Buffering and Screening

### A. General provisions.

1. It is the intent that these requirements shall provide for privacy and protection and reduce or eliminate the adverse impacts of visual or noise pollution at a development site, without unduly interfering with the view from neighboring properties or jeopardizing the safety of pedestrians and vehicles.
2. Buffering and screening is required to reduce the impacts on adjacent uses which are of a different type in accordance with the matrices in this chapter (Tables 18.745.1 and 18.745.2). The owner of each proposed development is responsible for the installation and effective maintenance of buffering and screening. When different uses would be abutting one another except for separation by a right-of-way, buffering, but not screening, shall be required as specified in the matrix.
3. In lieu of these standards, a detailed buffer area landscaping and screening plan may be submitted for the director's approval as an alternative to the buffer area landscaping and screening standards, provided it affords the same degree of buffering and screening as required by this code.

Per the Buffer Matrix, single-family detached development must provide a Type A buffer when adjacent to an arterial street. Lots 14 through 21 will be required to provide a ten foot buffer of lawn or living groundcover. The applicant proposes to provide this buffer within the 15 foot rear yard setback, which exceeds the minimum 10 foot rear yard buffer. This standard is met.

### B. Buffering and screening requirements.

1. A buffer consists of an area within a required setback adjacent to a property line and having a depth equal to the amount specified in the buffering and screening matrix and containing a length equal to the length of the property line of the abutting use or uses.
2. A buffer area may only be occupied by utilities, screening, sidewalks and bikeways, and landscaping. No buildings, accessways or parking areas shall be allowed in a buffer area except where an accessway has been approved by the city.
3. A fence, hedge or wall, or any combination of such elements, which are located in any yard is subject to the conditions and requirements of paragraph B.8 and subsection D of this section.
4. The minimum improvements within a buffer area shall consist of combinations for landscaping and screening as specified in Table 18.745.1. In addition, improvements shall meet the following specifications:
  - a. At least one row of trees shall be planted. Trees shall be chosen from any of the tree lists in the Urban Forestry Manual (except the nuisance tree list) unless otherwise approved by the director and have a minimum caliper of 1-1/2 inches for deciduous trees and a minimum height of six feet for evergreen trees at the time of planting. Spacing for trees shall be as follows:
    - i. Small stature or columnar trees shall be spaced no less than 15 feet on center and no greater than 20 feet on center.
    - ii. Medium stature trees shall be spaced no less than 20 feet on center and no greater than 30 feet on center.
    - iii. Large stature trees shall be spaced no less than 30 feet on center and no greater than 40 feet on center.
  - b. In addition, at least 10 five-gallon shrubs or 20 one-gallon shrubs shall be planted for each 1,000 square feet of required buffer area.
  - c. The remaining area shall be planted in lawn or other living ground cover.

### F. Buffer matrix.

1. The buffer matrices contained in Tables 18.745.1 and 18.745.2 shall be used in calculating widths of buffering/screening and required improvements to be installed between proposed uses and abutting uses or zoning districts.

Per the Buffer Matrix, single-family detached development must provide a Type A buffer when adjacent to an arterial street. Lots 14 through 21 will be required to provide a ten foot buffer of lawn or living groundcover. The applicant proposes to provide this buffer within the 15 foot rear yard setback, which exceeds the minimum 10 foot rear yard buffer. This standard is met.

### **18.765: Off-Street Parking and Loading Requirements**

#### **18.765.020 Applicability of Provisions**

**A. New construction. At the time of the erection of a new structure within any zoning district, off-street vehicle parking will be provided in accordance with Section 18.765.070.**

The application does not include building and parking designs for any of the newly created lots. Conformance with off-street parking and loading requirements will be determined at the time of building permit issuance when the new structures are erected.

FINDING: The standards of this chapter will be met through normal building permit review.

### **18.775: Sensitive Lands**

#### **18.775.020 Applicability of Uses—Permitted, Prohibited, and Nonconforming**

**A. CWS stormwater connection permit. All proposed development must obtain a stormwater connection permit from CWS pursuant to its design and construction standards.**

**D. Jurisdictional wetlands. Landform alterations or developments which are only within wetland areas that meet the jurisdictional requirements and permit criteria of the U.S. Army Corps of Engineers, Division of State Lands, CWS, and/or other federal, state, or regional agencies, and are not designated as significant wetlands on the City of Tigard “Wetland and Streams Corridors Map,” do not require a sensitive lands permit. The city shall require that all necessary permits from other agencies are obtained. All other applicable city requirements must be satisfied, including sensitive land permits for areas within the 100-year floodplain, slopes of 25% or greater or unstable ground, drainageways, and wetlands which are not under state or federal jurisdiction.**

Heritage Crossing contains two wetlands not on the Tigard Local Wetland Inventory, but subject to the jurisdictional requirements of federal, state, and regional agencies. The Applicant has applied for necessary state and federal permits to fill the wetlands and pay for off-site mitigation credits at a registered wetland bank.

In order to comply with this section, a condition of approval is recommended to require the submission of a copy of all applicable permits prior to any ground disturbance on the site.

As conditioned, this standard is met.

### **18.790: Urban Forestry Plan**

#### **18.790.030 Urban Forestry Plan Requirements**

**A. Urban forestry plan requirements. An urban forestry plan shall:**

- 1. Be coordinated and approved by a landscape architect (the project landscape architect) or a person that is both a certified arborist and tree risk assessor (the project arborist), except for minor land partitions that can demonstrate compliance with effective tree canopy cover and soil volume requirements by planting street trees in open soil volumes only;**
- 2. Meet the tree preservation and removal site plan standards in the Urban Forestry Manual;**
- 3. Meet the tree canopy site plan standards in the Urban Forestry Manual; and**
- 4. Meet the supplemental report standards in the Urban Forestry Manual.**

A certified arborist has prepared the Urban Forestry Plan for Heritage Crossing. Full findings of the tree

canopy standards, the tree preservation and removal standards, and the supplemental report standards have been provided on Sheets 13 and 14 of Exhibit A and in the Supplemental Arborist Report in Exhibit J of the application materials.

Additional conditions of approval are recommended to ensure the requirements of the Urban Forestry Plan are complied with during construction.

As conditioned, the requirements of Chapter 18.790 can be met.

### **18:795: Visual Clearance Areas**

#### **18.795.030 Visual Clearance Requirements**

**A. At corners.** Except within the CBD zoning district a visual clearance area shall be maintained on the corners of all property adjacent to the intersection of two streets, a street and a railroad, or a driveway providing access to a public or private street.

**B. Obstructions prohibited.** A clear vision area shall contain no vehicle, hedge, planting, fence, wall structure or temporary or permanent obstruction (except for an occasional utility pole or tree), exceeding three feet in height, measured from the top of the curb, or where no curb exists, from the street center line grade, except that trees exceeding this height may be located in this area, provided all branches below eight feet are removed.

#### **18.795.040 Computations**

**A. Arterial streets.** On all designated arterial streets the visual clearance area shall not be less than 35 feet on each side of the intersection.

**B. Non-arterial streets.**

1. **Non-arterial streets 24 feet or more in width.** At all intersections of two non-arterial streets, a non-arterial street and a driveway, and a non-arterial street or driveway and railroad where at least one of the streets or driveways is 24 feet or more in width, a visual clearance area shall be a triangle formed by the right-of-way or property lines along such lots and a straight line joining the right-of-way or property line at points which are 30 feet distance from the intersection of the right-of-way line and measured along such lines. See Figure 18.795.1.
2. **Non-arterial streets less than 24 feet in width.** At all intersections of two non-arterial streets, a non-arterial street and a driveway, and a non-arterial street or driveway and railroad where both streets and/or driveways are less than 24 feet in width, a visual clearance area shall be a triangle whose base extends 30 feet along the street right-of-way line in both directions from the centerline of the accessway at the front setback line of a single-family and two-family residence, and 30 feet back from the property line on all other types of uses.

Vision clearance triangles have been shown on the Preliminary Plat in Exhibit A, and will be verified at final plat and building permit submittal. SW Hall Boulevard is an arterial street and 35-foot vision clearance triangles will be required. All other proposed roads are local streets with a width of 28 feet except for SW Applewood Avenue between Schmidt Loop, which is 24 feet wide; 30 foot vision clearance triangles will be required for the local street intersections. This criterion will be met.

### **18.810: Street and Utility Improvement Standards**

#### **Improvements (Section 18.810.030)**

**Section 18.810.030.A.1 states no development shall occur unless the development has frontage or approved access to a public street.**

The Applicant states that Heritage Crossing has access to SW Applewood Avenue, SW Ashford Street, and SW Hall Boulevard.

**Section 18.810.030.A.2 states no development shall occur unless streets within the development meet the standards of this chapter.**

The Applicant states they meet this standard; however they have asked for an adjustment which is a Type 2 procedure to the cross section width and placement of sidewalks for the of Ashford Street and Applewood Avenue.

**Section 18.810.030.A.3 states no development shall occur unless the streets adjacent to the development meet the standards of this chapter, provided, however, that a development may be approved if the adjacent street does not meet the standards but half-street improvements meeting the standards of this title are constructed adjacent to the development.**

The Applicant states they will dedicate right of way and install an 8 foot sidewalk along Hall Boulevard frontage. It is yet to be determined that there is an adequate pavement section on SW Hall Boulevard that meets ODOT standards.

**Minimum Rights-of-Way and Street Widths: Section 18.810.030.E**

**Section 18.810.030.E states that unless otherwise indicated on an approved street plan, or as needed to continue an existing improved street or within the downtown district, street right-of-way and roadway widths shall not be less than the minimum width described below. Where a range is indicated, the width shall be determined by the decision-making authority based upon anticipated average daily traffic (ADT) on the new street segment. (The city council may adopt by resolution, design standards for street construction and other public improvements. The design standards will provide guidance for determining improvement requirements within the specified ranges.) These are presented in Table 18.810.1.**

The site is adjacent to Hall Boulevard, which is classified as an arterial. The Applicant has stated that the Hall Boulevard road section meets the ODOT standard, however half street improvements will be required to have a 36-foot paved width from centerline. Right of way dedication is 50 feet from centerline.

A 50-foot right-of-way and a 28-foot paved width are proposed for Schmidt Loop and Ashford Lane. Schmidt Loop's centerline radius is 59 feet; however the standard is a minimum of 166 feet. Eyebrows will be required at these four (4) curve locations on Schmidt Loop.

Parking is permitted if traffic volumes are less than 1,000 vpd.

A 46 foot right of way with a paved width of 24 feet and no parking is proposed for Applewood Lane. The maximum vehicles per day allowed for this configuration is 200 vpd. Lancaster's report does not address the number of vehicles projected for this section of the street; however it is the opinion of staff that given the short street length and the likelihood the vehicles using this length would be those who live on it then this narrowed section would be adequate.

Applewood Lane and Applewood Avenue show centerline radii as 59 feet however the standard is a minimum of 166 feet. The applicant has requested an adjustment to the local street standards for Ashford Street and Applewood Avenue. The adjustment would allow existing sidewalk adjacent to the curb to continue a short distance to Schmidt Loop.

The adjustment should be allowed.

**Future Street Plan and Extension of Streets:**

**Section 18.810.030.F states that a future street plan shall be filed which shows the pattern of existing and proposed future streets from the boundaries of the proposed land division. This section also states that where it is necessary to give access or permit a satisfactory future division of adjoining land, streets shall be extended to the boundary lines of the tract to be developed and a barricade shall be constructed at the end of the street. These street stubs to adjoining properties are not considered to be cul-de-sacs since they are intended to continue as through streets at such time as the adjoining property is developed. A barricade shall be constructed at the end of the street by the property owners which shall not be removed until authorized by the City Engineer, the cost of which shall be included in the street construction cost. Temporary hammerhead turnouts or temporary cul-de-sac bulbs shall be constructed for stub streets in excess of 150 feet in length.**

The applicant has provided a Future Street Plan showing the pattern of existing and planned future streets adjacent to and around the development. In addition to the connection to Hall Boulevard, Ashford Street will provide a connection to the west and Applewood Lane will provide a connection to the north.

### **Street Alignment and Connections (Section 18.810.030.H.1)**

Section 18.810.030.H.1 states that full street connections with spacing of no more than 530 feet between connections is required except where prevented by barriers such as topography, railroads, freeways, pre-existing developments, lease provisions, easements, covenants or other restrictions existing prior to May 1, 1995 which preclude street connections. A full street connection may also be exempted due to a regulated water feature if regulations would not permit construction.

Section 18.810.030.H.2 states that all local, neighborhood routes and collector streets which abut a development site shall be extended within the site to provide through circulation when not precluded by environmental or topographical constraints, existing development patterns or strict adherence to other standards in this code. A street connection or extension is precluded when it is not possible to redesign, or reconfigure the street pattern to provide required extensions. Land is considered topographically constrained if the slope is greater than 15% for a distance of 250 feet or more. In the case of environmental or topographical constraints, the mere presence of a constraint is not sufficient to show that a street connection is not possible. The applicant must show why the constraint precludes some reasonable street connection.

The proposed street plans in the development meet the spacing standard of no more than 530 feet between connections.

Ashford Street and Applewood Lane abut the site and will be extended through the site.

This criterion for connection and through circulation is met.

### **Grades and Curves (Section 18.810.030.N)**

Section 18.810.030.N states that grades shall not exceed ten percent on arterials, 12% on collector streets, or 12% on any other street (except that local or residential access streets may have segments with grades up to 15% for distances of no greater than 250 feet). Centerline radii of curves shall be as determined by the City Engineer.

The applicant states that the grades of the local streets proposed within the site do not exceed 3%, thereby meeting this criterion.

Centerline radii of SW Schmidt Loop do not meet this requirement. Washington County standard eyebrows may be used to meet standards.

### **Access to Arterials and Major Collectors (Section 18.810.030.Q)**

Section 18.810.030.Q states that where a development abuts or is traversed by an existing or proposed arterial or major collector street, the development design shall provide adequate protection for residential properties and shall separate residential access and through traffic, or if separation is not feasible, the design shall minimize the traffic conflicts. The design shall include any of the following:

- A parallel access street along the arterial or major collector;
- Lots of suitable depth abutting the arterial or major collector to provide adequate buffering with frontage along another street;
- Screen planting at the rear or side property line to be contained in a non-access reservation along the arterial or major collector; or
- Other treatment suitable to meet the objectives of this subsection;
- If a lot has access to two streets with different classifications, primary access should be from the lower classification street.

The site is adjacent to Hall Boulevard, an arterial. The applicant has provided a circulation plan that shows all lot access will be from the residential local streets.

This criterion is met.

### **Alleys, public or private (Section 18.810.030.R)**

Section 18.810.030.R states that alleys shall be no less than 20 feet in width. In commercial and industrial districts, alleys shall be provided unless other permanent provisions for access to off-street parking and loading facilities are made. While alley intersections and sharp changes in

alignment shall be avoided, the corners of necessary alley intersections shall have a radius of not less than 12 feet.

Access for lot 14 is through lot 15 via an easement.

**Private Streets (Section 18.810.030.T)**

Section 18.810.030.T states that design standards for private streets shall be established by the City Engineer. The City shall require legal assurances for the continued maintenance of private streets, such as a recorded maintenance agreement. Private streets serving more than six dwelling units are permitted only within planned developments, mobile home parks, and multi-family residential developments.

No private streets are proposed. This section does not apply.

**Street Cross-Sections (Section 18.810.030.AA).**

Section 18.810.030.AA states that the final lift of asphalt concrete pavement shall be placed on all new constructed public roadways prior to final city acceptance of the roadway and within one year of the conditional acceptance of the roadway unless otherwise approved by the city engineer. The final lift shall also be placed no later than when 90% of the structures in the new development are completed or three years from the commencement of initial construction of the development, whichever is less.

1. Sub-base and leveling course shall be of select crushed rock;
2. Surface material shall be of Class C or B asphaltic concrete;
3. The final lift shall be placed on all new construction roadways prior to city final acceptance of the roadway; however, not before 90% of the structures in the new development are completed unless three years have elapsed since initiation of construction in the development;
4. The final lift shall be Class C asphaltic concrete as defined by A.P.W.A. standard specifications; and
5. No lift shall be less than 1-1/2 inches in thickness.

Applicant has proposed a street section of 3 inches of asphaltic concrete on 10 inches of aggregate base. The standard requires 3 1/2 inches of asphaltic concrete.

Applicant shall revise plans to show 3 1/2 inches of asphaltic concrete in two lifts.

**Block Designs (Section 18.810.040.A)**

Section 18.810.040.A states that the length, width and shape of blocks shall be designed with due regard to providing adequate building sites for the use contemplated, consideration of needs for convenient access, circulation, control and safety of street traffic and recognition of limitations and opportunities of topography.

**Block Sizes (Section 18.810.040.B)**

Section 18.810.040.B.1 states that the perimeter of blocks formed by streets shall not exceed 2,000 feet measured along the right-of-way line except:

- Where street location is precluded by natural topography, wetlands or other bodies of water or pre-existing development or;
- For blocks adjacent to arterial streets, limited access highways, major collectors or railroads.
- For non-residential blocks in which internal public circulation provides equivalent access.

The Applicant states that Heritage Crossing is surrounded by existing development to the north, east, west, and south, which limits the ability to provide compact block lengths. Interior block perimeters are a maximum of 1,140 feet. The block created by SW Bellflower, SW Empire Terrace, SW Ashford Street, SW Schmidt Loop and SW Applewood Street has a perimeter length of approximately 2,590 feet. The block to the east of that block is approximately 1,480 measured from the existing pedestrian connection to SW Hall Boulevard. SW Hall Boulevard is subject to minimum access spacing standards of 600 feet for arterials. The block created along the south is very large, but no solution is available due to the existing development pattern.

Block size meets standards except to the south where existing development precludes any connections.

This criterion is met.

Section 18.810.040.B.2 also states that bicycle and pedestrian connections on public easements or right-of-ways shall be provided when full street connection is exempted by paragraph 1 of this subsection B. Spacing between connections shall be no more than 330 feet, except where precluded by environmental or topographical constraints, existing development patterns, or strict adherence to other standards in the code. (Ord. 06-20; Ord. 02-33)

**Lots - Size and Shape (Section 18.810.060.A)**

Section 18.810.060.A states that lot size, width, shape and orientation shall be appropriate for the location of the development and for the type of use contemplated, and:

1. No lot shall contain part of an existing or proposed public right-of-way within its dimensions.
2. The depth of all lots shall not exceed 2-1/2 times the average width, unless the parcel is less than 1-1/2 times the minimum lot size of the applicable zoning district.
3. Depth and width of properties zoned for commercial and industrial purposes shall be adequate to provide for the off-street parking and service facilities required by the type of use proposed.

This criterion is met.

**Lot Frontage (Section 18.810.060.B)**

Each lot shall abut upon a public or private street, other than an alley, for a width of at least 25 feet unless the lot is created through a minor land partition in which case 18.162.050.C applies, or unless the lot is for an attached single-family dwelling unit, in which case the lot frontage shall be at least 15 feet

This application is for a subdivision not a land partition. All lots shall abut at least 25 feet of frontage on public or private streets. Lots 4 and 30 do not meet this requirement.

Revise plan showing lots 4 and 30 to show a minimum of 25 feet of frontage on SW Schmidt Loop.

**Sidewalks (Section 18.810.070.A)**

Section 18.810.070.A requires that all industrial streets and private streets shall have sidewalks meeting city standards along at least one side of the street. All other streets shall have sidewalks meeting city standards along both sides of the street. A development may be approved if an adjoining street has sidewalks on the side adjoining the development, even if no sidewalk exists on the other side of the street. The applicant's plans indicate they will be installing full sidewalk improvements with this development along both sides of the internal streets.

The Applicant shows sidewalk on all streets. There are existing sidewalks adjacent to the curb on Ashford Street and Applewood Avenue. The plans show a cross section with a 5 foot concrete sidewalk adjacent to the curb. The standard when sidewalk is placed adjacent to the curb is 6 foot width not including the curb. The Applicant is requesting a variance to extend this geometry to Schmidt Loop.

The plans shall be revised to show a 6 foot concrete sidewalk adjacent to the curb for Ashford Street and Applewood Avenue from existing to Schmidt Loop.

**Planter Strip Requirements (Section 18.810.070.C)**

Section 18.810.070.C requires a planter strip separation of at least five feet between the curb and the sidewalk shall be required in the design of streets, except where the following conditions exist: there is inadequate right-of-way; the curbside sidewalks already exist on predominant portions of the street; it would conflict with the utilities; there are significant natural features (large trees, water features, significant habitat areas, etc.) that would be destroyed if the sidewalk were located as required; or where there are existing structures in close proximity to the street (15 feet or less) or where the standards in Table 18.810.1 specify otherwise. Additional consideration for exempting the planter strip requirement may be given on a case-by-case basis if a property abuts more than one street frontage.

The Applicant shows planter strips on all streets except Ashford Street and Applewood Avenue. The existing geometry of these streets have sidewalk adjacent to the curb. The plans show a cross section with a 5 foot concrete sidewalk adjacent to the curb. The Applicant is requesting a variance to extend this geometry to Schmidt Loop.

The plans shall be revised to show a 6 foot concrete sidewalk adjacent to the curb.

## SANITARY SEWERS

### Sewers Required (Section 18.810.090.A)

Section 18.810.090.A requires that sanitary sewer be installed to serve each new development and to connect developments to existing mains in accordance with the provisions set forth in Design and Construction Standards for Sanitary and Surface Water Management (as adopted by Clean Water Services in 1996 and including any future revisions or amendments) and the adopted policies of the comprehensive plan.

The applicant's plans indicate sanitary sewer mains will be constructed to accommodate the development. The mains will connect to an existing manhole at Hall Boulevard, a state highway.

Applicant shall obtain an ODOT permit for work within ODOT right of way.

## STORM DRAINAGE

### General Provisions (Section 18.810.100.A)

Section 18.810.100.A states that a culvert or other drainage facility shall be large enough to accommodate potential runoff from its entire upstream drainage area, whether inside or outside the development. The City Engineer shall approve the necessary size of the facility, based on the provisions of Design and Construction Standards for Sanitary and Surface Water Management (as adopted by Clean Water Services in 2000 and including any future revisions or amendments)

### Accommodation of Upstream Drainage (Section 18.810.100.C)

Section 18.810.100.C states that where it is anticipated by the City Engineer that the additional runoff resulting from the development will overload an existing drainage facility, the Director and Engineer shall withhold approval of the development until provisions have been made for improvement of the potential condition or until provisions have been made for storage of additional runoff caused by the development in accordance with the Design and Construction Standards for Sanitary and Surface Water Management (as adopted by Clean Water Services in 2000 and including any future revisions or amendments).

### Effect on Downstream Drainage (Section 18.810.100.D)

Section 18.810.100.D states that where it is anticipated by the City Engineer that the additional runoff resulting from the development will overload an existing drainage facility, the Director and Engineer shall withhold approval of the development until provisions have been made for improvement of the potential condition or until provisions have been made for storage of additional runoff caused by the development in accordance with the Design and Construction Standards for Sanitary and Surface Water Management (as adopted by Clean Water Services in 2000 and including any future revisions or amendments).

Applicant has submitted plans showing a storm drain design based on a Storm Drainage Analysis. Following collection and treatment, the runoff will be directed to the existing manhole in Hall Boulevard, a state highway. City of Tigard public works maintenance personnel request that a maintenance access point off of Hall Boulevard be provided. The maintenance accessway proposed may be reduced to 10 feet and connect through to Hall Boulevard and become a pedestrian/bicycle pathway.

Applicant shall revise plans to show a maintenance access driveway off of Hall Boulevard for maintenance of the outfall structure. Applicant shall revise plans for the water quality facility to show the pond ramp adjacent to Hall Boulevard. Maintenance accessway shown off of Schmidt Loop can be reduced to a 10 foot width.

Applicant shall obtain an ODOT permit for work within ODOT right of way.

### Bikeways and Pedestrian Pathways (18.810.110)

18.810.110.C.4 states that the Design standards for bike and pedestrian-ways shall be determined by the city engineer. (Ord. 12-13 §1; Ord. 11-04 §2; Ord. 09-09 §3; Ord. 02-33; Ord. 99-22).

Hall Boulevard is an ODOT facility and shall incorporate bike lanes and will be reviewed by ODOT.

The proposed maintenance accessway for the water quality facility can be reduced in width to 10 feet and will make a pedestrian/bike connection reducing walkable block length from 2,590 to approximately 2,180 feet.

Applicant shall revise plans to show a maintenance access driveway off of Hall Boulevard for maintenance of the outfall structure.

Applicant shall revise plans for the water quality facility to show the pond ramp adjacent to Hall Boulevard. Maintenance accessway shown off of Schmidt Loop shall be reduced to a 10 foot width.

## **UTILITIES**

### **Underground Utilities Section 18.810.120**

Section 18.810.120 states that all utility lines, but not limited to those required for electric, communication, lighting and cable television services and related facilities shall be placed underground, except for surface mounted transformers, surface mounted connection boxes and meter cabinets which may be placed above ground, temporary utility service facilities during construction, high capacity electric lines operating at 50,000 volts or above, and:

- The developer shall make all necessary arrangements with the serving utility to provide the underground services;
- The City reserves the right to approve location of all surface mounted facilities;
- All underground utilities, including sanitary sewers and storm drains installed in streets by the developer, shall be constructed prior to the surfacing of the streets; and
- Stubs for service connections shall be long enough to avoid disturbing the street improvements when service connections are made.

### **Exception to Under-Grounding Requirement (Section 18.810.120.C)**

Section 18.810.120.C states that a developer shall pay a fee in-lieu of under-grounding costs when the development is proposed to take place on a street where existing utilities which are not underground will serve the development and the approval authority determines that the cost and technical difficulty of under-grounding the utilities outweighs the benefit of under-grounding in conjunction with the development. The determination shall be on a case-by-case basis. The most common, but not the only, such situation is a short frontage development for which under-grounding would result in the placement of additional poles, rather than the removal of above-ground utilities facilities. An applicant for a development which is served by utilities which are not underground and which are located across a public right-of-way from the applicant's property shall pay a fee in-lieu of under-grounding.

There are overhead utilities that run parallel to the project along the east side of Hall Boulevard. Applicant shall pay a fee in-lieu of under-grounding of (838.55 feet) (\$35.00 /foot) = \$29,349.

The applicant states that all utility lines within the development shall be placed underground.

## **ADDITIONAL CITY AND/OR AGENCY CONCERNS WITH STREET AND UTILITY IMPROVEMENT STANDARDS:**

### **Traffic Study Findings:**

The applicant has submitted a Traffic Impact Study prepared by Lancaster Engineering, dated March 13, 2015. The analysis was done for the proposed Heritage Crossing development located along the west side of Hall Boulevard and is proposed to provide 53 single family homes.

The existing access spacing between Ashford Street and Langtree on Hall Boulevard does not meet ODOT standards; however the spacing is adequate to accommodate left-turn movements.

Based on the analysis done by Lancaster, the recommended installation of a continuous left-turn lane should be provided on Hall Boulevard between the intersections of Ashford Street/Ashford Lane and Langtree Street.

Lancaster's analysis concludes that the proposed neighborhood development can occur while maintaining acceptable traffic operations and safety at the study intersections

The applicant shall incorporate all of Lancaster's recommendations into their ODOT Permit application and City of Tigard PFI permit application for review and approval.

ODOT staff has been requested to provide comments and conditions. The applicant shall comply with the recommended conditions.

**Public Water System:**

The applicant indicates that they will provide service to this development by extending lines from street stubs at the existing terminations of Ashford Street and Applewood Avenue. In addition, a connection to the 12-inch line in Hall Boulevard is proposed.

This connection will require an ODOT permit.

**Storm Water Quality:**

**Surface Water Management (SWM) regulations established by Clean Water Services (CWS) Design and Construction Standards (adopted by Resolution and Order No. 07-20) require the construction of on-site water quality facilities. The facilities shall be designed to remove 65 percent of the phosphorus contained in 100 percent of the storm water runoff generated from newly created impervious surfaces. In addition, a maintenance plan shall be submitted indicating the frequency and method to be used in keeping the facility maintained through the year.**

A combined water quality and quantity treatment facility in a tract at the southeast corner of the site is proposed.

The applicant shall obtain a (CWS) Stormwater Connection Permit Authorization prior to issuance of the City of Tigard PFI permit.

**Grading and Erosion Control:**

**CWS Design and Construction Standards also regulate erosion control to reduce the amount of sediment and other pollutants reaching the public storm and surface water system resulting from development, construction, grading, excavating, clearing, and any other activity which accelerates erosion. Per CWS regulations, the applicant is required to submit an erosion control plan for City review and approval prior to issuance of City permits.**

**The Federal Clean Water Act requires that a National Pollutant Discharge Elimination System (NPDES) erosion control permit be issued for any development that will disturb one or more acre of land. Since this site is over five acres, the developer will be required to obtain an NPDES permit from the City prior to construction. This permit will be issued along with the site and/or building permit.**

A final grading plan shall be submitted showing the existing and proposed contours. The plan shall detail the provisions for surface drainage of all lots, and show that they will be graded to ensure that surface drainage is directed to the street or a public storm drainage system approved by the Engineering Department. For situations where the back portions of lots drain away from a street and toward adjacent lots, appropriate private storm drainage lines shall be provided to sufficiently contain and convey runoff from each lot.

The applicant will also be required to provide a geotechnical report, per Appendix J of the Oregon Specialty Structural Code (OSSC), for the proposed grading slope construction.

The design engineer shall also indicate, on the grading plan, which lots will have natural slopes between 10% and 20%, as well as lots that will have natural slopes in excess of 20%. This information will be necessary in determining if special grading inspections and/or permits will be necessary when the lots develop.

The site is over 5 acres in size, therefore an NPDES 1200-C permit is required.

**Address Assignments:**

The City of Tigard is responsible for assigning addresses for parcels within the City of Tigard. An addressing fee in the amount of \$50.00 per address shall be assessed. This fee shall be paid to the City prior to approval of the final plat.

For this project as currently proposed, the addressing fee will be \$2,700.00 (53 lots and 1 tract X \$50/address = \$2,700.00).

The developer will also be required to provide signage at the entrance of each shared flag lot driveway or unnamed private street that lists the addresses that are served by the given driveway or street. This will assist emergency services personnel to more easily find a particular home.

### **Survey Requirements**

The applicant's final plat shall contain State Plane Coordinates [NAD 83 (91)] on two monuments with a tie to the City's global positioning system (GPS) geodetic control network (GC 22). These monuments shall be on the same line and shall be of the same precision as required for the subdivision plat boundary. Along with the coordinates, the plat shall contain the scale factor to convert ground measurements to grid measurements and the angle from north to grid north. These coordinates can be established by:

- GPS tie networked to the City's GPS survey.
- By random traverse using conventional surveying methods.

In addition, the applicant's as-built drawings shall be tied to the GPS network. The applicant's engineer shall provide the City with an electronic file with points for each structure (manholes, catch basins, water valves, hydrants and other water system features) in the development, and their respective X and Y State Plane Coordinates, referenced to NAD 83 (91).

FINDING: Based on the analysis above, the approval criteria and standards for a quasi-judicial zone change and concurrent subdivision approval have not meet met, and the project cannot be conditioned to meet these applicable criterion and development standards.

### **IMPACT STUDY**

**SECTION 18.390.040.B.e requires that the applicant include an impact study. The study shall address, at a minimum, the transportation system, including bikeways, the drainage system, the parks system, the water system, the sewer system, and the noise impacts of the development. For each public facility system and type of impact of the development on the public at large, public facilities systems, and affected private property users. In situations where the Community Development Code requires the dedication of real property interests, the applicant shall either specifically concur with the dedication of real property interest, or provide evidence which supports the conclusion that the real property dedication requirement is not roughly proportional to the projected impacts of the development.**

The applicant has provided an impact analysis addressing the project's impacts on public systems (see Exhibit "L" of the applicant's materials). The applicant's plans propose improvements or upgrades as needed to not have any adverse impact on the city infrastructure. Existing public sanitary sewer and water laterals will serve the site. There is no known deficiency in capacity. A proportional share contribution will be made for the resulting transportation and park system impacts.

### **ROUGH PROPORTIONALITY ANALYSIS**

The applicant's plans concur with the City's request for the dedication of right-of-way and the construction of frontage improvements including 24 feet of pavement, a curb, and a six-foot wide sidewalk.

The Transportation Development Tax (TDT) is a mitigation measure required for new development and will be paid at the time of building permits. Based on Washington County implementation figures effective October 1, 2014, TDTs are expected to recapture approximately 32.1 percent of the traffic impact of new development on the Collector and Arterial Street system. Based on the use and the size of the use proposed and upon completion of this development, the future builders of the residences will be required to pay TDTs of approximately \$417,872 (\$8,036 x 53 single-family dwelling units including credit for one existing dwelling).

Based on the estimate that total TDT fees cover 32.0 percent of the impact on major street improvements citywide, a fee that would cover 100 percent of this project's traffic impact is \$1,305,850 (\$417,872 ÷ 0.32). The difference between the TDT paid and the full impact, is considered as unmitigated impact.

Estimate of Unmitigated Impacts

Full Impact .....	TDT ÷ 0.32=.....	\$1,305,850
Less TDT Assessment.....	13 lots x \$8,036/lot= .....	417,872
Less ROW value SW Hall Blvd.....	10,999.6 s.f. x \$10/s.f.=.....	109,996
<hr/>		
Estimated Value of Remaining Unmitigated Impacts		\$777,982

FINDING: Using the above cost factors, it can be determined that the value of the remaining unmitigated impacts exceeds the costs of the right-of-way dedication and provides for additional frontage improvements. Therefore, the City could condition the project should the Planning Commission find in favor of the zone change and subdivision proposal, and find the required land dedication and improvements to be roughly proportional and justified.

**TIGARD COMPREHENSIVE PLAN POLICIES**

**Policy 1.2: The City shall define and publicize an appropriate role for citizens in each phase of the land use planning process.**

Public involvement and notice requirements for quasi-judicial zone changes are described in application requirements determined by the Director and section 18.390.050.C of the Tigard Community Development Code. Pursuant to application form requirements, the applicant noticed and held a neighborhood meeting on Wednesday, December 17, 2014 at the Tigard Community Friends Church. Pursuant to noticing requirements set forth in 18.390.050 of the development code, the public was made aware of the project and instructed on how they may participate through direct mailing of public hearing notices to all property owners within 500 feet on April 20, the posting of on-site notice on April 24, and the publishing of a notice in the Tigard Times on Thursday, May 6, 2015. The rule for public participation at a public hearing is set forth in 18.390.050.D which the Planning Commission must follow when making a decision. This policy is satisfied.

**Policy 2.1.2: The City’s land use regulations, related plans, and implementing actions shall be consistent with and implement its Comprehensive Plan.**

As demonstrated in findings pertaining to the Tigard Community Development Code and Comprehensive Plan policies below, the application is not consistent with the City’s land use regulations and Comprehensive Plan policies. This policy is not met, and cannot be conditioned to be met.

**Policy 2.1.3: The City shall coordinate the adoption, amendment, and implementation of its land use program with other potentially affected jurisdictions and agencies.**

As required by 18.390.050.C.1.a(3) of the Tigard Community Development Code, and discussed in Section VI below, notice of the proposed zone change was sent to affected government agencies. Agency comments are discussed later in this report. This policy is satisfied.

**Policy 2.1.5: The City shall promote intense urban level development in Metro-designated Centers and Corridors, and employment and industrial areas.**

The applicant’s narrative states that this policy does not apply as Hall Boulevard is not listed on the Metro Title 6 map of designated centers, as contained in Metro’s Urban Growth Management Functional Plan. Staff finds the Title 6 map does apply to this application as Title 6 is intended to govern regional investment policy and does not supersede the Metro 2040 Growth Concept Map (Attachment “B”). This relationship was confirmed through an April 7, 2015 phone conversation and April 23, 2015 email from Brian Harper, Metro Regional Planner, who verified Hall Boulevard’s status as a Metro-designated corridor.

An action to reduce development density would be contrary to this policy requiring the city to promote “intense urban level development” in Metro designated corridors. Therefore, this policy is not met, and the application cannot be conditioned to meet this policy.

**Policy 2.1.14: Applicants shall bear the burden of proof to demonstrate that land use applications are consistent with applicable criteria and requirements of the Development Code, the Comprehensive Plan, and when necessary, those of the state and other agencies.**

As demonstrated in the analysis above and below in this report, the applicant has not met the burden of proof necessary for the City to approve this application. This policy is not met.

**Policy 2.1.15: In addition to other Comprehensive Plan goals and policies deemed applicable, amendments to Tigard’s Comprehensive Plan/Zone Map shall be subject to the following specific criteria:**

- A. Transportation and other public facilities and services shall be available, or committed to be made available, and of sufficient capacity to serve the land uses allowed by the proposed map designation;**
- B. Development of land uses allowed by the new designation shall not negatively affect existing or planned transportation or other public facilities and services;**

Heritage Crossing abuts SW Hall Boulevard and has two local streets stubbing into it to provide transportation connectivity. A Transportation Impact Analysis has been provided that outlines how the proposed subdivision will impact the surrounding roadway network. The proposed zone change will reduce the density of the project and thus reduce the transportation impacts of any development.

Sanitary sewer is available in the southeast corner as well as at the two street stubs. Water is available in the two street stubs as well. Sections A and B of this policy are satisfied.

- C. The new land use designation shall fulfill a proven community need such as provision of needed commercial goods and services, employment, housing, public and community services, etc. in the particular location, versus other appropriately designated and developable properties;**
- D. Demonstration that there is an inadequate amount of developable, appropriately designated, land for the land uses that would be allowed by the new designation;**

Section C of this policy requires the City to find that the new land use designation shall fulfill a “proven community need” in this particular location. As demonstrated in the table below, the proposed change in zoning would reduce or further restrict the allowed uses on the project site, and does not provide for a new use that is not presently allowed or needed in this particular location. More specifically, the applicant has failed to demonstrate a need to lower the density of housing in this particular location, or a need to prohibit multi-family housing, or restrict attached single-family housing in this particular location.

<b>ALLOWED HOUSING TYPES</b>		
	<b>R-12</b>	<b>R-7</b>
<b>Single Unit – Detached</b>	P	P
<b>Single Unit – Attached</b>	P	R <sup>9</sup> /C
<b>Accessory Units</b>	R	R
<b>Duplexes</b>	P	P
<b>Multifamily</b>	P	N
<b>Manufactured</b>	P	P

P=Permitted R=Restricted C=Conditional Use N=Not Permitted

<sup>9</sup>Permitted by right if no more than five units in a grouping; permitted conditionally if six or more units per grouping.

Section D of this policy requires the City to find there is an inadequate amount of developable, appropriately designated land for the land uses that would be allowed by the new designation. As stated above, the applicant has failed to demonstrate a need for larger lot, single-family homes in this area. The

application narrative makes a case that there is a “need” for R-7 land within the City, citing a number of deficiency of 59 housing units in the R-7 zone, but failing to analyze the similar diminishment of R-12 land which is capable of accommodating a broader variety of housing types at higher densities per acre. This lack of a balanced analysis is noted in the memorandum from the City of Tigard Housing Planner (Attachment G) which recommends denial of the project.

Based on the analysis above, sections C and D of this policy are not met, and the application cannot be conditioned to meet them.

**E. Demonstration that land uses allowed in the proposed designation could be developed in compliance with all applicable regulations and the purposes of any overlay district would be fulfilled;**

While the proposed subdivision requires changes to comply density, urban forestry, and infrastructure requirements, there is no reason to believe the property could not be developed in conformance with R-7 standards. Section E of this policy is satisfied.

**F. Land uses allowed in the proposed designation would be compatible, or capable of being made compatible, with environmental conditions and surrounding land uses; and**

In the applicant states in their proposed findings for this policy, “the key consideration for this proposed zone change is neighborhood compatibility”, that proposed densities would be “twice” that of existing densities, and stating that only attached or multi-family housing could meet minimum densities.

As discussed in previous analysis and findings, the Comprehensive Plan defines the term compatibility as follows:

“Compatibility — The ability of adjacent and/or dissimilar land uses to coexist without aesthetic, environmental, and/or operational conflicts that would prevent persons to enjoy, occupy, or use their properties without interference. A variety of remedies to compatibility conflicts are normally provided in a jurisdiction’s land use program; including limited land use designation, buffering, screening, site and building design standards, transportation facility design, etc.”

The applicant has provided no evidence other than stated differences in density and housing type regarding what sort of aesthetic, environmental, or operational conflicts would result from development built in conformance with R-12 standards adjacent to existing homes constructed to R-7 standards. Both zones are intended to provide for medium density residential land uses, and both base zone standards and Chapter 18.720 exist to ensure transitions between densities are as harmonious and compatible as possible. In addition, the code allows for lot size averaging which would allow the applicant to develop larger lots around the edge of the project site, further easing the transition.

The applicant also asserts that it is impossible to develop single-family detached homes on the site. Staff disagrees as the site is flat, unconstrained, and other developers have conformed to the R-12 standard elsewhere in the City without the need for Planned Development Review or variances. The most recent example being the Solera I (SUB2005-00023) and Solera II (SUB2011-00001) subdivisions on Greenburg Road, where detached single-family homes were built on lots 25 feet wide, and averaging 3,063 and 3,193 square feet in size respectively. These dimensions were inclusive of a 30-foot rear yard setback which provides both buffering and outdoor amenities to the residents.

As demonstrated above, the applicant has not demonstrated a compatibility issue exists in the current situation which would make the new land uses significantly more compatible. This policy is not met and cannot be met through conditions.

**G. Demonstration that the amendment does not detract from the viability of the City’s natural systems.**

The zone change does not change potential wetland impacts. Section G of this policy is satisfied.

**Policy 2.1.17: The City may allow concurrent applications to amend the Comprehensive Plan/Zoning Map(s) and for development plan approval of a specific land use.**

Per this policy, the application is for a concurrent zoning map amendment and subdivision approval. This policy is satisfied.

**Policy 2.1.23: The City shall require new development, including public infrastructure, to minimize conflicts by addressing the need for compatibility between it and adjacent existing and future land uses.**

The proposal is for a zone consistent with that applied to adjoining properties where development was constructed according to R-7 zoning. No compatibility issues are anticipated as a result of the zone change. This policy is satisfied.

**Policy 6.1.3: The City shall promote land use patterns which reduce dependency on the automobile, are compatible with existing neighborhoods, and increase opportunities for walking, biking, and/or public transit.**

As detailed above, the proposal is to reduce the number of households on a site immediately adjacent to a bus stop and in walkable distance of school sites and a neighborhood commercial center. Hall Boulevard is also a designated bike route in the Tigard Transportation System Plan (Figure 5-7) and contains a bike route. An action to reduce the number of households within walkable distance of these services and facilities is not consistent with this policy. This policy is not met.

**Policy 10.1.1: The City shall adopt and maintain land use policies, codes, and standards that provide opportunities to develop a variety of housing types that meet the needs, preferences, and financial capabilities of Tigard's present and future residents.**

The proposed zone change reduces the variety of housing types available to Tigard residents. The applicant makes a case that there is a general deficiency of R-7 land in the City, but has not provided evidence that the larger lot sizes and reduction in attached or multi-family units that would result from the zone change meets the needs, preferences, and financial capabilities of Tigard's present and future residents to a greater degree than that allowed in the existing R-12 zone. This policy is not met.

**Policy 10.1.5: The city shall provide for high and medium density housing in the areas such as town centers (Downtown), regional centers (Washington Square), and along transit corridors where employment opportunities, commercial services, transit, and other public services necessary to support higher population densities are either present or planned for in the future.**

The project site is immediately adjacent Tri-Met bus line 76. The 76-line connects this property to major destinations in Washington County including the Beaverton Transit Center, Downtown Beaverton, the Washington Square Transit Center, the Hall/Nimbus station, the Tigard Transit Center, Bridgeport Village, and Legacy Meridian Park Hospital (Attachment "C"). These stops form a corridor of employment opportunities, commercial services, transit connections, and other public services necessary to support higher population densities along this and other transit lines.

While both the existing and proposed zoning are intended to provide for medium-density housing, the lowering of densities on this site would diminish conformance with this policy rather than enhance it. This policy is not met.

**Policy 10.2.5: The City shall encourage housing that supports sustainable development patterns by promoting the efficient use of land, conservation of natural resources, easy access to public transit**

**and other efficient modes of transportation, easy access to services and parks, resource efficient design and construction, and the use of renewable energy resources.**

The proposal to reduce population density would result in a less efficient use of residentially designated land, would reduce the net benefit provided by the fill of mapped wetlands on the property, and would reduce the number of potential households along a transit corridor.

As noted her memorandum of April 23, the City of Tigard Housing Planner found the location of the project to be of particular importance due to its location near the amenities and services identified above (Attachment "G").

This policy is not met.

**Policy 10.2.7: The City shall ensure that residential densities are appropriately related to locational characteristics and site conditions such as the presence of natural hazards and natural resources, availability of public facilities and services, and existing land use patterns.**

The R-12 designation was assigned to this property due to its proximity to an arterial, a Tri-Met bus line, and to schools and neighborhood commercial. Additionally, the R-12 designation was a decision made in 1983 to see this area develop to medium-density residential standards. Reducing density would not make full use of the locational opportunities listed above. This policy is not met.

**Policy 10.2.8: The City shall require measures to mitigate the adverse impacts from differing, or more intense, land uses on residential living environments, such as:**

- A. orderly transitions from one residential density to another;**
- B. protection of existing vegetation, natural resources and provision of open space areas; and**
- C. installation of landscaping and effective buffering and screening.**

**Policy 10.2.9: The City shall require infill development to be designed to address compatibility with existing neighborhoods.**

As previously discussed, the Tigard Community Development Code has standards to account for changes in density and housing types when they abut one another. The applicant has provided no evidence that development consistent with R-12 standards will be incompatible with adjacent, existing development and that existing compatibility standards required in Title 18 are inadequate. The proposed change in zoning is not supported by this policy. This policy is not met.

**Policy 12.1.1: 1. The City shall plan for a transportation system that meets current community needs and anticipated growth and development**

**2. The City shall prioritize transportation projects according to community benefit, such as safety, performance, and accessibility, as well as the associated costs and impacts.**

**3. The City shall maintain and enhance transportation functionality by emphasizing multi-modal travel options for all types of land uses.**

**4. The City shall promote land uses and transportation investments that promote balanced transportation options.**

**5. The City shall develop plans for major transportation corridors and provide appropriate land uses in and adjacent to those corridors.**

**6. The City shall support land use patterns that reduce greenhouse gas emissions and preserve the function of the transportation system.**

**Policy 12.3.1: The City shall continue to support the existing commuter rail and**

**bus service in Tigard and will seek opportunities for increased service frequency and passenger convenience.**

As discussed previously in this report, the lowering of density and reduction of potential transportation system users adjacent to a state highway, city arterial, bike route, and Tri-Met bus line does not promote balanced transportation options for the greatest number of people, or support existing bus service through the diminishment of potential riders. These policies are not met.

FINDING: Based on the analysis above, the applicable Comprehensive Plan policies are not satisfied.

## **METRO URBAN GROWTH MANAGEMENT FUNCTIONAL PLAN**

### **TITLE 1: HOUSING CAPACITY**

#### **3.07.110 Purpose and Intent**

**The Regional Framework Plan calls for a compact urban form and a “fair-share” approach to meeting regional housing needs. It is the purpose of Title 1 to accomplish these policies by requiring each city and county to maintain or increase its housing capacity except as provided in section 3.07.120.**

Title 1 of the Metro Urban Growth Management Functional Plan requires cities and counties to maintain or increase their zoned capacity as a means of protecting regional housing capacity and requiring a “fair share” approach for each jurisdiction. This policy was approved by the Metro Council in 2011 after a long regional discussion with local partners that focused on how all jurisdictions would cooperate to address the 2011 Urban Growth Management Decision.

#### **3.07.120 Housing Capacity**

**A. A city or county may reduce the minimum zoned capacity of the Central City or a Regional Center, Town Center, Corridor, Station Community or Main Street under subsection D or E. A city or county may reduce its minimum zoned capacity in other locations under subsections C, D or E.**

The property fronts Hall Boulevard, a designated corridor on the Metro 2040 Growth Concept Map (Attachment “B”). Therefore, the City may only consider a reduction in minimum zoned capacity under subsection D or E as detailed below. As a result, the applicant may not rely on subsection C that allows reductions in if there is an equivalent increase in another location.

Metro Regional Planner Brian Harper has confirmed the status of the corridor, and the strict applicability of subsections D and E below.

**C. A city or county may reduce its minimum zoned capacity by one of the following actions if it increases minimum zoned capacity by an equal or greater amount in other places where the increase is reasonably likely to be realized within the 20-year planning period of Metro’s last capacity analysis under ORS 197.299:**

- 1. Reduce the minimum dwelling unit density, described in subsection B, for one or more zones;**
- 2. Revise the development criteria or standards for one or more zones; or**
- 3. Change its zoning map such that the city’s or county’s minimum zoned capacity would be reduced.**

**Action to reduce minimum zoned capacity may be taken any time within two years after action to increase capacity.**

The application states that a separate development, approved in 2013 (Bonaventure Senior Housing / PDR2013-00001), provided 101 more dwelling units than allowed under existing zoning. This information is not relevant as this application may only be considered under subsections D and E due to the adjacency of a designated corridor on the Metro 2040 Growth Concept map.

Metro Regional Planner Brian Harper has confirmed the adjacency of a Metro designated corridor, and the strict applicability of subsections D and E below. As a result, the applicant may not rely on subsection C

that allows reductions in if there is an equivalent increase in another location.

Even if the corridor were not present, the application would not satisfy this criterion. The Bonaventure approval did not include an “upzone” as part of its land use decision, was not considered concurrent with this application, and an assisted living facility is not an equivalent type of dwelling to the detached single-family homes being proposed.

This criterion is not relevant. If it were relevant, the criterion would not be met.

- D. A city or county may reduce the minimum zoned capacity of a zone without increasing minimum zoned capacity in another zone for one or more of the following purposes:**
- 1. To re-zone the area to allow industrial use under Title 4 of this chapter or an educational or medical facility similar in scale to those listed in section 3.07.1340D(5)(b)(i) of Title 13 of this chapter; or**
  - 2. To protect natural resources pursuant to Titles 3 or 13 of this chapter.**

The project does not propose an industrial, education, or medical use. The only inventoried natural resources on site are not proposed for protection, and the site will be fully developed. This criterion does not apply.

- E. A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city’s or county’s overall minimum zoned residential capacity.**

The application proposes to meet this criterion through the use of Goal 10 methodology, citing excess capacity, but Title 1 creates separate requirements that prohibit any reduction in capacity beyond a negligible effect. The proposed zone change will reduce the overall capacity of the City’s housing capacity by 66 housing units when housing type is not taken into consideration. When accounting for the change in allowed housing types, the city could lose the capacity for 66 attached units or 107 multi-family units, which is not a negligible effect on the City’s overall zoned residential capacity.

**FINDING:** As demonstrated in the evidence and analysis above, the proposed zone change does not comply with Title 1 of the Metro Urban Growth Management Functional Plan.

## **SECTION VI. ADDITIONAL CITY STAFF AND OUTSIDE AGENCY COMMENTS**

**The City of Tigard Building Division, Department of Land Conservation and Development, Oregon Department of Fish and Wildlife, Oregon Division of State Lanes, Oregon Public Utilities Commission, Century Link, Comcast, NW Natural Gas, Portland General Electric, Tigard/Tualatin School District, and Verizon** were invited to comment but did not submit a response.

**The City of Tigard Police Department and Washington County Land Use and Transportation** reviewed the proposal and have no objection to it.

**The City of Tigard Development Engineering Division** has reviewed the proposal and provided comments which are included in the Access, Egress and Circulation section and Street and Utility Improvements Standards section of this report. Recommended conditions are included in the conditions of approval. A full copy of the Division’s comments are included as Attachment “H” of this report.

**The City of Tigard Public Works Division** reviewed the proposal and requested additional street-light, signage, and standard construction details. Such details are normally requested and approved by the City of Tigard Engineering Division through normal Public Facility Improvement (PFI) Permit review.

**The City of Tigard Housing Planner** reviewed the proposal and provided comments in a memorandum

which are included in the Comprehensive Plan Policies section of this report. In these comments, the Housing Planner recommends denial of the zone change, citing Comprehensive Plan policies and noting the applicant has failed to consider both sides of the equation regarding housing needed and land available. The letter also finds the analysis to misrepresent the River Terrace plan, noting there is three times as much R-7 as there is R-12 in the River Terrace Plan (190.2 Acres vs. 64.04 Acres). A copy of the memorandum is included as Attachment “G” of this report.

**The City of Tigard Transportation Planner** submitted a memo dated May 14, 2015. This memorandum detailed Tri-Met’s plans for service enhancements to the 76 Bus Line, which would increase headways to 15 minute intervals during peak hours.

**Metro** has reviewed the proposal and submitted preliminary comments on April 23, 2015 by email, which have been incorporated into the findings and analysis above. The email was followed by a formal comment letter dated May 14, 2015 which recommended denial of the application, stating noncompliance with section 3.07.120 of the Urban Growth Management Functional Plan.

**The Oregon Department of Transportation** reviewed the proposal and has requested additional coordination between the **City of Tigard** and **Tri-Met** regarding proposed frontage improvements to Hall Boulevard to ensure all users (automotive, bike, transit, and pedestrian) are able to move safely and efficiently along the roadway. This coordination has not concluded as of the publication of this report, but should the Planning Commission find in favor, conditions of approval will be recommended to ensure compliance with the standards of all three jurisdictions.

**Tri-Met** submitted a letter dated April 22, 2015 regarding recommendations for the maintenance and improvement of the bus stop adjacent to the project site. A copy of this letter was forwarded to the ODOT as any improvements within Hall Boulevard will require approval by ODOT. Should the planning commission find in favor of the application, conditions of approval will be added to incorporate these design criteria into required frontage improvements along Hall Boulevard. A copy of this letter is included as Attachment “P” of this report.

**Tualatin Valley Fire & Rescue** has reviewed the proposal and submitted a comment letter dated April 23, 2015. In their letter TVF&R endorsed the proposal for a 53 unit subdivision, predicated on 18 criterion and conditions of approval. Should the Planning Commission find in favor of the proposal, conditions of approval will be added to ensure compliance with this agency’s requirements. A copy of this letter is included as Attachment “J” of this report.

**Clean Water Services (CWS)** has reviewed the proposal and submitted a comment letter dated April 21, 2015, requesting a condition of approval that requires the applicant to obtain Storm Water Connection Permit Authorization prior to any site work and partition plat recording. Should the Planning Commission find in favor of the proposal, conditions of approval will be added to ensure compliance with this agency’s requirements. A copy of this letter is included as Attachment “K” of this report.

## **SECTION IX. PUBLIC COMMENTS**

Written comments were submitted by nearby residents, including the following:

- Brian Wegener, Tualatin Riverkeepers; April 30, 2015
- Michael Mitchell; April 30, 2015
- Dale and Melissa Blue; May 14, 2015
- Applewood Park Neighborhood Homeowners Association; May 14, 2015

In addition, oral comments were submitted by the following individuals:

- Frank Medeiros
- Ellen Schell
- Sharon Mead
- Barbara Cumbo
- Mike Peterson
- Craig Smelter
- Matt Hughart
- Anthony Yi

Two comments were opposed to the project based on impacts to wetlands and the nature of the mitigation proposed. Because the affected wetlands are not listed as significant on the Tigard Local Wetland Inventory, the Tigard Development Code only requires the city to ensure that all state and federal permits are obtained by the applicant. The remaining comments were in support of the zone change, citing compatibility issues as the primary basis of support.

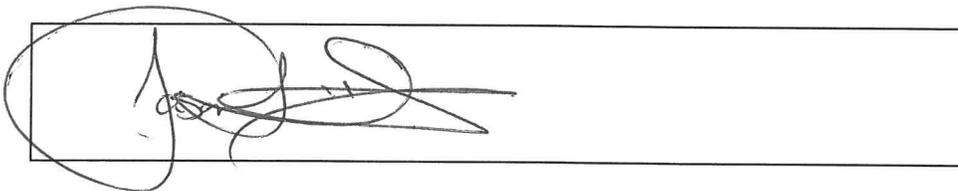
The full text of all comments can be found in the project file and planning commission minutes of May 18, 2015.

## **SECTION X. CONCLUSION**

As detailed above, the City of Tigard Planning Commission has **DENIED** the Heritage Crossing Zone Change, Subdivision, and Adjustment to Street Standards \*(ZON2015-00002, SUB2015-00001, and VAR2015-00001).

**IT IS FURTHER ORDERED THAT THE APPLICANT AND ALL PARTIES TO THESE PROCEEDINGS BE NOTIFIED OF THE ENTRY OF THIS ORDER.**

**PASSED: THE 18<sup>th</sup> DAY OF MAY 2015 BY THE CITY OF TIGARD PLANNING COMMISSION.**

A rectangular box containing a handwritten signature in black ink. The signature is cursive and appears to read 'Jason Rogers'.

Jason Rogers, Planning Commission President  
Dated this 28th day of May, 2014.

### Attachments

Exhibit A: Vicinity and Zoning Map  
Exhibit B: Site Plan

# Zoning Map

## Generalized Zoning Categories

### Legend

 Subject Site

### Zone Description

-  Residential
-  Mixed Use Residential
-  Mixed Use Central Business District
-  Commercial
-  Mixed Use Employment
-  Industrial
-  Parks and Recreation
-  Washington County Zoning

### Overlay Zones

-  Historic District Overlay
-  Planned Development Overlay

Map Printed: 08-Apr-15

INFORMATION ON THIS MAP IS FOR GENERAL LOCATION ONLY AND SHOULD BE VERIFIED WITH THE DEVELOPMENT SERVICES DIVISION.

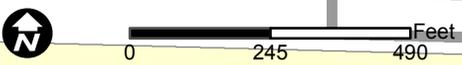
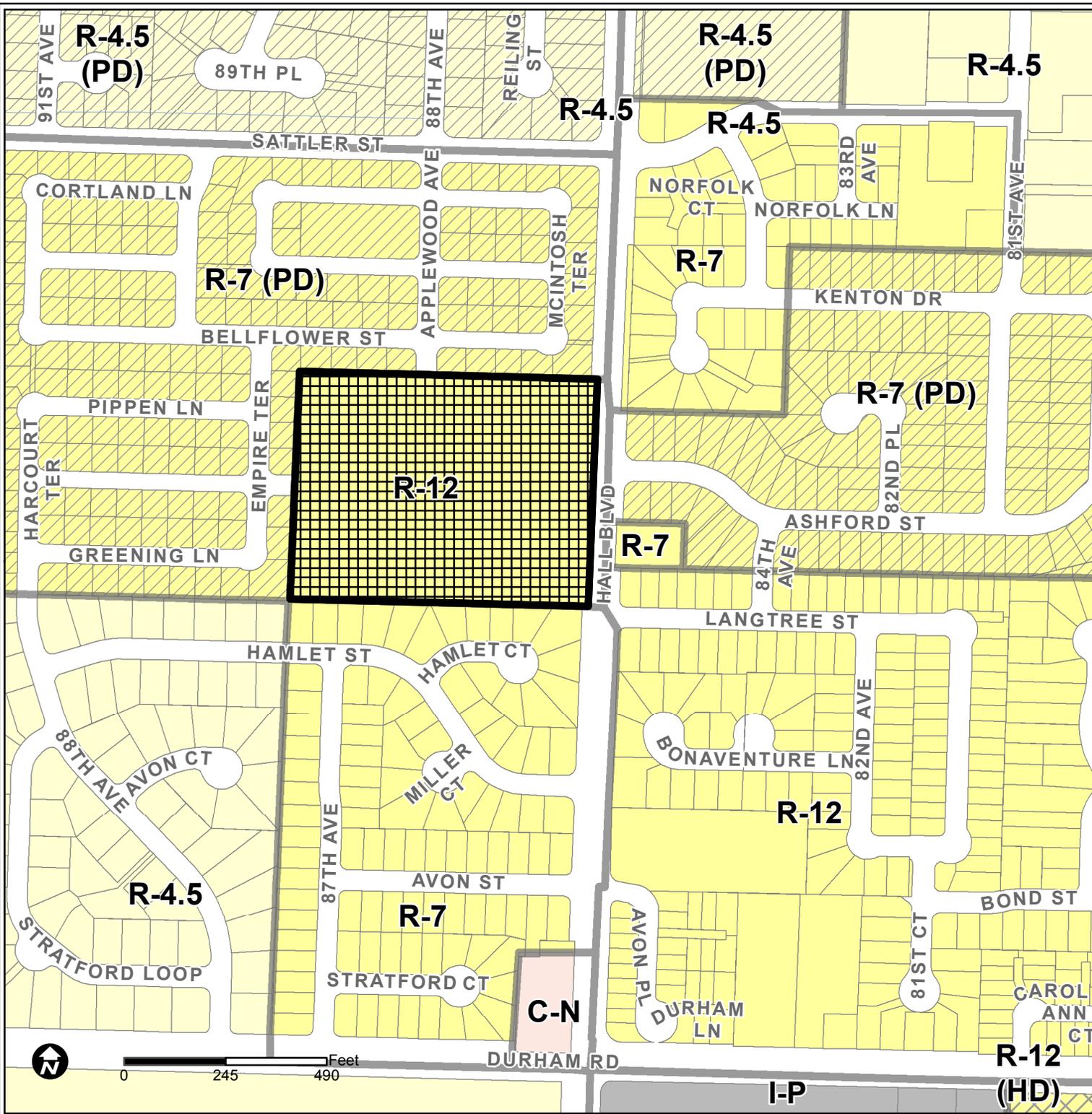
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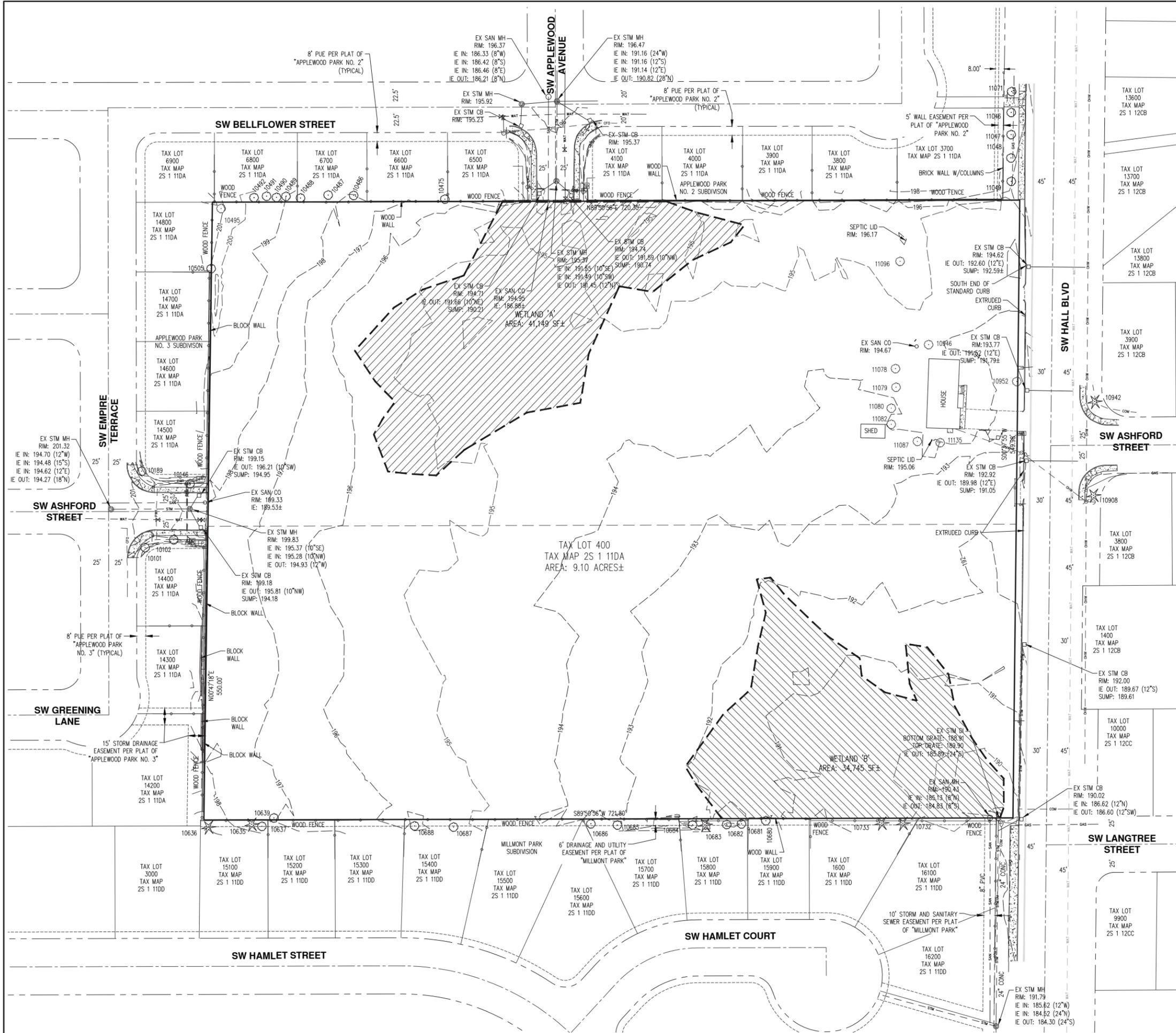
COMMUNITY DEVELOPMENT DEPARTMENT

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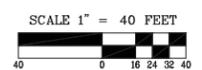




**LEGEND**  
 WETLAND 'A' - DELINEATION LIMITS (41,149 SF/0.94 ACRES±)  
 WETLAND 'B' - DELINEATION LIMITS (34,745 SF/0.80 ACRES±)

**TREE TABLE**

TREE NUMBER	SPECIES	DBH (IN.)
<b>ONSITE</b>		
10495	OREGON WHITE OAK	59
10639	SWEET CHERRY	5
10946	SILKTREE	9
10952	SILKTREE	17
11078	APPLE	16
11079	NORTHERN CATALPA	10,15,17
11080	APPLE	7,10,12
11082	EUROPEAN WHITE BIRCH	19
11087	APPLE	13
11096	WALNUT	17,17
11135	SILKTREE	10,13
<b>OFFSITE</b>		
10101	CRABAPPLE	10
10102	CRABAPPLE	9
10146	CRABAPPLE	9
10189	CRABAPPLE	8
10475	QUAKING ASPEN	13
10486	CALIFORNIA BLACK OAK	24
10487	CALIFORNIA BLACK OAK	16
10488	CALIFORNIA BLACK OAK	18
10489	CALIFORNIA BLACK OAK	20
10490	CALIFORNIA BLACK OAK	13
10491	CALIFORNIA BLACK OAK	13
10492	CALIFORNIA BLACK OAK	13
10505	HAWTHORN	15
10635	PONDEROSA PINE	20
10636	DOUGLAS-FIR	20
10637	SWEET CHERRY	14
10680	EUROPEAN WHITE BIRCH	21
10681	RED MAPLE	12
10682	RED MAPLE	12
10683	LOGEPOLE PINE	7
10684	RED MAPLE	16
10685	QUAKING ASPEN	15
10686	PAPER BIRCH	6
10687	RED MAPLE	14
10688	RED MAPLE	14
10732	WESTERN REDCEDAR	12
10733	WESTERN REDCEDAR	14
10908	DEODAR CEDAR	15
10942	LOGEPOLE PINE	13
11046	PEAR	10
11047	PEAR	9
11048	PEAR	11
11049	PEAR	10
11071	PEAR	11





**CITY OF TIGARD  
PLANNING COMMISSION  
Draft Meeting Minutes  
May 18, 2015**

**CALL TO ORDER**

President Rogers called the meeting to order at 7:01 p.m. The meeting was held in the Tigard Civic Center, Town Hall, at 13125 SW Hall Blvd.

**ROLL CALL**

**Present:** President Rogers  
Vice President Fitzgerald  
Alt. Commissioner Enloe  
Commissioner Feeney  
Commissioner Lieuallen  
Commissioner Middaugh  
Commissioner Schmidt

**Absent:** Alt. Commissioner Mooney; Commissioner Muldoon; Commissioner Smith

**Staff Present:** Tom McGuire, Assistant Community Development Director; John Floyd, Associate Planner; Monica Bilodeau, Associate Planner; Doreen Laughlin, Executive Assistant; Greg Berry, Kim McMillan, Lina Smith

**COMMUNICATIONS** – None.

**CONSIDER MINUTES**

May 4 Meeting Minutes: President Rogers asked if there were any additions, deletions, or corrections to the May 4 minutes; there being none, Rogers declared the minutes approved as submitted.

**OPEN PUBLIC HEARING**

**PUBLIC HEARING**

**POLYGON AT SOUTH RIVER TERRACE PLANNED DEVELOPMENT - PDR2015-00003  
SUB2015-00005; SLR2015-00002**

**REQUEST:** The applicant requests a 190-unit single family residential planned development with concurrent concept and detailed plan review, subdivision review, and sensitive lands review on a 27.25 acre site. The proposed development will include 127 detached single- family homes and 63 attached row homes **APPLICANT:** Polygon Northwest Company **ZONE/COMP PLAN**

**DESIGNATION** R-7: medium-density residential district; R-12: medium-density residential district; River Terrace Plan District.

**LOCATION:** South of Bull Mountain Road and east of Roy Rogers. Washington County Tax Map 2S1070, Tax Lots 1300, 1302, 1303, 1305, 1900, 2000

**APPLICABLE REVIEW CRITERIA:** Community Development Code Chapters 18.350, 18.390, 18.430, 18.510, 18.660, 18.705, 18.715, 18.725, 18.745, 18.765, 18.775, 18.785, 18.790, 18.795 and 18.810

## **QUASI-JUDICIAL HEARING STATEMENTS**

President Rogers read the required statements and procedural items from the quasi-judicial hearing guide. There were no abstentions; there were no challenges of the commissioners for bias or conflict of interest. Ex-parte contacts: None. Site visitations: Feeney, Rogers, Fitzgerald, Middaugh, Schmidt had made site visits. No one in the audience wished to challenge the jurisdiction of the commission.

## **STAFF REPORT**

Associate Planner, Monica Bilodeau introduced herself and the proposal. She noted that it's a 190-unit single family residential development, 127 detached units – 63 attached – on 27.25 acres just south of Bull Mountain Road. Several community amenities and major infrastructure improvements are proposed. Fred Gast and his team at Pacific Community Design will go into further detail on the proposal and design.

## **STAFF RECOMMENDATION**

Staff has thoroughly reviewed the proposed plans and recommends two actions:

1. In favor of the Concept Plan Map.
2. In favor of the proposed Detailed Planned Development Map, Subdivision, and Sensitive Lands Review.

## **QUESTIONS FROM THE COMMISSIONERS**

Commissioner Fitzgerald pointed out that page 20 of the staff report, 18.430.040 Subdivisions Section A.3 states “The Future Street Plan demonstrates that streets internal to the proposed subdivision are laid out to conform with the existing subdivision to the east and the existing road pattern. This criterion is not met.” Commissioner Fitzgerald asked whether that was the case and that the criterion is *not* met, or whether that was a typo. Monica noted that the criterion actually *is* met and that was a typo.

## **APPLICANT'S PRESENTATION**

**Jim Lange** with Pacific Community Design thanked staff for the hard work and effort they'd expended on this. He said the Concept Plan created a great framework. He went over a PowerPoint presentation (**Exhibit A**). He went over the logistics of the project – the location, the roads, the pump stations, water lines, density, etc. He noted the diversity of the subdivision – there will be row homes, alley loaded homes, and a mixture of standard, medium and large homes. He showed some photos of the different architectural designs – English, Craftsman and French styles. He reminded the commission that this is the third project they're doing in this area. He said they will all be interconnected by several things. There will be a series of neighborhood parks and that this particular project has one of those parks on it; that neighborhood park and the open space totals about 18 acres. He noted there would be a swim center that would serve this area. There are about 1 ½ miles of new infrastructure roads.

**TESTIMONY IN FAVOR** - None

**TESTIMONY IN OPPOSITION** - None

## **PUBLIC HEARING – CLOSED**

No further testimony or questions from the audience are allowed.

## **DELIBERATION**

Commissioner Fitzgerald had no concerns, she said it was following along what had already been seen from previous submittals by this developer. It's meeting the intent of what they want in River Terrace. She just wanted the commissioners to note that there was a typo in the findings of the staff report and that should be addressed if a motion is made.

Commissioner Feeney believes they're creating a neighborhood with the diversity they want. He commends the applicant and the city for coming together on this.

President Rogers – Hats off to all the developers and particularly to this developer as they have taken on the vision of not only council and staff, but the public. There's been huge public outreach with this – the neighbors were brought in at various times. This developer has done a good job of capturing their vision. Moreover, the new vision the city has about walk-ability within the city and “Interconnected Tigard” – they've done a very good job with capturing that.

## **CONCEPT PLAN MOTION**

**President Rogers asked if there was a motion on the Concept Plan:**

**Commissioner Fitzgerald** made a motion on the Concept Plan: “I move for approval of application PDR2015-00003 and the adoption of the findings and conditions of approval contained in the staff report.”

Motion was seconded by **Commissioner Feeney**.

There was a vote - **All in favor – none opposed – no abstentions.**

## **CONCEPT PLAN MOTION PASSES UNANIMOUSLY**

## **DETAILED PLAN MOTION**

**President Rogers asked if there was a motion on the Detailed Plan.**

**Commissioner Fitzgerald** made a motion on the Detailed Plan: I move for approval of application SUB2015-00005 & SLR2015-00002 and the adoption of the findings and the conditions of approval contained in the staff report with the modification to the Subdivision language in 18.430.040 A.3 - that the staff note needs to be changed to read “met” instead of “not met” [Due to typo].

Motion was seconded by **Commissioner Schmidt**.

There was a vote - **All in favor - none opposed – no abstentions.**

## **MOTION PASSES**

## OPEN PUBLIC HEARING

### **HERITAGE CROSSING ZONE CHANGE AND SUBDIVISION - ZON2015-00002/SUB2015-00001/VAR2015-00001**

**REQUEST:** The applicant is requesting a concurrent Zone Change, Subdivision, and Special Adjustment to street standards to develop approximately 9.10 acres located at 15435 SW Hall Boulevard. The zone change would be a quasi-judicial map amendment from R-12 (existing) to R-7 (proposed), with no associated change to the Comprehensive Plan Map designation of Medium Density Residential. The subdivision would result in the creation of 53 lots intended for single-family residential style development, and an associated water quality tract. The special adjustment requests an alternate street section to match existing streets that adjoin the property. **APPLICANT:** Venture Properties **LOCATION:** 15435 SW Hall Blvd. Washington County Tax Map 2S111DA, Tax Lot 00400 **CURRENT ZONE:** R-12 medium-density residential district. **PROPOSED ZONE:** R-7: medium-density residential district. **APPLICABLE REVIEW CRITERIA:** Community Development Code Chapters 18.370.020.C.9, 18.380.030.C, and 18.430.040.A; and Metro Urban Growth Management Functional Plan Title 1

### **QUASI-JUDICIAL HEARING STATEMENTS**

President Rogers read the required statements and procedural items from the quasi-judicial hearing guide. There were no abstentions; there were no challenges of the commissioners for bias or conflict of interest. Ex-parte contacts: Commissioner Feeney noted that he has worked in the past in the same firm as Ms. Doukas. He noted also that their firms are working together on a separate project – not in the City of Tigard. Also he works with Mike Robinson (their land-use attorney) on projects together – but not in the City of Tigard. He stated that this will not impair his decision making ability. Commissioner Fitzgerald noted that Ms. Doukas is known to her from their joint meetings between the City of Tigard and the City of Beaverton with their involvement on the Planning Commission. She believes this will not make her biased. Site visitations: Commissioners Enloe, Feeney, Fitzgerald, Middaugh, and Schmidt had made site visits. No one in the audience wished to challenge the jurisdiction of the commission.

### **STAFF REPORT**

Associate Planner, John Floyd, presented the staff report on Heritage Crossing. (Staff reports are available online one week before the hearing). He went over a PowerPoint presentation (**Exhibit B**). He noted staff is recommending denial because the application does not meet the approval criteria for a quasi-judicial zone change.

The subdivision is proposed to be built to R-7 standards; it cannot be approved without a concurrent zone change - otherwise it would not meet our minimum density requirements for the current zone.

The Tigard Development Code specifies three approval criteria for a quasi-judicial zone change: The first bullet represents the criteria – the second bullet represents staff's response.

- ❖ Compliance with Tigard Comprehensive Plan
  - The staff report details how the applicant has not sufficiently addressed the criteria pertaining to Goal 2 land use, Goal 6 – environmental quality, Goal 10 housing, and Goal 12 transportation. The proposal to downzone is inconsistent with city goals for housing types, transportation system development, etc.

- ❖ Compliance with other applicable ordinances and requirements (Tigard Development Code, Metro Urban Growth Management Functional Plan)
  - Metro and staff found the application inconsistent with the Functional Plan – specifically approval criteria for a reduction of density along Metro designated corridors. Staff does not find it consistent in that it’s not just a matter of a reduction of housing units – it’s also a reduction of the available housing type. The R-12 zone allows multi-family housing and it’s easier to develop attached housing under R-12 than it is under R-7. So by going to R-7, potential housing types are precluded.
- ❖ Evidence of 1 of 2) Mistake or inconsistency in zoning map.
  - The staff report details the zoning history and in the attachments there are clear ordinances adopting the R-12 zone on this property in 1983. So it is not a mistake in the designation of R-12 itself.
  - 2 of 2) change in community or neighborhood
  - Pages 6 – 9 relate to what actually has changed. In 1983 there were a number of factors that caused the city to assign the R12 designation to this property. Things like topography, natural features, - at the time these were undeveloped parcels. They are relatively unconstrained. That situation has not changed for the site. It’s still flat and relatively unconstrained. Also these parcels were adjacent to transportation infrastructure; that still exists today – Hall Blvd back then was used as an arterial – today it still is. Location criterion has not changed. It’s also the distance of the site from neighborhood services and commercial centers as well. The school locations are still present, as well as Cook Park – which is also nearby. Those factors have not changed.

The applicant has to satisfy all three criterion. It’s not a matter of pick one or pick two – it’s all three. If the Planning Commission finds they don’t meet any one of those three, the application must be denied.

John noted that – looking longer term – and more of a policy issue in terms of this – the Planning Commission may want to be careful in terms of setting a precedent of not allowing different housing types next to each other. In terms of future development – if attached single family & multi-family is inherently at conflict with detached, it would be a serious hindrance to the city achieving housing goals across the city; something to consider.

### **STAFF RECOMMENDATION**

As detailed in the staff report and supplemental information provided, the application does not meet the three approval criteria for a zone change – and the application cannot be conditioned to meet those criteria. So, as such, we recommend the planning commission deny the zone change and with that – deny the subdivision.

As a background issue, the staff wants to communicate to the Planning Commission that we have consistently told the applicant that staff has concerns about this proposal. That goes all the way back to the pre-application conference in September. This is not a situation where staff is surprising the applicant. This is something that’s been on the table since September.

### **QUESTIONS**

**You’ve given a good history since 1983 of the initial land use designation. In any Comp Plan updates or anything since ’83 to now, has the city or anybody raised this site as being a different zone – be it an R-7 or anything like that?** Offhand I couldn’t tell you for

certain; however, I don't recall any. There may have been some pre-applications in the past but I don't believe there are any actual applications to change it. The city also did a Comprehensive Plan update a few years ago and the Comprehensive Plan map and zoning map were not changed as part of that update. So the zoning has been consistent since then. I'm not aware of any official consideration other than perhaps a pre-application conference. We don't maintain long-term records about pre-apps.

## **APPLICANT'S PRESENTATION**

**Mimi Doukas** of AKS Engineering went over a PowerPoint presentation (**Exhibit C**). She disagreed with staff's assertion that there is no evidence of change in the community citing the following changes:

### Substantial Changes Since 1983

- Rezone of land to the south from R-12 to R-7
- Rezone of land to the north from R-12 to R-7
- Rezone of land to the west from R-4.5 to R-7
- Build-out of most of the corridor between 1983 and 1998
- Establishment of minimum density provisions in 1998

Ms. Doukas said there was an acknowledged mistake in their decision making in the Sattler Zone Change - [Applicant's Exhibit O - shown in minutes as **Exhibit D**.]

She said, "We've provided a buildable land inventory – we relied on the 2010 Johnson Gardner report which was adopted by the city; as a foundation we updated that for the 2014 land inventory. We laid on top of that the River Terrace new inventory that came on line; then we talked about what this zone change would do to the ultimate capacity. That's all outlined in that buildable land inventory included in the application. The short story is that there is excess capacity for both R-7 and R-12 lands within the city. Actually, you now have excess capacity in all residential zones. We also need to talk about – 'What is the right mix of attached housing versus detached housing?' Staff has said there's more to the conversation than just attached and detached - but that is part of the conversation. So Johnson Gardner identified that from 2000 to 2010 housing demand was 64% for detached housing. Moving forward, they identified a demand of 53.4% for detached housing. Your land inventory provides for 56% detached housing – so it's very close.

When talking 'type,' the 2010 Johnson Gardner Goal 10 report identified 64% of demand is for detached housing and 36% attached. Inventory provided 53% detached and 47% attached. With approval of River Terrace, Tigard's inventory became 56% detached and 44% attached. This application reduces the total density by 51 units and changes the percentage by an insignificant amount so even with this zone change you still have a 56% capacity of detached housing."

Ms. Doukas then spoke to the applicable Comprehensive Plan policies:

- Compatibility
  - Policy 6.1.3: The city shall promote land use patterns which reduce dependency on the automobile, are **compatible with existing neighborhoods**, and increase opportunities for walking, biking, and/or public transit.

- Policy 10.1.1: The City shall adopt and maintain land use policies, codes, and standards that provide opportunities to develop a variety of housing types that meet the needs, **preferences**, and financial capabilities of Tigard’s **present** and future residents.
- Policy 10.2.7: The City shall ensure that **residential densities are appropriately related to locational characteristics** and site conditions such as the presence of natural hazards and natural resources, availability of public facilities and services, **and the existing land use pattern.**
- Unique site configuration with street stub locations
- Existing lots to the north and west are only 60-66 feet deep
- Compatibility standards require a 30 foot setback where the property abuts lower density, which is north, south, and west. This standard acknowledges the incompatibility of the uses and proposes the setback as mitigation.
- Cannot reasonably meet minimum density with detached homes.
- In this case, the mitigation extends to three boundaries and uses 24,180 SF of the property.
- With the street stub locations, and the design standards for attached housing, parking would be located next to existing homes.
- R-12 density doubles the number of units on the property (53 vs 111).

She went on to talk about two possible alternate plans and how they wouldn’t meet density requirements and how the awkwardness of the property factors in. The design standards require that the buildings need to be placed against the street and parking needs to be placed in the rear. In this particular piece of property it means that the property and service areas and trash dumpsters and the lighting will all be adjacent to the existing homes – which is not a good site planning situation – it’s not good for compatibility – and it’s the opposite of what you’d want to try to accomplish in a piece of property like this. With the shallow lots to the north and to the west – that’s a fairly intense relationship.

She spoke about locating higher densities adjacent to city services. She showed a slide with a red circle that is approximately a half-mile circle from the property (as far as most people would want to walk). She showed a handful of parks shown in green. There are schools but the only commercial service is a small store and coffee shop at the corner. There is some low intensity industrial land to the south and further to the east. So it is not a highly serviced piece of property. It is on a transit line but there’s not much around it. It is really a residential neighborhood. So, yes it has transit, but it’s through transit – it’s not really service transit.

At this point Land-Use Attorney Mike Robinson (on behalf of Venture Properties) from Perkins Coie came up to address the commission. In response to the staff report, Attorney Robinson noted to the commissioners that local governments simply don’t set precedent in quasi-judicial decisions. Each application that comes to you is individualized so to speak. You make that decision based on the facts as you apply the law to those facts. So even if you decide (and we hope you do tonight) that R-12 is the wrong zone for this property – that’s not going to compel you to make a similar finding in another case – because the facts may be different. I appreciate staff raising that issue – I think it’s an important issue to raise, but my professional opinion – you’re not setting a precedent for either yourself, your City Council, or your staff. Secondly – regarding the TriMet Service Enhancement Program. We appreciate staff writing that

information, but I know it's not final – it may be adopted. Even if it is adopted, remember TriMet Service is a function of funding. When they don't have funding, they cut back the service. So while we understand the need in Oregon especially because of the TPR to tie land use to transportation, I think it's always a little bit difficult to assume the level of transit service you have now or in the future is going to be there. He went on to talk about some other policies and summed up that the commission is not bound to deny the application. They can find that the relevant Tigard Comprehensive Plan policies can be met. He said they certainly can provide findings for them. The key thing is – is this the right site for more intense urban development and will it be compatible? The answer is – it's not appropriate for higher density development and it won't be compatible. Lastly, with regard to Metro Functional Plan Title One, that essentially says that it doesn't prohibit down-zonings – but it says that you can downzone only if you have a quote “negligible effect” – neither Mr. Harper's letter from Metro, nor the staff report tells us what the zone capacity is. We tried to take a crack at that in our May 14<sup>th</sup> letter and if you look at what the city found to be their remaining residential development capacity in 1996, even if you assume that there's 100 unit differential between R-12 and R-7, that's 1.5% of the available residential units some 20 years ago. The fact that you've had more development potential occur in the last 20 years because you've been annexing brown – River Terrace for example – so I think you can find that, in fact, there is a negligible effect. That's all the Metro policy code requires – it doesn't prohibit down-zoning – it simply says the decision maker has to find a negligible effect and I think that's the case here. We have the greatest respect for your staff but in this case we think that the recommendation is incorrect and that you should approve this; we hope you do.

## QUESTIONS

**I keep hearing that it doesn't quite fit with the community and the neighborhood in that area. I see to the southeast that R-12 is actually zoned – so for me to keep hearing that it doesn't fit in – I feel like it visually fits in – I'm not sure about the layout of the site... is it because you think an R-7 zoning is the type of home that would be more marketable in that situation – rather than an R-12?**

Ms. Doukas answered – Obviously marketing does factor into it. But also, we would have to face the neighborhood and try to get approvals for a higher density project - and that's not a pleasant thought. What's important to remember is that (and I mentioned this in my presentation) land over to the SE was not developed to minimum density standards – so it does look compatible because those lot sizes are closer to what you see in an R-7 zone. We would be looking at lot sizes that are half the width of the existing lots to the north and the west and even worse, to the south. The lots to the south are quite large. So it's about housing type but it's also about lot size and the intensity of that use. It's intensity of traffic, noise, activity – and in certain urban areas that's completely appropriate – but in this case, an established neighborhood like this, it's going to be an anomaly.

Mr. Robinson added that there's nothing similar to this zoning west of Hall Blvd. The only support for anything even remotely close to R-12 is to the SE but it was developed at R-7 densities, not R-12. Another point is that even if we could do small lot, single family development, if you looked at how those lots back up to the adjacent lots, you almost always have two new lots backing up onto one lot.

Some **questions were asked about blended densities** & how the previous application – (Polygon's) River Terrace had managed to do it.

**Kelly Ritz - Venture Properties** – addressed the question regarding blended densities and River Terrace. She said that the smaller the scale of the site and the more constrained by existing conditions, the more challenging it is. So when looking at River Terrace she thought it was interesting how they did it. They had the highest density up against the road and then got less dense as you went. Where there was existing homes – they went less dense. Where that’s a challenge with this site is two-fold – 1) it’s only nine acres – almost 10 acres. The site approved for River Terrace was over 200 lots – a much bigger area so in a much larger area you can have different housing types and they seem to work better. The smaller the area of a development, the more difficult it is to blend the housing types. And 2) if you look at our site, it’s bordered on three sides by low density. River Terrace was only bordered on one side by the existing lower density. So it was easier to address that.

#### **TESTIMONY IN FAVOR**

**Frank Medeiros 9013 SW Phippen Lane, Tigard 97224** – lives one block east of the property in question. He urged the commission to approve the rezone. His primary concerns were the nature of the neighborhood and potential effect this would have on traffic – and particularly the livability of the neighborhood, congestion, and public safety – especially safety for the children.

**Ellen Schell 8625 SW Braeburn Lane, Tigard 97224** - is concerned her property value (Applewood neighborhood) will decrease with all the new traffic. She’s concerned about the traffic and noise as well as the safety of the children. She is happy with the Heritage Crossing Subdivision because she believes it’s as good as they can hope for in an adjacent neighborhood. An R-12 would make it considerably more crowded on the neighborhood streets as well as Sattler Street. She does not want a high density area; doesn’t want tragedy with a child being hit by a car.

**Sharon Mead 15320 SW Empire Terrace, Tigard 97224** – is an Applewood Park resident and is on the Board of Directors for the Homeowners Association. She believes a rezone from R-12 to R-7 would be consistent with the other neighborhoods. She’s concerned about traffic going through Applewood Park. Bus line runs along Hall – has never seen a plethora of people waiting for a bus. The busses take a long time to come.

**Barbara Cumbo 8888 SW Bellflower Street, Tigard 97224** – lives in Applewood Park community. They’ve lived in Tigard for 7 ½ years – having moved from Queens, New York City. They lived in a high density area in Queens and moved to Tigard because it had a small town feel. They wanted a walkable area – like Applewood Park. She’s concerned about consistency of the neighborhoods, traffic, and infill. She wants to change the zoning from R-12 to R-7.

**Mike Petersen – 14145 SW 97<sup>th</sup> Place, Tigard 97224** – has a rental house in the Applewood area. He’s concerned about the traffic for future renter’s children. Likes the Heritage plan – thinks it’s a good solution.

**Craig Smelter – 14900 SW 103<sup>rd</sup> Ave., Tigard 97224** - knows the area well. He’s astonished the zoning is R-12 and is in favor of the proposed zone change. He thinks it’s compatible with the three surrounding sites in the area. He looks forward to the connectivity of the streets completing the project in that area will provide for walking the neighborhood.

**Matt Hughart – 8817 SW Greening Lane, Tigard 97224** – President of Applewood Park’s HOA. On behalf of the rest of the board members, they agree that this application is compatible and is the best use of that site – they fully support it.

**Anthony Yi 8967 SW Greening Lane, Tigard 97224** - believes higher density causes more traffic. His concerns are about traffic, safety, and a sense of community that he hopes will be maintained. He supports the current application.

**TESTIMONY IN OPPOSITION** – None.

### **APPLICANT REBUTTAL**

**Attorney Mike Robinson** made two points:

- He appreciates that people who live in the area had come out to testify in support of the application. He believes they’ve pretty clearly stated that the R-7 makes a lot more sense to them and is more consistent with their neighborhood than the R-12.
- With regard to Polygon: This is not a site like River Terrace and is not the same. If this had been planned like River Terrace, you wouldn’t see this. You would have seen a conceptual plan that transitioned to a detailed development plan but you wouldn’t have a solid R-12 area surrounded by an entirely different use. There would be more consistency – some other kind of compatible use adjacent to this. This is not a site that had the benefit of River Terrace like planning and you can see the result of that. You have R-12 plopped down in the middle of R-7. Many demands in the R-12 zone that are going to be difficult to achieve. The reality is it’s very difficult to take an infill site like this and come up with something that works not only for what the city wants to see but what the market wants to see. You can’t disregard what makes sense for the market because if you do you end up with unsuccessful development. R-7 gives good successful residential neighborhoods, R-12 does not. We hope you’ll approve this application.

### **STAFF COMMENTS**

**Tom McGuire, Assistant Community Development Director**, reminded the commission that the focus is on the approval criteria before them. It’s the applicant’s burden to make the case that they meet that approval criteria. He reminded them that they’re not looking at a change in density. Both of the zones are the same Comp Plan designation – that’s a medium density designation; this is not about high density. He also addressed the compatibility issue – there are many ways this site can be designed under the R-12. Compatibility is in many ways a function of that design. That property could be designed under the R-12 in a way that could be compatible with the neighborhood and allow for the housing that’s allowed under R-12. Focus on whether they’re meeting the approved criteria for housing type.

**John Floyd** – pulled up some slides of homes from recent developments in the past 10 years that were built in the R-12 zone (**Exhibit E**).

Regarding traffic impacts and access to Hall Blvd. – ODOT has reviewed the application – they are comfortable with direct access onto Hall Blvd. There are some final design issues that would need to be worked out – that would be reviewed as part of implementation by the development. Many of the traffic impacts in the area are a result of cut-through traffic occurring because of congestion at the high school. The crosswalk on Durham Blvd causes a lot of congestion. Traffic backs up so people cut through this neighborhood to get to Sattler. So a lot of the congestion is a result of traffic occurring out of the neighborhoods – pass through traffic. Any future

development here would have direct access onto Hall Blvd so it would not all be funneling entirely through the existing neighborhoods.

Mr. Floyd also addressed Ms. Doukas' assertion that the Sattler subdivision zone change was approved based on a mistake. That was one of three basis for that zone change. In that decision staff assumed there was a mistake because they could not find evidence in the record by a certain date. So that was an assumption of a mistake. The Planning Commission chose to go with that in that regards but I want to make that clarification. Also the road capacity of Sattler had been increased since 1983. Also by blending the density they actually increased density in that area. That zone change actually increased the number of units in the area.

Regarding the TriMet issue – TriMet's budget does go up and down but they've demonstrated they have a clear and long term commitment to this area. Right now this site is empty so that this particular bus stop does not have a lot of individuals there presently. Ridership and densities go hand in hand. Maintaining the current density levels for R-12 would do more to promote transit enhancements in the area rather than reduce them.

Mr. Floyd addressed several additional policies that had not been addressed by the applicant.

If we don't maintain the current density levels along the existing transit routes we have to put that elsewhere in the city and that may not be easy to achieve. Also – on page three of the development standards comparison, going back to the compatibility issue – I understand people's concerns about something potentially different coming. I don't think what's allowed under R-12 is that different than what's allowed under R-7. If you look at this comparison you'll see similar front yard setbacks. I think the primary differences here are a matter of minimum lot size and the current standards account for that by requiring the 30 foot setback around the perimeter. The differences are not as great as they may seem.

## QUESTIONS

**Can you speak to the comment made about the property that was zoned R-12 but looks like it was built out to R-7 standards?** (Northeast - at Hall and Durham). The site immediately across the street from the project site in the R-12 zone was built to R-7 standards but that was prior to our medium density requirements – that would be prior to 1996. The last few years however where infill area occurs, it's R-12.

## APPLICANT REBUTTAL

**Mike Robinson** – said that not all policies in the staff report are relevant to this decision. Some are more general policies that don't apply to quasi-judicial map amendments such as this. The important policies – the compatibility policies, the corridor policies, the where intense urban development should go policies – you've heard people talk about that tonight and I think you can find that their testimony is relevant. The photos shown are not sensitive, nor are they complementary to this existing residential neighborhood. And that's what your plan policies call for. I think what John showed us are perfectly appropriate in the right context, but we don't know anything about what's going on around them. We don't know whether it's a new area or an infill development. All those things make a difference. I would note that the folks who've testified tonight would tell you that one-car garages with no front yards are not sensitive and complementary to the existing development around them. The photos make a point about what's doable but what's more important is – where are they located. This site doesn't have anything

that suggests that that kind of development is appropriate nor that it's occurred here. This is many times more difficult than River Terrace because you're dealing with a vacant site that has surrounding properties and notwithstanding that the zoning's been there – it doesn't match what's there today.

Mr. Robinson reiterated that TriMet is always constrained by funding and, notwithstanding that, they may be looking at service enhancements for this corridor and may achieve them. It's difficult to hinge a planning program on availability of bus transit because you just don't know what it's going to be like in five years. It ebbs and flows outside of the central city and it has a lot to do with funding. Even without the site's development or without it being R-12 that service frequency will still get increase perhaps, and it might stay for awhile. It has nothing to do with developing this site for R-12.

Ms. Doukas responded regarding the R-12 design versus R-7. Yes – you can design the site to be R-12. If this application gets turned down, we're going to go back to the drawing board and figure something out but I will tell you that it's going to be very awkward. Staff acknowledged that there are variances involved in the applications that you saw earlier. The code is not set up for it. It's very challenging; it's awkward, forced, and not necessary in this case. You've got plan policies that say you need to look at this in the right way - you don't have to be beholden to the transit conversation. Residential development does not build transit by itself. It builds it in context of a mixture of services and a mixture of community design. This doesn't have it so therefore we're just going to be awkwardly trying to work through the design struggles of different types of development against an existing residential neighborhood that was built in a special way - with very shallow, wide lots. We'd make it work... but it's not a good decision.

## **PUBLIC HEARING – CLOSED**

No further testimony or questions from the audience are allowed.

## **DELIBERATION**

**Commissioner Fitzgerald:** I think it would be great to make it R-7 but I don't believe the applicant has met the criteria. I almost wish they could go back to the drawing board and find a different angle to approach getting the R-7 approved. But what I see before me is not convincing me enough that they meet all three of these requirements. I don't want to say that to you but that's where I'm at. I have these rules we have to follow – I think there probably could be a better argument made for the R-7 - what that argument is – I couldn't give guidance to but I think focusing on some of the language that has been focused on hasn't been convincing enough to me. I'd be interested in seeing what the community would say to what an R-12 would be – what would that look like? We're all going to react to a property development next to us that's more than what we have on our property. I would. We don't want to see more traffic – but we're a growing community and it's going to happen.

**Commissioner Enloe:** Since Metro does gives us density requirements to follow and this lot being an R-12 and being next to one of the very few transit lines Tigard has, makes it in my mind, a hard case to make a change in the zoning because we have to make up the density somewhere and there's not very many places with a transit line that we would be able to make that up.

**Don Schmidt:** I live in the area – I live in the R-12 zone on Bond Street and we're going through growing pains. I live across the street from Gage Forest and it was built to the R-12

standards. They are very narrow lots, very close together. The community that has developed there I see as a great neighborhood. I think we have goals and we've had standards to meet those goals and it's hard to revert away from that and changing the zoning from R-12 to R-7. I don't know what an R-7 or R-12 neighborhood would look like on this site. I think it's probably doable. I think if the application was formed in a different way it might be more approvable to zone it down but the standard still exists. I can't see supporting the zone change. I would rather the neighborhood that goes in there look like what's around it on three sides. That's what I have a problem with – but I don't have the evidence to support the change.

**Commissioner Feeny:** The R-7 surrounding this – it does feel like it wants to be an R-7 – it really does. I totally agree that the neighbors want it to be very similar – I'd be in the same point as well. And it is a small space comparatively – to try to squeeze some higher density – but it is zoned R-12 and we have those criteria to meet. We've seen some ultimate design showing apartment complexes – I don't want to see that on the site. Is there a blend? I don't know. Can they meet that density? Maybe – but we haven't seen it. Just going R-7 which looks great to worst case scenario – showing an apartment, there might be something in the middle – and if we had something there, maybe it could go the other way. I'm definitely on the fence right now.

**Commissioner Middaugh** drove out to the site – agrees that it looks like R7 would be more compatible – but there are other areas on Hall that have the higher density apartment complexes, the attached homes. It also makes sense that it would be R-12 as well. He thinks when it was originally zoned in 1983, there was some forward thinking. He thinks they need to take that into consideration.

**Commissioner Lieuellen:** When I see the neighbors here very concerned about traffic and the safety for kids and this kind of thing and boy am I right on that. Sometimes this ideal that we have in Tigard that all of our roads need to connect, personally I'm not on board with that in every situation and if we could have walk-ability here but not necessarily connect the roads, I think we could be taking care of two thirds of the neighbors' concerns so far as increased traffic; however, that's not what's before me. So we have to deal with what's there.

**President Rogers:** I live on the north side of Summerlake and we've got nice big lots and we're going through an apartment complex that's coming in and... trust me – all the pitchforks and torches and all that stuff has come out – and they all know I'm a Planning Commissioner... which is great... so... And I was also president of the Homeowners Association and I can tell you it's a tough thing but the thing I go back to is - the original zoning for the thing was in 1983 and the same thing applies to the piece of land that's being developed in my neighborhood at that point. And where was everybody at that point – when you knew that it was coming down the pike at some point. So I knew it was going to be an R-12 at some point. I love the public turnout here – I think it's fantastic. From the HOA holding public meetings and putting out letters of support, to the neighbors coming out and rallying the cause... but it doesn't change what we do ultimately. I think we are bound by certain rules – I hate that it doesn't blend perfectly with the existing neighborhood – but Tigard's evolving. I drive down Hall – I drive down Greenburg and I see these little pocket neighborhoods that don't fit in with the existing neighborhood - part of that is just change. I'm a public safety guy – so I'm sensitive to the traffic and safety needs – I get that. But when I look at the three things that we're asked to weigh – there's not a compelling argument there. We're stuck and it's not going to be a popular decision. So that's where we're at. Do I have a motion at hand?

## **MOTION**

**Commissioner Fitzgerald** made the following motion: **“I move denial of application ZON2015-00002; SUB2015-00001; VAR2015-00001 and adoption of the findings in support of denial contained in the staff report.”**

**Commissioner Schmidt** seconded the motion.

A vote was taken.

**In Favor:** Commissioners Rogers, Fitzgerald, Lieuallen, Middaugh, & Schmidt

**Opposed:** Commissioner Feeney

## **MOTION TO DENY PASSES 5-1**

**OTHER BUSINESS** – Tom McGuire talked to the commissioners about the upcoming schedule and the fact that the joint meeting with Council had been moved to August.

## **ADJOURNMENT**

President Rogers adjourned the meeting at 9:45 p.m.

---

Doreen Laughlin, Planning Commission Secretary

---

ATTEST: President Jason Rogers

June 15, 2015

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Mr. John Cook, Mayor  
City of Tigard  
Tigard City Hall  
13125 SW Hall Boulevard  
Tigard, OR 97223

**Re: Appeal of Tigard Planning Commission Final Order in ZON2015-0002,  
SUB2015-0001, and VAR2015-0001**

Dear Mayor Cook and Members of the Tigard City Council:

This office represents the Applicant and Appellant, Venture Properties, Inc. ("Venture Properties"). This letter constitutes the Appellant's detailed statement of the specific issues raised on appeal, as required by Tigard Community Development Code ("TCDC") 18.390.040.G.2.a.ii(C).

## 1. Introduction and Procedure.

This letter explains why the Tigard Planning Commission (the "Planning Commission") erred in denying Venture Properties' three (3) applications (the "Application" or "Applications") for the property located at 15435 SW Hall Boulevard (the "Site"). As explained in more detail below, because the Tigard City Council (the "City Council") can approve the zoning amendment based on substantial evidence demonstrating that all of the applicable TCDC, Tigard Comprehensive Plan (the "Plan") and Metro Urban Growth Functional Plan (the "Functional Plan") provisions are satisfied, the City Council can also approve the subdivision and variance applications.

The Applicant's substantial evidence includes the complete application submitted by Venture Properties, two (2) letters submitted by Perkins Coie LLP on behalf of Venture Properties, dated respectively May 6, 2015 and May 14, 2015, oral testimony by Venture Properties, and oral and written testimony by persons living near the Site in support of the Applications. **Exhibit 1** is the Applicant's May 6, 2015 5-page letter including three (3) exhibits. **Exhibit 2** is the Applicant's May 14, 2015 4-page letter including two (2) exhibits.

## 2. Specific Reasons Why the Denial of the Applications Should be Reversed.

This letter contains the specific reasons why the Planning Commission erred and why the City Council should reverse the three (3) denials. The first Application addressed is the subdivision application, followed by the variance application and concluding with the zoning map amendment.

**A. Subdivision Application.**

The City Council can find that the Planning Commission denied the subdivision application because the Planning Commission also denied the zoning map amendment, thus rendering the subdivision application inconsistent with the R-12 zoning district. If the City Council approves the zoning map amendment, it can also approve the subdivision application.

a. **TCDC 18.430.040.A.1 (page 9).** The City Council can find that this standard can be approved if the zoning map amendment is approved.

b. **TCDC 18.715.020.A-C (page 12).** The City Council can find that the density standards can be met if the zoning map amendment is approved.

c. **TCDC 18.810.030.A.3 (page 17).** The Planning Commission did not make a finding on whether the pavement section on SW Hall Boulevard meets Oregon Department of Transportation ("ODOT") standards. The City Council must find that the Planning Commission did not conclude that this standard was not met. The City Council should make a finding on this standard.

d. **TCDC 18.810.060.B (page 20).** The City Council can find, as did the Planning Commission, that lots 4 and 30 can be conditioned to provide a minimum of 25' of frontage on SW Schmidt Loop, thus meeting this standard.

e. **TCDC 18.810.070.C (page 20).** The City Council can find that the Plan can be conditioned to provide a 6' wide concrete sidewalk adjacent to the curb.

For these reasons, if the City Council approves the zoning map amendment, it can also approve the subdivision application.

**B. Variance Application (Special Adjustment to Street Standards).**

The decision at page 5 explains that the Appellant requested a special adjustment to street standards to provide an alternate street section for the proposed local street extensions of SW Ashford Street and SW Applewood Avenue to match existing street sections to the north and west. The Planning Commission concluded that the variance and adjustment standards have been met.

a. **TCDC 18.810.030.E (page 17).** The Planning Commission found that this adjustment should be allowed.

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City of Tigard  
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For these reasons, if the City Council finds that the zoning map amendment can be approved, then it can also approve the variance application (special adjustment to street standards).

**C. Zoning Map Amendment from R-12 to R-7.**

The City Council can find that all applicable TCDC requirements and Plan policies are satisfied. It is clear that the proposed R-7 zoning district is more compatible with the surrounding residential development than is the R-12 zoning district. The R-12 and R-7 zoning districts are consistent with the acknowledged Plan designation of Medium-Density Residential for the Site and, more importantly, the Site is surrounded on the west side of SW Hall Boulevard by other R-7 development and is adjacent to other R-7 development on the east side of SW Hall Boulevard. Only a small area of R-12 development is across SW Hall Boulevard from the southeast corner of the Site but it is developed to R-7 standards.

Additionally, of eight (8) persons who testified at the May 18, 2015 Planning Commission hearing, none of them testified against the zoning map amendment. Two (2) persons testified solely based on the impacts of the development to wetlands. The Planning Commission concluded at page 33 of its decision that, because the wetlands are not listed as "significant" on the Tigard Local Wetlands Inventory ("TLWI") map, the TCDC only requires the City to ensure that state and federal permits are obtained by the Applicant. Six (6) persons told the Planning Commission that they thought the proposed R-7 zoning district would be more compatible with their development than would be the R-12 zoning district.

Finally, some of the Plan policies found not to be satisfied by the application are not applicable to the Application. TCDC 18.380.030.C.1 requires that the Applicant demonstrate compliance only with *applicable* Plan policies and map designations. As explained below, because some of the Plan policies are not applicable, they are not a basis for a denial of this Application.

**a. Summary of reasons why the City Council can Approve the zoning map amendment.**

- i. The zoning surrounding the Site is either R-7 or R-4.5, including the zoning of the property across SW Hall Boulevard from the Site, except for a small area across from the southeast corner of the Site which is zoned R-12 but substantial evidence demonstrates that the R-12 zoned area is developed to the R-7 standard.
- ii. The development can meet all R-7 standards.
- iii. The Applicant has demonstrated by substantial evidence that the application meets all *applicable* Plan policies.

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iv. Substantial evidence demonstrates that there has been a change in the neighborhood that warrants the R-7 zoning district, or that the R-12 zoning district was mistakenly applied.

v. Comments by the Metropolitan Service District ("Metro") that there will be a "negligible effect" on the City's overall zoned residential capacity is not supported by substantial evidence because Metro failed to demonstrate the overall zoned residential capacity of the City. However, the Applicant demonstrated that the zoning map amendment from R-12 to R-7 would have only a negligible effect on the overall zoned residential capacity of the City in its May 14, 2015 letter at pages 3 and 4.

vi. The Decision at page 6 states that Plan Policy 10.1.2 is not met but contains no findings on this Policy. The Appellant reserves its right to raise this issue further.

b. **"Proposal Description" (page 3)**. The Planning Commission erred by excluding the R-12 lands in the River Terrace area from its analysis of the amount of available R-12 land. By properly including such lands, this Site represents far less than 27% of the available R-12 lands. There is no basis for the City Council to exclude the consideration of R-12 lands in the River Terrace area.

c. **TCDC 18.380.030.C.1 (page 6)**. The City Council can find, for the reasons explained below, that all *applicable* Plan policies are met.

d. **TCDC 18.380.030.C.2 (page 6)**. The City Council can find that the Metro Functional Plan is neither part of "this Code", nor is it an "applicable implementing ordinance". To the extent the City Council finds that the Metro Functional Plan is an "applicable implementing ordinance", then for the reasons explained below, the City Council can find that the Applicant has met its burden of proof to demonstrate that this zoning map amendment will have only a "negligible effect" on the City's overall zoned residential capacity.

e. **TCDC 18.380.030.C.3 (page 6)**. The City Council can find based on substantial evidence that there is evidence that there has been either a change in the neighborhood or that a mistake in the zoning has occurred.

f. **Plan Policy 2.1.2 (page 25)**. The City Council can find based on substantial evidence that the zoning map amendment is consistent with and will implement the Plan.

g. **Plan Policy 2.1.5 (page 25)**. The Applicant acknowledges that SW Hall Boulevard is a Metro-designated "Corridor." However, the Planning Commission erred in finding that Plan Policy 2.1.5 is applicable to this Application. As explained at pages 2 and 3 of

the May 6, 2015 letter (**Exhibit 1**), this Plan policy calls only for the City to *promote* intense urban-level development in designated corridors. Plan Policy 2.1.5 says nothing about whether the City may change a zoning map designation in a case such as this, where the change makes the zoning map designation consistent with the development of surrounding property, and the change is supported by, and implements, other Plan policies.

Moreover, the Planning Commission erred by failing to define the ambiguous term "intense urban-level development". Additionally, the Plan policy does not prohibit other than intense urban-level development along Corridors. The City Council can take official notice of the fact that much of SW Hall Boulevard consists of medium-density residential development, or lower-density residential development, similar to the requested R-7 zoning district for the Site.

Finally, this zoning map amendment complies with, and implements other, applicable Plan policies which, when balanced against this Plan policy, require the City Council to approve this zoning map amendment.

h. **Plan Policy 2.1.14 (page 26)**. The City Council can find that the Applicant has met its burden of proof to demonstrate that the zoning map amendment is consistent with the applicable criteria of the TCDC, the Plan, and the Metro Functional Plan, for the reasons explained in this letter and other evidence submitted by the Applicant.

i. **Plan Policy 2.1.15.C (page 26)**. The City Council can find that the Application demonstrates that there is a "proven community need" for an R-7 zoning district in this particular location because, as explained in the Application, the R-7 zoning district is the most compatible zoning district with the surrounding development and substantial evidence demonstrates a need for additional R-7 housing at this location, in part, because of the requirement for compatibility.

j. **Plan Policy 2.1.15.D (pages 26 and 27)**. The City Council can find that the Application demonstrates that there is an inadequate amount of developable, appropriately designated land for R-7 lots, whereas there is more than adequate available R-12 land, including the River Terrace area.

k. **Plan Policy 2.1.15.F (page 27)**. The City Council can find that the Planning Commission misapplied this Plan policy. This Plan policy provides that "land uses allowed in the proposed designation would be compatible, or capable of being made compatible, with environmental conditions and surrounding land uses." The Planning Commission misapplied the policy because it does not require a demonstration of incompatibility; the Plan policy simply requires a demonstration of compatibility. Substantial evidence in the record demonstrates that the R-7 zoning district is inherently more compatible with the adjacent R-7 zoning than is the

R-12 zoning district. Moreover, the Planning Commission erred in another way because it adopted the word "significantly" when this word does not appear in Plan Policy 2.1.15.F.

l. **Plan Policy 6.1.3 (page 28).** The City Council must first find that this Plan policy is inapplicable. This Plan policy calls for the City to *promote* certain types of land use patterns, but does not require them. To the extent that the City Council finds that this Plan policy is applicable, substantial evidence supports a finding that the R-7 zoning district, which matches the zoning district of the surrounding development, promotes compatibility with the existing neighborhoods, does not increase dependency on the automobile and does not decrease opportunities for walking, biking and/or public transit. No evidence in the record demonstrates that more people will drive from the R-7 zoning district, or that fewer people will walk, bike or use public transit from the R-7 zoning district. Regardless of how the Site is zoned, the City Council can conclude that transit remains available (through Tri-Met bus line 76) on SW Hall Boulevard, that sidewalks are located on the interior residential streets and along SW Hall Boulevard, and that most residents use their automobiles to shop and work. The zoning of the Site will not affect the use of automobiles, or biking, walking and transit use.

m. **Plan Policy 10.1.1 (page 28).** The City Council can find that this Plan policy is not applicable to the decision because a zoning map amendment is not a "land use policy, code and standard".

n. **Plan Policy 10.1.5 (page 28).** The City Council can find that this Plan policy is not applicable because the Site is not along a "transit corridor" in an area where employment opportunities, commercial services, transit and other public services necessary to support higher population densities are either present or planned for in the future. There is no Tigard map designation of "Transit Corridor" on the Site, nor did the Planning Commission define the term. Substantial evidence demonstrates that the Site is located in an area of predominantly single-family homes with no significant retail or employment opportunities anywhere in the area. The fact that Tri-Met bus line 76 may connect to other very distant areas that constitute employment or commercial opportunities does not defeat the fact that this area is an area where these opportunities are not present.

Nevertheless, if the City finds that the Plan policy is applicable, then it must also find that it is satisfied by the application because Plan Policy 10.1.5 calls for the City to provide for high and medium density housing in such areas. **Exhibit 3** is page 18.510-1 of the TCDC which describes the R-7 zoning district as a "Medium-Density Residential District".

o. **Plan Policy 10.2.5 (pages 28 and 29).** The City Council can find this Plan policy is not applicable to a quasi-judicial application because it only directs the City to implement certain types of housing by "encouraging" certain activities. If the City Council finds that this

Plan policy is applicable, it can also find that the Plan policy is satisfied because the R-7 zoning district implements Plan Policy 10.2.5 because the activities to be encouraged will or can occur in the R-7 zoning district.

p. **Plan Policy 10.2.7 (page 29).** The City Council can find that this policy is satisfied because the R-7 residential density is "appropriately related" to the existing land use pattern of R-7 development and is supported by available public facilities and services. No natural hazards or natural resource areas identified and mapped by the City are located on the Site.

q. **Plan Policy 10.2.8 and 10.2.9 (page 29).** The Planning Commission erred by failing to provide specific findings on Plan Policy 10.2.8. Further, the Planning Commission erred by finding that Plan Policy 10.2.9 is not met. Substantial evidence in the whole record demonstrates that the R-7 zoning district is compatible with existing neighborhoods. In fact, the Planning Commission found at page 28 that Plan Policy 2.1.23 was satisfied. The Planning Commission's finding states "The proposal is for a zone consistent with that applied to adjoining properties for development was constructed according to R-7 zoning. No compatibility issues are anticipated as a result of the zone change. This Policy is satisfied." Having found Plan Policy 2.1.23 satisfied, it is inconsistent to find that Plan Policy 10.2.9 is not satisfied.

r. **Plan Policy 12.1.11-6 and Plan Policy 12.3.1 (pages 29 and 30).** The City Council can find that the Planning Commission erred by failing to adopt specific findings related to the express language of the Plan policies. Moreover, the City Council must find that Plan Policy 12.1.11-5 is inapplicable because the Plan policy is a direction to the City to implement a particular type of transportation system. Additionally, the City Council must find that Plan Policy 12.3.1 is also inapplicable because it is a direction to the City to support existing commuter rail. No substantial evidence supports the Planning Commission's findings that the R-7 zoning district will be less supportive of the City's transportation system and existing commuter rail than would be the R-12 zoning district because there is no evidence as to potential ridership of residents of either zone.

s. **Conclusion.** For the above reasons, the City Council can find that the applicable Plan policies are satisfied.

#### D. **Metro Functional Plan.**

The Planning Commission found at page 31 that the Applicant had failed to meet its burden of proof to demonstrate that Metro Functional Plan 3.07.120.E is satisfied, which provides that the City may reduce the minimum zoned capacity of a single lot, provided the reduction has a "negligible effect" on the City's overall minimum zoned residential capacity. The evidence

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relied upon from Metro contains no comparative number which allowed the Planning Commission to conclude that the reduction of a certain number of dwelling units would be more than a negligible effect on the City's overall zoned residential capacity. However, the Applicant's May 14, 2015 letter at pages 3 and 4 explained that the zoning map amendment would have less than a 1% impact on the City's minimum zoned residential capacity. No substantial evidence rebuts the Applicant's evidence.

**3. Conclusion.**

For the reasons contained in this letter as well as other substantial evidence in the whole record, the City Council can find that the Applicant has met its burden of proof. Consequently, the City Council can find that the Planning Commission erred in denying the zoning map amendment. If the City Council approves the zoning map amendment, it can also approve the subdivision and variance applications.

The Applicant respectfully requests that the City Council reverse the Planning Commission, approve the three (3) applications and direct the Applicant, as the prevailing party, to prepare findings in support of the applications.

Very truly yours,



Michael C. Robinson

MCR:sv

Enclosures: 3 Exhibits

Cc: Ms. Kelly Ritz (via email) (w/encls.)  
Ms. Mimi Doukas (via email) (w/encls.)  
Mr. Mike Ard (via email) (w/encls.)  
Mr. Tom McGuire (via email) (w/encls.)  
Mr. John Floyd (via email) (w/encls.)

May 6, 2015

Michael C. Robinson  
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**VIA EMAIL**

Mr. Jason Rogers, President  
City of Tigard Planning Commission  
13125 SW Hall Boulevard  
Tigard, OR 97223

**Re: City of Tigard File Nos. ZON2015-00002/SUB2015-00001/VAR2015-00001;  
Heritage Crossing Zoning Map Amendment, Subdivision and Variance Application  
(the "Application")**

Dear President Rogers and Members of the Planning Commission:

This office represents Venture Properties ("Venture"). This letter addresses the applicable approval criteria that the City of Tigard (the "City") Community Development staff identified as not satisfied by the Application and that are the basis for a recommendation of denial of this Application. This letter explains why the Planning Commission can find that substantial evidence supports Venture's request for a zoning map amendment from R-12 to R-7, consistent with the City of Tigard Comprehensive Plan map (the "Plan") designation of "Medium Density Residential" and a concurrent land division application to create a 53-lot subdivision.

**I. Introduction.**

The property that is the subject of the zoning map amendment and concurrent subdivision application is located on the west side of SW Hall Boulevard, north of Durham Road. This R-12 zoned site is entirely surrounded by R-7 and R-4.5 zoning districts on its north, west and south and an R-7 zoning district on the east side of SW Hall Boulevard. (**Exhibit 1**) The only similarly R-12 zoned property is located on the east side of SW Hall Boulevard. However, as the Application narrative explains, that R-12 area was developed at the R-7 density. Thus, the existing pattern of development is entirely consistent with the R-7 and R-4.5 zoning districts and not the higher density R-12 zoning district.

Were this site to develop under the current zoning map designation of R-12, it would be the only R-12 development in the area and would be entirely surrounded by development with larger lots and larger single-family homes. The R-12 zoning district allows up to 111 dwelling units on this site, compared with the more reasonable and compatible 53-lot subdivision proposed by the Application.

**2. The Planning Commission can find that Tigard Community Development Code (“TCDC”) 18.380.030.B.1-.3 are satisfied.**

TCDC 18.380.030.B.1-.3 contains the three (3) approval criteria for a quasi-judicial zoning map amendment. The Applicant’s narrative explains how TCDC 18.380.030.B.1-.3 are satisfied. Tigard Planning Department staff have told the Applicant that TCDC 18.380.030.B.1 and .3 are not satisfied by the Application.

The three (3) criteria require Venture to show:

- “1. Demonstration of compliance with all applicable comprehensive plan policies and map designations;**
- 2. Demonstration of compliance with all applicable standards of any provision of this code or other applicable implementing ordinance; and**
- 3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application.”**

**3. The Planning Commission find that TCDC 18.380.030.B.1 is satisfied.**

The Planning Commission can find that relevant Plan Policies are satisfied for the following reasons.

**A. Plan Policy 2.1.5.**

Plan Policy 2.1.5 provides:

**“The City shall promote intense urban land development in Metro-designated Centers and Corridors, and employment and industrial areas.”**

Metro’s 2040 Regional Concept map designates SW Hall Boulevard as a “Corridor.” Notwithstanding this designation, the City is not bound to deny the zoning map Application because of Plan Policy 2.1.5. First, the Plan Policy calls only for the city to *promote* intense urban-level development in designated corridors. Plan Policy 2.1.5 says nothing about whether the City may change a zoning map amendment in a case such as this where the change makes the zoning map designation consistent with the development of surrounding property and the change is supported by other Plan Policies.

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Moreover, the Plan Policy says nothing about how much intense urban-level development must be promoted by the City, or where it must be located along a Corridor. The City can certainly find that this Plan Policy has been satisfied along SW Hall Boulevard without denying this Application. For example, there is intense urban-level development at the north end of SW Hall Boulevard adjacent to Highway 99 and intense urban-level development at the terminus of SW Hall Boulevard near Durham Road.

Finally, this Plan Policy does not prohibit the City from making a common sense decision where it is clear that the current zoning map designation is inconsistent with surrounding development. "Intense urban land development" in the middle of less-dense single-family development is inconsistent with the City's Land Use Planning Program. Plan Goal 2, "Land Use Planning", Section 1, "Legislative Finding" at pages 2-3 and 2-4 states:

**"Within residential areas, the City's land use program assures that infill occurs in a way that is sensitive and complimentary to existing residential neighborhoods".**

This vision is implemented by Plan Policy 2.1.15.D which calls for zoning map amendments to be compatible with surrounding areas. This Application achieves the purpose of the City's land use program, whereas leaving the R-12 zoning district in place does not.

The Planning Commission can either find that Plan Policy 2.1.5 is satisfied by this Application, or does not apply to a quasi-judicial map amendment, or does not prohibit approval of this Application.

**B. The Planning Commission can find that Plan Policy 10.1.5 is satisfied.**

The Planning Commission can also find that Plan Policy 10.1.5 supports this map amendment and, in fact, directs that high and medium density housing occur in other areas.

Plan Policy 10.1.5 provides:

**"The City shall provide for high and medium density housing in the area such as town centers (Downtown), regional centers (Washington Square), and along transit corridors where employment opportunities, commercial services, transit, and other public services necessary to support higher population densities are either present or planned for in the future."**

The Planning Commission can determine by simply looking at an aerial photograph of the developed area and the City's zoning map designation for this site that this Plan Policy is not promoted by leaving this property in its current R-12 zone. (Exhibit 2) First, as the Application

narrative explains, notwithstanding that SW Hall Boulevard is served by Tri-Met Bus Line 76 does not operate at headways that support higher population densities nor is SW Hall Boulevard a "transit corridor". (Exhibit 2) Bus Line 76 operates at only 30 minute headways throughout the day.

Second, the Plan Policy calls for the City to direct high and medium density housing to areas, such as town centers and transit corridors, where employment opportunities and commercial services are either present or planned to support higher population densities. The surrounding area is not within downtown Tigard or Washington Square. Moreover, the surrounding area is a wholly residential area without any employment opportunities or commercial services that support or justify higher population densities.

### **C. Conclusion on Plan Policy Compliance.**

Taken together, Plan Policies 2.1.5 and 10.1.5 support a determination by the Planning Commission that this area is inappropriate for high-density residential development and can find that the Plan Policies support the zoning map amendment.

#### **4. The Planning Commission can find that TCDC 18.380.030.B.3 is satisfied.**

The Planning Commission can find that TCDC 18.380.030.B.3 is satisfied. This criterion requires:

**"Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application."**

The Application narrative explains at pages 16-19 how this area has substantially changed since the imposition of the R-12 zoning designation in 1983, more than 30 years ago. TCDC 18.380.030.B.3 allows the Planning Commission to approve a quasi-judicial map amendment with "evidence of change in the neighborhood . . ."

The Planning Commission need not find that all three (3) of the criteria in TCDC 18.380.030.B.3 are met because the criterion uses the word "or" between the three (3) factors. The Application narrative demonstrates that the neighborhood has changed. The Planning Commission can make this determination by noting that the development pattern is consistently lower density single-family in this area. This site is the only remaining vacant site in the area. The area that has developed around this site has developed under low-density residential standards and development of this site in the R-12 zoning map designation would be inconsistent with the surrounding development.

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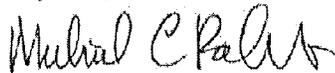
Plan Policy 2.1.15.F provides that "land uses permitted by the proposed designation would be compatible, or capable of being made compatible, with environment conditions and surrounding land uses." The Application narrative explains that development in the R-12 zoning district would be *incompatible* with surrounding land uses. The applicant would be required to either develop small lot detached single-family housing (with a minimum lot size of 3050 square feet, compared to a minimum lot size of 5,000 square feet in the R-7 zoning district), or multiple-family housing with the parking areas on the perimeter of the site. Neither type of housing would be compatible with, nor welcomed by, the surrounding residents.

#### 5. Conclusion.

For these reasons, the Planning Commission can find that the zoning map amendment meets the applicable approval criteria in TCDC 18.380.030.B.1.-3. and satisfies relevant Plan Policies.

I have asked the Community Development Department to place this letter before you at the initial evidentiary hearing on May 18, 2015 and in the official file for this Application.

Very truly yours,



Michael C. Robinson

MCR:rsr  
Enclosures

cc: Ms. Kelly Ritz (via email) (w/ encls.)  
Ms. Mimi Doukas (via email) (w/ encls.)  
Mr. Tom McGuire (via email) (w/ encls.)  
Mr. John Floyd (via email) (w/ encls.)

# Zoning Map

City of Tigard, Oregon

## Zoning Classifications

- |                                     |                               |
|-------------------------------------|-------------------------------|
| R-1 10,000 Sq Ft Min Lot Size       | CG General Commercial         |
| R-2 12,000 Sq Ft Min Lot Size       | CU Neighborhood Commercial    |
| R-3 12,000 Sq Ft Min Lot Size       | CF Professional Commercial    |
| R-4 12,000 Sq Ft Min Lot Size       | MUC Medium Use Commercial     |
| R-4.5 12,000 Sq Ft Min Lot Size     | MUC-1 Mixed Use Commercial 1  |
| R-7 10,000 Sq Ft Min Lot Size       | MUC-2 Mixed Use Commercial 2  |
| R-7 (PD) 10,000 Sq Ft Min Lot Size  | MUE Medium Use Employment     |
| R-12 10,000 Sq Ft Min Lot Size      | MUE-1 Mixed Use Employment 1  |
| R-12 (PD) 10,000 Sq Ft Min Lot Size | MUE-2 Mixed Use Employment 2  |
| R-25 12,000 Sq Ft Min Lot Size      | LI Light Industrial           |
| R-4B 40 Units Per Acre              | LP Industrial Park            |
| MUR-1 Mixed Use Residential 1       | IP Heavy Industrial           |
| MUR-2 Mixed Use Residential 2       | PR Parks and Recreation       |
| MU-CBO Mixed Use Office/Community   | CC City Center/Community      |
| CC Community Center                 | CC (PD) City Center/Community |

- |                             |                        |                       |
|-----------------------------|------------------------|-----------------------|
| Shaded Street Overlay       | Target City Boundary   | Urban Growth Boundary |
| Planned Development Overlay | Urban Renewal Boundary |                       |

## Zoning Designations of the Tigard Municipal Code, Title 15: Community Development Code

Current zoning designations for the City of Tigard in conformity with the City's Comprehensive Plan guides development throughout the City. The map is intended as a general reference only and zoning designations should always be verified.

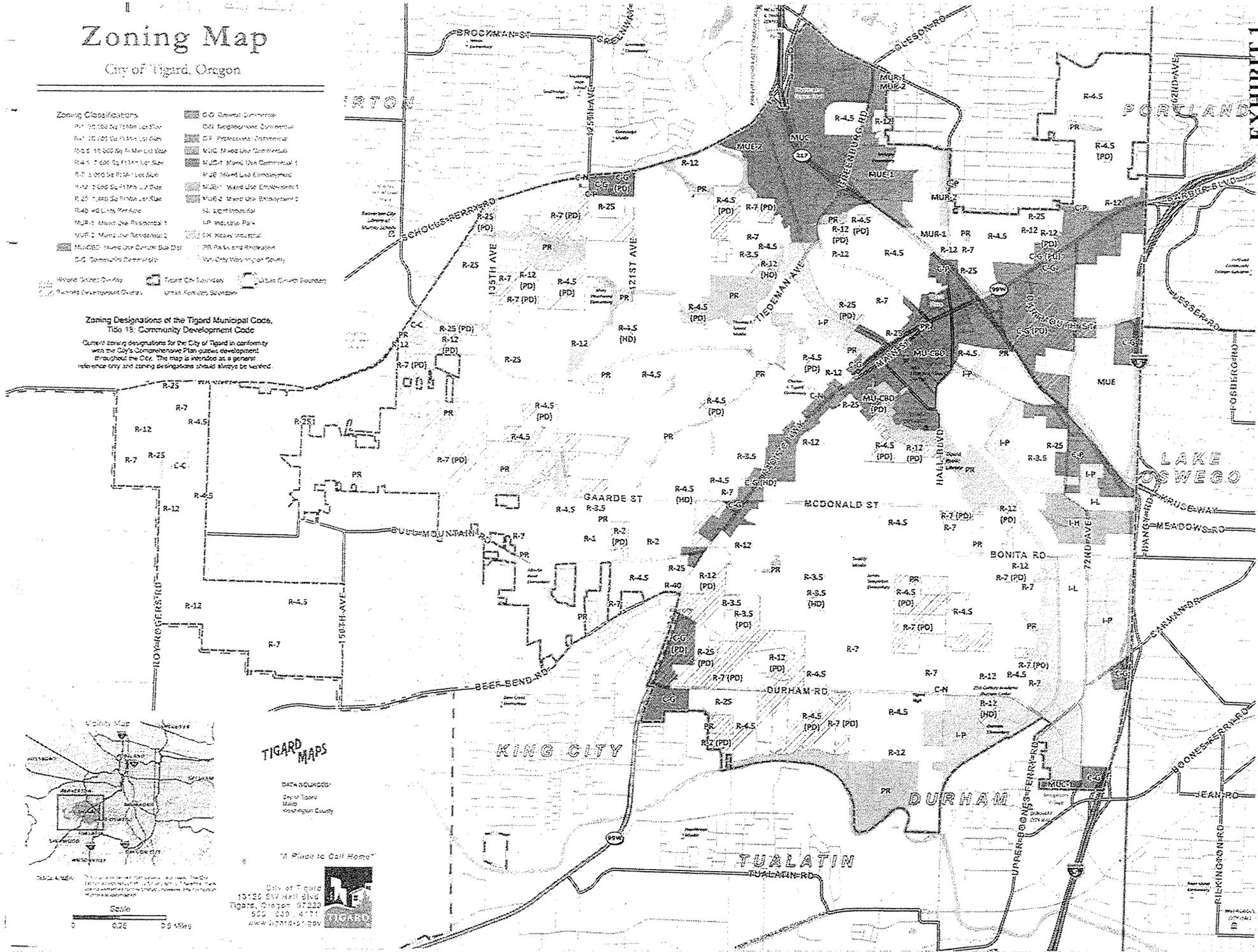




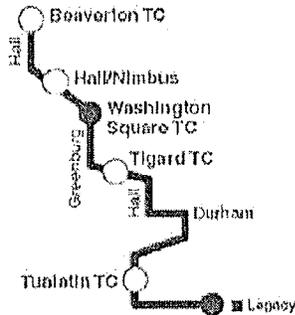
EXHIBIT 2



Select a bus or rail line...

## 76-Beaverton/Tualatin

76-Beaverton/Tualatin runs between Tualatin, Tigard, Washington Square and Beaverton, along Sagert, Martinazzi, Lower Boones Ferry Road, 72nd, Durham, Greenburg Road and Hall.



### Schedules

#### Monday – Friday

- To Tualatin
- To Beaverton Transit Center

#### Saturday

- To Tualatin
- To Beaverton Transit Center

#### Sunday

- To Tualatin
- To Beaverton Transit Center

[View detailed route map PDF](#)

[View on Interactive Map](#)

Get Line 76 updates by email:



[or learn more/privacy](#)

### More information

[Next arrivals from TransitTracker](#)

[Turn-by-turn route description](#)

[Accessibility features](#)

[Bringing your bike?](#)

[TriMet holiday service](#)

[Winter weather riding tips](#)



**76-Beaverton/Tualatin**  
To Tualatin • Weekday

Beaverton Transit Center Stop ID 9981	SW Hall & Hart Stop ID 2286	Washington Square Transit Center Stop ID 9653	Tigard Transit Center Stop ID 8212	Tualatin Park & Ride Stop ID 7880	SW Boones Ferry Rd & Nyberg Stop ID 13079	Meridian Park Hospital Main Stop Stop ID 3868
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76-Beaverton/Tualatin

To Beaverton Transit Center • Weekday

Meridian Park Hospital Main Stop Stop ID 3868	SW Boones Ferry Rd & Seneca Stop ID 13084	Tualatin Park & Ride Stop ID 7879	Tigard Transit Center Stop ID 8209	Washington Square Transit Center Stop ID 9650	SW Hall & Hart Stop ID 2285	Beaverton Transit Center
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**76-Beaverton/Tualatin**  
To Tualatin • Saturday

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May 14, 2015

Michael C. Robinson  
MRobinson@perkinscoie.com  
D. (503) 727-2264  
F. (503) 346-2264

**VIA EMAIL**

Mr. Jason Rogers, Chair  
City of Tigard Planning Commission  
13125 SW Hall Boulevard  
Tigard, OR 97223

**Re: City of Tigard File Nos. ZON2015-00002/SUB2015-00001/VAR2015-00001;  
Heritage Crossing Zoning Map Amendment, Subdivision and Variance Application  
(the "Application")**

Dear Chair Rogers and Members of the Planning Commission:

This office represents Venture Properties ("Venture"). This letter is submitted on behalf of Venture to respond to four (4) issues:

- (1) Letter dated April 30, 2015 from Mr. Michael Mitchell;
- (2) Email dated April 30, 2015 from Mr. Brian Wegner representing the Tualatin Riverkeepers;
- (3) The definition of "net development area" as it applies to this site; and
- (4) Email dated April 23, 2015 from Mr. Brian Harper representing Metro.

I have asked Mr. Floyd to place this letter in the official Planning Department file for the above-referenced Application and before the Planning Commission at the beginning of the initial evidentiary hearing for this Application on May 18, 2015.

**1. Response to letter from Mr. Mitchell.**

Mr. Mitchell raises two (2) issues concerning the two (2) wetlands on the site. The first is his question about the delineation of the wetlands. Venture contracted with AKS Engineering to delineate the wetlands. AKS has delineated the wetlands and the Oregon Department of State Lands ("DSL") has accepted the delineations.

Second, Mr. Mitchell raises the issues of whether the wetlands will be filled. The wetlands are not mapped on the Tigard Sensitive Lands map and are wetlands over which DSL and the United

Mr. Jason Rogers, Chair  
May 14, 2015  
Page 2

States Army Corps of Engineers ("COE") have jurisdiction. Venture has applied for a fill permit to fill both of the isolated wetlands.

The City does not regulate the fill of wetlands not shown on the City's Sensitive Lands map. To the extent the Application is able to satisfy the applicable criteria for fill permits issued by DSL and COE, then the wetlands may be lawfully filled.

Mr. Mitchell also raises two (2) issues unrelated to wetlands. His first issue concerns traffic increase in the neighborhood. The Application's evidence demonstrates that traffic generation from the subdivision proposed by Venture will be consistent with the types of streets serving the subdivision and that those streets have sufficient capacity to accommodate the expected vehicle trip generation from the site. As an aside to Mr. Mitchell's comments, Venture believes that the downzoning of this property from R-12 to R-7 is appropriate and development of the property in the R-7 zone will generate less vehicular traffic than development of the property in the current R-12 zone.

The second issue unrelated to wetlands raised by Mr. Mitchell is the lack of a neighborhood park. No applicable approval criteria require a neighborhood park. The neighborhood in which Mr. Mitchell lives, and which surrounds the site, is a pleasant neighborhood with large single-family lots providing outdoor recreation space for families and children. Venture would like to develop the same type of single-family development on this site and will be able to do so in the R-7 zones but will only be able to provide smaller lots with less open space if the R-12 zone is retained.

## **2. Response to Email from Tualatin Riverkeepers.**

Tualatin Riverkeepers raises an issue regarding the wetlands. As noted above, the City does not regulate wetlands that are not located on the City's Sensitive Lands map. As long as Venture is able to demonstrate to the satisfaction of DSL and the COE that the isolated wetlands may be filled, then that is appropriate.

Tualatin Riverkeepers also argues that the wetlands areas may not be included in density calculations. For the reasons explained below under the discussion of net development area, density calculations are controlled by the Tigard Community Development Code ("TCDC"), not Metro.

## **3. Calculation of Net Development Area.**

The Planning Commission can find that the definition of "net development area" in TCDC 18.715.020.A.1 excludes areas not mapped as Sensitive Lands. Wetlands outside of Sensitive Lands may be calculated as part of the net development area. Further, TCDC 18.775.010, part of

the "Purpose" statement, does not control over the specific definition found in TCDC 18.715.020.A.1. Finally, TCDC 18.775.020.D, "Jurisdictional Wetlands," provides that wetlands, subject to other jurisdictional requirements and not mapped as sensitive wetlands on the City's map, are not subject to a Sensitive Lands permit.

Because the two (2) isolated wetlands areas on the site are not located on the City's Sensitive Lands map, and because they are subject to the jurisdiction of DSL and the COE, they may be filled if the approval criteria for fill are satisfied.

Ms. Doukas, representing Venture, will submit a separate letter requesting a condition of approval if the Planning Commission approves the zoning map amendment and subdivision applications. The condition of approval will provide that in the event that Venture demonstrates that it is feasible to obtain the necessary fill permits, then it is appropriate to include the two (2) isolated wetlands areas in the net development area so that they may be calculated for density purposes. If fill permits are not obtained, then they must be excluded from the net development area. In any event, the Planning Commission can find that it is feasible for Venture to obtain the necessary fill permits and, pursuant to the relevant TCDC provisions cited above, the two (2) isolated wetlands areas may be calculated as part of the net development area and included in the density of the site.

#### 4. Response to Email from Metro.

Metro asserts that the City may not change the zoning district from R-12 to R-7 on this site because SW Hall Boulevard is designated as a "Corridor" on the Metro 2040 Growth Concept Map. Metro reaches this conclusion because it disagrees with the Applicant's findings pursuant to Metro Code section 3.07.120.E. Metro Code 3.07.120.E provides as follows:

**"A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city's or county's overall minimum zoned residential capacity."**

The Tigard Comprehensive Plan contains the City's minimum zoned capacity pursuant to acknowledgment by Metro. Tigard Comprehensive Plan Goal 10, Page 10-2 provides that an additional 6038 dwelling units can be constructed in the city (the 1996 number). **(Exhibit 1)** Substantial evidence in the whole record demonstrates that the difference between the R-12 development of 130 lots and the R-7 development of 79 lots for a net difference of 51 lots is "negligible" because it represents less than 1% of the City's minimum zoned capacity for additional dwelling units (and an even smaller percentage of the City's total zoned capacity).

Mr. Jason Rogers, Chair  
May 14, 2015  
Page 4

The word “negligible” is undefined in the TCDC. TCDC 18.120.010 directs that the commonly accepted, dictionary meaning be used where a word is undefined in the TCDC. “Negligible” is defined as “so small or unimportant or of so little consequence as to warrant little or no attention; trifling.” merriam-webster.com.

The Planning Commission can find that the reduction of 51 units is a negligible reduction. Moreover, while the phrase “negligible effect” is found in the Metro Code adopted by the Metro Council, the Planning Commission in this quasi-judicial proceeding may apply that term based on evidence before it. Metro’s argument that the reduction of 51 units is not negligible is not supported by the evidence in the record. The Planning Commission can find with that the reduction of only 51 units from the City’s minimum “zoned capacity” (as that term is defined in Metro Code 3.07.1010; **Exhibit 2**) will have only a negligible effect.

## 5. Conclusion.

On behalf of Venture, I respectfully request that the Planning Commission reject the issues raised by Mr. Mitchell, the Tualatin Riverkeepers, and Metro, and find that the applicant has met its burden of proof on these issues to the extent they are relevant to applicable approval criteria. With respect to the net development area issue, the Planning Commission can find that the two (2) isolated wetlands areas, because they are not shown on the City’s Sensitive Lands map, may be calculated as part of the site’s net development area.

Very truly yours,

 for  
Michael C. Robinson

MCR:rsr  
Enclosures

cc: Kelly Ritz (via email) (w/ encls.)  
Mimi Doukas (via email) (w/ encls.)  
Tom McGuire (via email) (w/ encls.)  
Lina Smith (via email) (w/ encls.)  
John Floyd (via email) (w/ encls.)  
Gary Pagenstecher (via email) (w/ encls.)  
Stacey Reed (via email) (w/ encls.)



## Urban Growth Management Functional Plan

Metro implements Goal 10 through Title 1. To meet Title 1, each jurisdiction was required to determine its housing capacity and adopt minimum density requirements. Tigard adopted an 80% of minimum density requirement for development in 1998, which means that a development must build 80% of the maximum units allowed by the zoning designation. The City has committed to providing the development opportunity for an additional 6,308 dwelling units between 1998 – 2017. This number shows Tigard’s zoned capacity for additional dwelling units. It is an estimate based on the minimum number of dwelling units allowed in each residential zoning district, assuming minimum density requirements.

*“The City of Tigard maintains an up-to-date buildable lands inventory.”*

The City of Tigard maintains an up-to-date buildable lands inventory, a permit tracking system for development, as well as complying with Metro’s Functional Plan. The City is responsible for monitoring residential development. All of these tools aid the City in monitoring its progress toward the above goals, and determining if the opportunity remains for current and future residents to have diverse housing choices.

## Tigard’s Geographic Limits to Growth

In the last several years, Washington County has urbanized significant areas of unincorporated land to the south and west of Tigard. It and service districts provide the minimum required facilities and services. The county’s actions, combined with state annexation law, make it is improbable that most of these developed lands will annex to Tigard. Urbanized unincorporated land forms a barrier between Tigard and unincorporated urban growth areas designated by Metro. Thus, Tigard is unlikely to expand its City boundaries in the future. The lack of vacant residential land will require Tigard to meet its housing capacity commitment within its current, mostly built-out, City limits. This will require actions to increase residential density within the appropriate areas such as along major transportation corridors, and within designated Regional and Town Centers. Thus, much new residential development will occur through urban infill and redevelopment.

sufficient to support and under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas. Wetlands are those areas identified and delineated by a qualified wetland specialist as set forth in the 1987 Corps of Engineers Wetland Delineation Manual.

(uuu) "Zoned capacity" means the highest number of dwelling units or jobs that are allowed to be contained in an area by zoning and other city or county jurisdiction regulations.

(Ordinance No. 97-715B, Sec. 1. Amended by Ordinance No. 98-721A, Sec. 1; Ordinance No. 98-730C, Sec. 10. Readopted by Ordinance No. 00-839, Sec. 1. Amended by Ordinance No. 00-869A, Sec. 2; Ordinance No. 02-972A, Sec. 1; Ordinance No. 05-1077C, Sec. 6; and Ordinance No. 10-1244B, Sec. 9).

## **TITLE 11: PLANNING FOR NEW URBAN AREAS**

### 3.07.1105 Purpose and Intent

The Regional Framework Plan calls for long-range planning to ensure that areas brought into the UGB are urbanized efficiently and become or contribute to mixed-use, walkable, transit-friendly communities. It is the purpose of Title 11 to guide such long-range planning for urban reserves and areas added to the UGB. It is also the purpose of Title 11 to provide interim protection for areas added to the UGB until city or county amendments to land use regulations to allow urbanization become applicable to the areas.

(Ordinance No. 99-818A, Sec. 3. Amended by Ordinance No. 02-969B, Sec. 11; and Ordinance No. 10-1238A, Sec. 5; and Ordinance No. 11-1252A, Sec. 1).

### 3.07.1110 Planning for Areas Designated Urban Reserve

- A. The county responsible for land use planning for an urban reserve and any city likely to provide governance or an urban service for the area, shall, in conjunction with Metro and appropriate service districts, develop a concept plan for the urban reserve prior to its addition to the UGB pursuant to sections 3.07.1420, 3.07.1430 or 3.07.1435 of this chapter. The date for completion of a concept plan and the area of urban reserves to be planned will be jointly determined by Metro and the county and city or cities.
- B. A local government, in creating a concept plan to comply with this section, shall consider actions necessary to achieve the following outcomes:

**Chapter 18.510**  
**RESIDENTIAL ZONING DISTRICTS**

**Sections:**

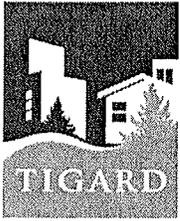
- 18.510.010 Purpose**
- 18.510.020 List of Zoning Districts**
- 18.510.030 Uses**
- 18.510.040 Minimum and Maximum Densities**
- 18.510.050 Development Standards**
- 18.510.060 Accessory Structures**

**18.510.010 Purpose**

- A. Preserve neighborhood livability. One of the major purposes of the regulations governing development in residential zoning districts is to protect the livability of existing and future residential neighborhoods, by encouraging primarily residential development with compatible nonresidential development—schools, churches, parks and recreation facilities, day care centers, neighborhood commercial uses and other services—at appropriate locations and at an appropriate scale.
- B. Encourage construction of affordable housing. Another purpose of these regulations is to create the environment in which construction of a full range of owner-occupied and rental housing at affordable prices is encouraged. This can be accomplished by providing residential zoning districts of varying densities and developing flexible design and development standards to encourage innovation and reduce housing costs.

**18.510.020 List of Zoning Districts**

- A. R-1: low-density residential district. The R-1 zoning district is designed to accommodate detached single-family homes with or without accessory residential units at a minimum lot size of 30,000 square feet. Some civic and institutional uses are also permitted conditionally.
- B. R-2: low-density residential district. The R-2 zoning district is designed to accommodate detached single-family homes with or without accessory residential units at a minimum lot size of 20,000 square feet. Some civic and institutional uses are also permitted conditionally.
- C. R-3.5: low-density residential district. The R-3.5 zoning district is designed to accommodate detached single-family homes with or without accessory residential units at a minimum lot size of 10,000 square feet. Duplexes are permitted conditionally. Some civic and institutional uses are also permitted conditionally.
- D. R-4.5: low-density residential district. The R-4.5 zoning district is designed to accommodate detached single-family homes with or without accessory residential units at a minimum lot size of 7,500 square feet. Duplexes and attached single-family units are permitted conditionally. Some civic and institutional uses are also permitted conditionally.
- E. R-7: medium-density residential district. The R-7 zoning district is designed to accommodate attached single-family homes, detached single-family homes with or without accessory residential units, at a minimum lot size of 5,000 square feet, and duplexes, at a minimum lot size of 10,000 square feet. Mobile home parks and subdivisions are also permitted outright. Some civic and institutional uses are also permitted conditionally.



# City of Tigard

## Land Use Applications - 14/15 Fee Schedule

PROCEDURE	FEE	SURCHARGE	TOTAL
ACCESSORY RESIDENTIAL UNITS	\$ 299	\$ 44	\$ 343
ANNEXATION Moratorium on Annexation fees in effect until February 2014	\$ 2,803	\$ 414	\$ 3,217
APPEAL			
Director's Decision (Type II) to Hearings Officer	\$ 292	\$ -	\$ 292
Expedited Review (Deposit) «	\$ 351	\$ -	\$ 351
Hearings Referee	\$ 585	\$ -	\$ 585
Planning Commission/Hearings Officer To City Council	\$ 2,818	\$ 416	\$ 3,234
APPROVAL EXTENSION	\$ 299	\$ 44	\$ 343
BLASTING PERMIT	\$ 317	\$ 47	\$ 364
CONDITIONAL USE PERMIT			
Initial	\$ 5,580	\$ 824	\$ 6,404
Major Modification	\$ 5,580	\$ 824	\$ 6,404
Minor Modification	\$ 611	\$ 90	\$ 701
DESIGN EVALUATION TEAM (DET) RECOMMENDATION (DEPOSIT)	\$ 1,558	\$ 230	\$ 1,788
DEVELOPMENT CODE PROVISION REVIEW			
Single-Family Building Plan	\$ 75	\$ 11	\$ 86
Commercial/Industrial/Institution--New Development	\$ 299	\$ 44	\$ 343
Commercial/Industrial/Institution--Tenant Improvements in Existing Development			
Project Valuation up to \$4,999	\$ -	\$ -	\$ -
Project Valuation \$5,000 - \$74,999	\$ 75	\$ 11	\$ 86
Project Valuation \$75,000 - \$149,999	\$ 187	\$ 28	\$ 215
Project Valuation \$150,000 and more	\$ 299	\$ 44	\$ 343
DOWNTOWN REVIEW			
Downtown Review Compliance Letter (Type I)	\$ 611	\$ 90	\$ 701
Downtown Design Administrative Review (Type II)			
Under \$1,000,000	\$ 1,428	\$ 211	\$ 1,639
\$1 Million/Over (Maximum fee of \$25,000)	\$ 5,505	\$ 813	\$ 6,318
Downtown Design Review – Design Review Board (Type III)	\$ 2,897	\$ 428	\$ 3,325
			base + applicable Type II fee
HEARING POSTPONEMENT	\$ 340	\$ 50	\$ 390
HISTORIC OVERLAY/REVIEW DISTRICT			
Historic Overlay Designation	\$ 4,363	\$ 644	\$ 5,007
Removal of Historic Overlay Designation	\$ 4,363	\$ 644	\$ 5,007
Exterior Alteration in Historic Overlay District	\$ 654	\$ 97	\$ 751
New Construction in Historic Overlay District	\$ 654	\$ 97	\$ 751
Demolition in Historic Overlay District	\$ 654	\$ 97	\$ 751



# City of Tigard Memorandum

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To: Honorable Mayor Cook and Tigard City Council

From: John Floyd, Associate Planner

Re: Appeal of the Planning Commission's final order for the Heritage Crossing Zone Change and Subdivision (ZON2015-00002/SUB2015-00001/VAR2015-00001)

Date: June 30, 2015

## Background Information

On May 18<sup>th</sup>, 2015, the Tigard Planning Commission held a public hearing to consider the Heritage Crossing Project, a quasi-judicial zoning map amendment and 53 lot residential subdivision. The project site is located at 15435 SW Hall Boulevard (Schmidt Acres, LLC), is approximately 9.10 acres in size, and has significant frontage along Hall Boulevard and two existing street stubs into the Applewood Subdivision.

The requested zone change would amend the Tigard Zoning Map to remove the existing R-12 designation assigned to the property in 1983, and replace it with an R-7 designation. Key points include the following:

- The Tigard Development Code requires the applicant to meet three approval criteria for a quasi-judicial zone change. All three must be met, not one or two. The Planning Commission found that the application failed to meet any of the three of the approval criteria.
- Both zones meet the definition of "medium-density residential," but substantially differ in allowed densities and housing types.
  - The R-12 zone is intended to accommodate the full range of housing types at a minimum lot size of 3,050 square feet. This includes single-family detached and attached, duplexes, and multi-family units.
  - The R-7 zone is a more restrictive designation and is designed to accommodate single-family homes on 5,000 square foot lots, and duplexes on 10,000 square foot lots. Attached single-family homes are allowed, but subject to restrictions and possible conditional use permit review.
- The effect of the zone change would be to remove housing capacity on one of the City's largest and least constrained infill sites, by reducing both the number and variety of potential dwelling units that could be developed.

As detailed in the final order and draft minutes, the Planning Commission denied the application in a 5-1 vote. The Planning Commission felt that the applicant had not made a compelling case given the high burden of proof necessary to comply with the approval criteria. Because the associated subdivision was proposed to meet R-7 standards, it too was denied for not meeting the standards of the existing zone.

In response, the applicant filed an appeal on June 15<sup>th</sup>. In order to grant the appeal, Council must find the application consistent with all three approval criteria specified in Tigard Development Code (TDC) 18.380.030.B:

1. Demonstration of compliance with all applicable comprehensive plan policies and map designations.
2. Demonstration of compliance with all applicable standards of any provision of this code or other applicable implementing ordinance; and
3. Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application.

To assist Council in their consideration of the appeal, staff has summarized and responded to the applicant's appeal letter as contained below.

#### Zoning Map Amendment (ZON2015-00002)

##### “Proposal Description” (Page 3 of Final Order)

Applicant: “The Planning Commission erred by excluding R-12 lands in the River Terrace area from its analysis of the amount of available R-12 land...there is no basis for the city Council to exclude the consideration of R-12 lands in the River Terrace Area”

Staff Response: The proposal description in Section II of the final order was included as background information, and is not an approval criterion. As noted in the final order, the description cites acreage calculations from the most recent Buildable Lands Inventory available (January 1, 2014), which predates adoption of River Terrace Zoning.

“TDC18.380.030.C.2 - Demonstration of compliance with all applicable standards of any provision of this code or other applicable implementing ordinance;” (Page 6)

Applicant: “The City Council can find that the Metro Functional Plan is neither part of ‘This Code’, nor is it an ‘applicable implementing ordinance”.

Staff Response: Metro is a creation of the State for the purposes of implementing Statewide Planning Rules at a regional level. The Metro Functional Plan is

relevant and applicable to this decision pursuant to TDC 18.210.030.A (Consistency with comprehensive plan and all laws) and Metro Code 3.07.110 (Housing Capacity: Purpose and Intent). Therefore, Metro Code requirements are applicable to this decision.

“TDC18.380.030.C.3 - Evidence of change in the neighborhood or community or a mistake or inconsistency in the comprehensive plan or zoning map as it relates to the property which is the subject of the development application.” (Page 6)

Applicant: “The City Council can find based on substantial evidence that there is evidence that there has been either a change in the neighborhood or that a mistake in zoning has occurred”

Staff Response: The final order and associated record do not support this conclusion.

As detailed in Section III of the Final Order, the R-12 zone was properly adopted and reaffirmed by Council in 1983 under Ordinance Nos. 83-24 and 83-52. There is no evidence of a mistake in the zoning map.

The Final Order contains substantial evidence regarding the history of the site and adjacent properties (Pages 2-3 and 6-9). On balance there is evidence of more continuity than change in both the neighborhood and community goals. The site met the locational criteria and policy goals for the R-12 zone in 1983, and on balance the site continues to meet similar goals set forth in current Comprehensive Plan Policies. These include the placement of land intensive densities adjacent to transit corridors and arterials, proximity to services, and the efficient use of relatively unconstrained land.

Comprehensive Plan Policy 2.1.2: “The City’s land use regulations, related plans, and implementing actions shall be consistent with and implement its Comprehensive Plan.”

Applicant: “The City Council can find based on substantial evidence that that zoning map amendment is consistent with and will implement the plan”

Staff Response: As detailed in the Final Order, the Planning Commission found the record to be inconsistent with applicable Comprehensive Plan policies.

Plan Policy 2.1.5 “The City shall promote intense urban level development in Metro designated Centers and Corridors, and employment and industrial areas.”

Applicant: “The Planning Commission erred in finding [this policy] applicable...the plan policy calls only for the city to promote intense urban level development in designated corridors. Plan Policy 2.1.5 says nothing about

whether the City may change a zoning map designation...and the change is supported by, and implements other Plan policies.”

“Moreover, the Planning Commission erred by failing to define the term “intense urban-level development”.

Additionally, the Plan policy does not prohibit other than intense urban level development.”

**Staff Response:** The policy is applicable in that the action before the city is within the definition of the term “promote”, is of relevance to the intensity and style of development that would be allowed on the site, and the property is located in a Metro designated corridor (Hall Boulevard).

As defined, the word promote has clear meaning, as defined by the Comprehensive Plan glossary: “support, advocate, or take affirmative action to achieve a particular community objective”. In the context of this policy, the community objective is “intense, urban-level development” along Metro designated centers (i.e. Downtown Tigard) and corridors (i.e. Hall Boulevard).

Applying this policy to the project, the City is being asked to take affirmative action in a metro-designated corridor that (1) would reduce the intensity of uses, and (2) would preclude or prohibit types of housing more often found in urban areas than suburban or rural areas. Council can find the requested zoning map amendment to be contrary to the content and intent of this policy, and uphold the Planning Commission denial.

Plan Policy 2.1.14 Applicants shall bear the burden of proof to demonstrate that land use applications are consistent with applicable criteria and requirements of the Development Code, the Comprehensive Plan, and when necessary, those of the state and other agencies.

**Applicant:** “The City Council can find that the applicant has met its burden of proof to demonstrate that the zoning map amendment is consistent with the applicable criteria of the TCDC, the Plan, and the Metro Functional Plan, for the reasons explained in this letter and other evidence submitted by the applicant.”

**Staff Response:** As discussed in the final order and draft minutes of the hearing, the Planning Commission found that based on the record before them, the applicant had not met the burden of proof.

Policy 2.1.15.C: The new land use designation shall fulfill a proven community need such as provision of needed commercial goods and services, employment, housing, public and community services, etc. in the particular location, versus other appropriately designated and developable properties;

Applicant: “the R-7 zoning district is the most compatible zoning district with the surrounding development and substantial evidence demonstrates a need for additional R-7 housing at this location, in part, because of the requirement for compatibility.”

Staff Response: As documented in the final order and draft minutes, the Planning Commission found insufficient evidence of a need for housing built to R-7 standards in this particular location, at the expense of other allowed housing types, versus other similarly zoned and developable properties across the city.

In their application and appeal letter, the applicant cites neighborhood compatibility as a community need in this particular location. The applicant has not provided clear evidence of a community need to remove the R-12 designation in order to address potential compatibility issues.

- The application does not identify how development built to existing R-12 standards would create specific aesthetic, environmental, or operational conflicts that would prevent neighboring residents from enjoying, occupying or using their property without interference.
- There is substantial similarity in the development standards for height and massing between the existing and proposed zones (final order page 3).
- The Tigard Development Code requires certain site and building design treatments to ensure compatibility where there is a zone boundary or differential housing types. For example, new housing within Heritage Crossing would be required to maintain a 30 foot setback from the periphery of the project site (twice the normal distance).
- The applicant could address potential compatibility issues under existing zoning. These include flexible design strategies such as lot size averaging, a mix of housing types, and/or a Planned Development application to ensure development at the edge of the project site was more similar to existing development.

Policy 2.1.15.D: Demonstration that there is an inadequate amount of developable, appropriately designated, land for the land uses that would be allowed by the new designation;

**Applicant:** “The City Council can find that the application demonstrates that there is an inadequate amount of developable, appropriately designated land for R-7 lots, whereas there is more than adequate available R-12 land, including the River Terrace Area.

**Staff Response:** This policy requires the City to determine that there is an inadequate amount of land for the desired land uses. When interpreting this policy, Council should consider the fact that the applicant can already develop the property with detached, single-family homes. No change in zoning is required to achieve this outcome.

The final order found the applicant’s analysis to insufficiently address the effect of the zone change on the availability of land for all needed housing types. If approved, the zone change would restrict or prohibit the development of attached single-family and multifamily housing units within the City. This is a growing form of needed housing, as discussed below.

In 2013 the Council adopted a Housing Strategies report prepared by Angelo Planning Group and Johnson & Reid. The report analyzed the city’s current and future housing needs, which included the following conclusions which are relevant to the appeal:

- “In general, there is a need for some less expensive ownership units and rental units.”
- “Single family attached units are projected to meet nearly 20% of future housing need.”
- “It is projected that in coming decades a greater share of housing will be attached types, including attached single family.”

An action to increase minimum lot sizes and restrict attached units would not be consistent with the needs outlined above.

**Policy 2.1.15.F:** Land uses allowed in the proposed designation would be compatible, or capable of being made compatible, with environmental conditions and surrounding land uses;

**Applicant:** “The planning commission misapplied the policy because it does not require a demonstration of incompatibility the Plan policy simply requires a demonstration of compatibility.”

“Moreover, the Planning Commission erred in another way because it adopted the word “significantly” when this word does not appear in Plan Policy 2.1.15.F.”

Staff Response: Council can interpret this policy broadly and with degrees of significant, as the applicant did in their application (Project Narrative, Page 72), and consider whether or not there is a need to address compatibility issues on the site given existing conditions. The applicant asserts in their application that “the key consideration for this proposed zone change is neighborhood compatibility”, followed by a discussion of possible outcomes under existing zoning. As discussed in the final order and broader record, the Tigard Comprehensive Plan and Development Code both anticipate and address potential compatibility issues where differing zones our housing types abut one another. As a result, the Planning Commission did not find an issue of incompatibility to exist under current zoning.

Policy 6.1.3: The City shall promote land use patterns which reduce dependency on the automobile, are compatible with existing neighborhoods, and increase opportunities for walking, biking, and/or public transit.

Applicant: “No evidence in the record demonstrates that more people will drive from the R-7 zoning district, or that fewer people will walk, bike, or use public transit from the R-7 zoning district.”

Staff Response: The policy speaks to “increased opportunities” for walking, biking, and public transit, not a specific number.

As documented in the final order and record, there are three schools within 0.3 miles of the site, and the City’s largest park just beyond the high school. There is also a neighborhood commercial center approximately 0.15 miles from the project site. Continuous sidewalks connect the project site to all of these facilities.

The site is also adjacent to a transit stop for the Tri-Met 76 bus line, soon to be upgraded to frequent service (15 minute headways) as part of the Southwest Service Enhancement Plan. As documented in the record, this line serves a number of significant employment and town centers, and transportation hubs. Few other sites in town have this level of proximity to such services. To reduce the number of people living within proximity to these services would decrease opportunities for walking and/or public transit. As a result, the Planning Commission found this policy to not be met.

Policy 10.1.1: The City shall adopt and maintain land use policies, codes, and standards that provide opportunities to develop a variety of housing types that meet the needs, preferences, and financial capabilities of Tigard’s present and future residents.

Applicant: “The City Council can find that this plan policy is not applicable to the decision because a zoning map amendment is not a “land use policy, code and standard.”

Staff Response: Council can find this policy applicable, as the applicant did in their application (Project Narrative, Pages 72-75).

Policy 10.1.5: The city shall provide for high and medium density housing in the areas such as town centers (Downtown), regional centers (Washington Square), and along transit corridors where employment opportunities, commercial services, transit, and other public services necessary to support higher population densities are either present or planned for in the future

Applicant: “The City Council can find that this plan policy is not applicable because the Site is not along a “transit corridor” in an area where employment opportunities, commercial services, transit, and other public services necessary to support higher population densities are either present or planned for in the future...the site is located in an area of predominately single-family homes with no significant retail or employment opportunities anywhere in the area”

“If the City finds that the plan policy is applicable...it must also find that it is satisfied by the application because Plan Policy 10.1.5 calls for the City to provide for high and medium density housing in such areas.”

Staff Response: As demonstrated in the record, the Tri-met 76-line connects this property to a north-south corridor of destinations including the Beaverton Transit Center, Downtown Beaverton, the Washington Square Transit Center, the Hall/Nimbus station, the Tigard Transit Center, Bridgeport Village, and Legacy Meridian Park Hospital (Attachment “C”). These stops form a corridor of employment opportunities, commercial services, transit connections, and other public services necessary to support higher population densities along this and other transit lines.

As contained in the final order, the Planning Commission found that while both the existing and proposed zoning are intended to provide for medium-density housing, the lowering of densities on this site would diminish conformance with this policy rather than enhance it.

Policy 10.2.5: The City shall encourage housing that supports sustainable development patterns by promoting the efficient use of land, conservation of natural resources, easy access to public transit and other efficient modes of transportation, easy access to

services and parks, resource efficient design and construction, and the use of renewable energy resources.

**Applicant:** “The City Council can find that this Plan Policy is not applicable to a quasi-judicial application because it only directs the city to implement certain housing types by “encouraging” certain activities.”

“If the City Council finds that this Plan policy is applicable, it can also find that the Plan policy is satisfied because the R-7 zoning district implements Plan Policy 10.2.5 because the activities to be encourage will or can occur in the R-7 zone.”

**Staff Response:** The policy was found relevant and applicable in both the project narrative submitted by the applicant (Page 76), and the Planning Commission. As determined in the final order, the proposal to reduce population density would result in a less efficient use of residentially designated land, would reduce the net benefit provided by the fill of mapped wetlands on the property, and would reduce the number of potential households along a transit corridor. As noted in a memorandum to the Planning Commission, the City of Tigard Housing Planner found the location of the project to be of particular importance due to its location near the amenities and services identified above.

**Policy 10.2.7:** The City shall ensure that residential densities are appropriately related to locational characteristics and site conditions such as the presence of natural hazards and natural resources, availability of public facilities and services, and existing land use patterns.

**Applicant:** “The City Council can find that this policy is satisfied because the R-7 residential is “appropriately related” to the existing land use pattern of R-7 development and is supported by available public facilities and services.”

**Staff Response:** As determined in the final order, the R-12 designation was assigned to this property in 1983 due to its proximity to an arterial, a Tri-Met bus line, and to schools and neighborhood commercial. The property is flat with limited natural resources and no known natural hazards, and is relatively unconstrained compared to other sites within the City which may contain steep slopes, riparian resources, floodplain hazards, and other limitations. All of these factors are present today and remain relevant to the decision. Reducing density would not make full use of the locational opportunities listed above.

**Policy 10.2.8:** The City shall require measures to mitigate the adverse impacts from differing, or more intense, land uses on residential living environments, such as:

- A. orderly transitions from one residential density to another;
- B. protection of existing vegetation, natural resources and provision of open space areas; and
- C. installation of landscaping and effective buffering and screening.

Applicant: “The Planning Commission erred by failing to provide specific findings on Plan Policy 10.2.8”

Staff Response: Specific findings were contained within the Final Order. Due to the similarity of issues, the Final Order combined the findings for plan policy 10.2.8 and 10.2.9 into a singular response.

The policy and findings are relevant in that the applicant’s materials state that the proposed zone change will remove an unspecified compatibility issue between the existing R-12 zone and adjacent R-7 zone (Project Narrative pages 19, 72, 73, and 76). The application narrative also references this policy as applicable to the application (Project Narrative, page 76). In response, the Planning Commission adopted the following findings:

“As previously discussed, the Tigard Community Development Code has standards to account for changes in density and housing types when they abut one another. The applicant has provided no evidence that development consistent with R-12 standards will be incompatible with adjacent, existing development, and that existing compatibility standards required in Title 18 are inadequate. The proposed change in zoning is not supported by this policy. ”

Policy 10.2.9: The City shall require infill development to be designed to address compatibility with existing neighborhoods.

Applicant: “The Planning Commission erred by finding Plan Policy 10.2.9 is not met. Substantial evidence in the whole record demonstrates that the R-7 zoning district is compatibility with existing neighborhoods.

Staff Response: This Plan policy is a broadly defined directive that infill development be designed to reduce or avoid conflicts with adjoining land uses. The vehicle of compliance is not specified, nor has the applicant established clear compatibility issues present under existing zoning, which would justify the zone change under this policy. As a result, the Final Order contained the following findings:

“As previously discussed, the Tigard Community Development Code has standards to account for changes in density and housing types when they

abut one another. The applicant has provided no evidence that development consistent with R-12 standards will be incompatible with adjacent, existing development, and that existing compatibility standards required in Title 18 are inadequate. The proposed change in zoning is not supported by this policy. ”

Policy 12.1.1: The City shall plan for a transportation system that meets current community needs and anticipated growth and development.

Policy 12.1.2. The City shall prioritize transportation projects according to community benefit, such as safety, performance, and accessibility, as well as the associated costs and impacts.

Policy 12.1.3. The City shall maintain and enhance transportation functionality by emphasizing multi-modal travel options for all types of land uses.

Policy 12.1.4. The City shall promote land uses and transportation investments that promote balanced transportation options.

Policy 12.1.5. The City shall develop plans for major transportation corridors and provide appropriate land uses in and adjacent to those corridors.

Policy 12.1.6. The City shall support land use patterns that reduce greenhouse gas emissions and preserve the function of the transportation system.

Applicant: “The City Council can find that the Planning Commission erred by failing to adopt specific findings related to the express language of the Plan policies. Moreover, the City Council must find that Plan Policy 12.1.5 is inapplicable because the Plan policy is a direction to the city to implement a particular type of transportation system.”

Staff Response: These policies were addressed through a single, consolidated finding, in an identical manner as the project narrative submitted with the application (Project Narrative, Pages 76-77). The Final Order responds to the narrative in a proportional manner, identifying and consolidating findings for all policies submitted with the project narrative. The burden of proof is on the applicant to demonstrate compliance with all applicable policies.

Policy 12.3.1: The City shall continue to support the existing commuter rail and bus service in Tigard and will seek opportunities for increased service frequency and passenger convenience.

Applicant: “The City Council must find that Plan Policy 12.3.1 is inapplicable because it is a direction to the City to support existing commuter rail. No substantial evidence supports the Planning Commission’s findings that the R-7 zoning district will be less supportive of the City’s transportation system and existing commuter rail...”

Staff Response: The policy is applicable as it calls for the City to “support the existing commuter rail and bus service in Tigard”. The Final Order identifies the proposed zone change as having the effect of diminishing the number of potential riders near an existing bus stop.

## Metro Functional Plan

### Title 1: Housing Capacity

3.07.120.E: A city or county may reduce the minimum zoned capacity of a single lot or parcel so long as the reduction has a negligible effect on the city’s or county’s overall minimum zoned residential capacity.

Applicant: “The evidence relied upon from Metro contains no comparative numbers which allowed the Planning Commission to conclude that the reduction of a certain number of dwelling units would be more than a negligible effect on the city’s overall zoning Capacity”. However, the Applicant’s May 14, 2015 letter...explained that he zoning map amendment would have less than a 1% impact on the City’s minimum zoned residential capacity. No substantial evidence rebuts the Applicant’s evidence.

Staff Response: As acknowledged by the applicant in their May 14 letter to the Planning Commission, the term “negligible” is undefined in the Metro Functional Plan or Tigard Development Code. Council has discretion on how to apply the term.

The applicant’s analysis did not provide an assessment on the loss or restriction of attached housing types allowed under the current code, focusing only on the reduction of housing units generally.

With the addition of River Terrace to the 2014 Buildable Lands Inventory, the City has approximately 254.74 acres of R-7 zoned land available for development, and only 98.3 acres of R-12 zoned land available for development. As a result, the loss of 9.1 acres of land would have a significant and disproportionate impact on the city’s supply of attached and multifamily housing which is restricted or prohibited in the R-7 zone, without significantly contributing to the city’s overall supply of R-7 zoned land for detached single-family.

## Subdivision Application (SUB2015-00001)

The Planning Commission denied this application because the site design is dependent upon approval of the zone change. Were Council to reverse the Planning Commission decision and approve the zone change, this project could be conditioned to meet the requirements of the Tigard Development Code.

Adjustment to Street Standards (VAR2015-00001)

The Planning Commission denied this application because the design is dependent upon approval of the zone change. Were Council to reverse the Planning Commission decision and approve the zone change, this project could be conditioned to meet the requirements of the Tigard Development Code.

Link to Additional Materials for Heritage Crossing:

<http://publicrecords.tigard-or.gov/public/Browse.aspx?startid=684963>

**AIS-2270**

**6.**

**Business Meeting**

**Meeting Date:** 07/14/2015  
**Length (in minutes):** 10 Minutes  
**Agenda Title:** Rosacker Annexation  
**Submitted By:** Cheryl Caines, Community Development  
**Item Type:** Ordinance  
Public Hearing - Quasi-Judicial

**Meeting Type:** Council  
Business  
Meeting -  
Main

**Public Hearing** Yes  
**Newspaper Legal Ad Required?:**  
**Public Hearing Publication** 07/02/2015  
**Date in Newspaper:**

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**Information**

**ISSUE**

Consider adoption of an ordinance to annex three (3) parcels located on the north side of SW Fern Street totaling approximately 1.50 acres into the City of Tigard.

**STAFF RECOMMENDATION / ACTION REQUEST**

Staff recommends the City Council approve the proposed Rosacker annexation (ZCA2015-00001) by adoption of the attached ordinance.

**KEY FACTS AND INFORMATION SUMMARY**

Key Facts:

Located within a 7.79 acre island of incorporated Washington County, the proposed annexation area includes three (3) parcels totaling 1.50 acres on the north side of SW Fern Street. The two northern parcels (tax lots 300 & 400) are vacant, and annexation is being requested for city services and future development. The third parcel (tax lot 500) is developed with a single family home on septic. The owners of this site, Josh and Jennifer Loesche, joined the application and will be provided with a sanitary lateral by the applicant. All property owners and registered voters in the proposed territory have consented to the annexation. The applicant and the City invited the remaining property owners in the island to join the annexation but found no interest. Washington County zoning is R6. The parcels will be zoned R-7 upon annexation. This is the closest equivalent city zoning.

Key Findings:

The proposed annexation area is contiguous to the Tigard City Limits. Urban services are available and of sufficient capacity to serve the site. The site is within the Washington County Enhanced Sheriff's Patrol District and Urban Road Maintenance District; therefore the ordinance addresses the removal from these two districts. As outlined in the staff report, the proposed annexation meets the requirements of the Tigard Community Development Code, Comprehensive Plan, state statutes, and the Metro Code.

**OTHER ALTERNATIVES**

Adopt findings to deny the application.

**COUNCIL OR CCDA GOALS, POLICIES, MASTER PLANS**

No applicable council goals.

**DATES OF PREVIOUS CONSIDERATION**

n/a

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**Fiscal Impact**

**Cost:** n/a

**Budgeted (yes or no):** n/a

**Where Budgeted (department/program):** n/a

**Additional Fiscal Notes:**

n/a

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**Attachments**

Proposed Ordinance

Exhibit A - Map

Exhibit B - Legal Description

Exhibit C - Staff Report

Applicant's Materials

Power Point Site Map

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CITY OF TIGARD, OREGON  
TIGARD CITY COUNCIL  
ORDINANCE NO. 2015- \_\_\_\_\_

AN ORDINANCE ANNEXING THREE (3) PARCELS OF LAND TOTALLING APPROXIMATELY 1.54 ACRES, APPROVING THE ROSACKER ANNEXATION (ZCA2015-00001) AND WITHDRAWING PROPERTY FROM THE WASHINGTON COUNTY ENHANCED SHERIFF'S PATROL DISTRICT AND WASHINGTON COUNTY URBAN ROADS MAINTENANCE DISTRICT.

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WHEREAS, the City of Tigard is authorized by ORS 222.120(4)(b), ORS 222.125, and ORS 222.170(1) to annex contiguous territory upon receiving written consent from owners of land in the territory proposed to be annexed; and

WHEREAS, the City of Tigard is authorized by ORS 222.120(5) and 222.520 to withdraw property which currently lies within the boundary of the Washington County Enhanced Sheriff's Patrol District and Washington County Urban Roads Maintenance District upon completion of the annexation; and

WHEREAS, the Tigard City Council held a public hearing on July 14, 2015, to consider the annexation of three (3) parcel Washington County Tax Map (WCTM) 2S104BC, Tax Lots 300, 400, & 500 of land located on SW Fern Street, and withdrawal of said parcels from the Washington County Enhanced Sheriff's Patrol District and Washington County Urban Roads Maintenance District; and

WHEREAS, pursuant to Metro 3.09, ORS 222.120 and 222.524, notice was given and the City held a public hearing on the issue of the annexation into the City and on July 14, 2015; and

WHEREAS, pursuant to ORS 222.524, the City must declare the withdrawal of the annexed property from the Washington County Enhanced Sheriff's Patrol District and Washington County Urban Roads Maintenance District; and

WHEREAS, the Tigard Development Code states that upon annexation, the zone is automatically changed to the City zoning which most closely implements the City's comprehensive plan map designation or to the City designations which are the most similar; and

WHEREAS, the annexation has been processed in accordance with the requirements of Metro 3.09 and has been reviewed for compliance with the Tigard Community Development Code and the Comprehensive Plan and the annexation substantially addresses the standards in Metro 3.09 regulating annexations; and

WHEREAS, the Tigard City Council has carefully considered the testimony at the public hearing and determined that withdrawal of the annexed property from the applicable service districts is in the best interest of the City of Tigard.

NOW, THEREFORE, THE CITY OF TIGARD ORDAINS AS FOLLOWS:

SECTION 1: The Tigard City Council hereby annexes the subject parcels as described and shown in the attached Exhibits "A" and "B", and withdraws said parcels from the Washington County Enhanced Sheriff's Patrol District and Washington County Urban Roads Maintenance District.

SECTION 2: The Tigard City Council adopts the "Staff Report to the City Council" (ZCA20015-00001) as findings in support of this decision; a copy of the staff report is attached hereto as Exhibit "C" and incorporated herein by this reference.

SECTION 3: City staff is directed to take all necessary measures to implement the annexation, including filing certified copies of the Ordinance with Metro for administrative processing, filing with state and county agencies as required by law, and providing notice to utilities.

SECTION 4: Pursuant to ORS 222.120(5), the effective date of the withdrawal of the property from Washington County Enhanced Sheriff's Patrol District and Washington County Urban Roads Maintenance District shall be the effective date of this annexation.

SECTION 5: In accordance with ORS 222.180, the annexation shall be effective upon filing with the Secretary of State.

PASSED: By \_\_\_\_\_ vote of all Council members present after being read by number and title only, this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

\_\_\_\_\_  
Carol A. Krager, City Recorder

APPROVED: By Tigard City Council this \_\_\_\_\_ day of \_\_\_\_\_, 2015.

Approved as to form:

\_\_\_\_\_  
John L. Cook, Mayor

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
Date



Legal description for annexation

Lot 9, Handy Acres, a subdivision in the Northwest quarter of Section 4, Township 2 South, Range 1 West, Willamette Meridian, in the County of Washington and the State of Oregon.

**ANNEXATION CERTIFIED**

BY VF

APR 22 2015

WASHINGTON COUNTY A & T  
CARTOGRAPHY

Hearing Date: July 14, 2015 Time: 7:30 PM

**STAFF REPORT TO THE  
CITY COUNCIL  
FOR THE CITY OF TIGARD, OREGON**



120 DAYS = N/A

**SECTION I. APPLICATION SUMMARY**

**FILE NAME:** ROSACKER ANNEXATION  
**CASE NO:** Zone Change Annexation (ZCA) ZCA2015-00001

**APPLICANT:** William Rosacker  
 401 Kemper Crest Dr.  
 Newberg, OR 97132

**OWNER 1:** William & Rhonda Rosacker  
 401 Kemper Crest Dr.  
 Newberg, OR 97132      **OWNER 2:** Josh & Jennifer Loesche  
 14065 SW Fern St.  
 Tigard, OR 97223

**PROPOSAL:** A request to annex approximately three parcels totaling approximately 1.50 acres into the city of Tigard. The site is located on the north side of SW Fern Street within a 7.79 acre island of unincorporated Washington County properties.

**LOCATION:** 14033 SW Fern Street; WCTM 2S104BC, Tax Lot 300  
 14047 SW Fern Street; WCTM 2S104BC, Tax Lot 400  
 14065 SW Fern Street; WCTM 2S104BC, Tax Lot 500

**COUNTY ZONE:** R6: Residential, 5 units/acre minimum density, 6 units/acre maximum density. The purpose of the R-6 District is to implement the policies of the Comprehensive Plan for areas designated for residential development at no more than six (6) units per acre and no less than five (5) units per acre, except as specified by Section 300-2, Section 300-5, or Section 303-6. The intent of the R-6 District is to provide the opportunity for more flexibility in development than is allowed in the R-5 District.

**EQUIVALENT CITY ZONE:** R-7: Medium-Density Residential District. The R-7 zoning district is designed to accommodate attached single-family homes, detached single-family homes with or without accessory residential units, at a minimum lot size of 5,000 square feet, and duplexes, at a minimum lot size of 10,000 square feet. Mobile home parks and subdivisions are also permitted outright. Some civic and institutional uses are also permitted conditionally.

**APPLICABLE REVIEW CRITERIA:** The approval standards for annexations are described in Community Development Code Chapters 18.320 and 18.390; Comprehensive Plan Goal 1.1, Goal 11.1 (Policy 4), Goal 11.3 (Policy 6), and Goal 14.2 (Policy 1-4); ORS Chapter 222; and Metro Code Chapter 3.09.

## **SECTION II. STAFF RECOMMENDATION**

Staff recommends that the Council find that the proposed annexation (ZCA2015-00001) meets all the approval criteria as identified in ORS Chapter 222, Metro Code Chapter 3.09, Community Development Code Chapters 18.320 and 18.390, and the following Comprehensive Plan Goals and Policies: Goal 1.1; Goal 11.1, Policy 4; Goal 11.3, Policy 6; and Goal 14.2, Policy 1-4. Therefore, staff recommends APPROVAL of ZCA2013-00002 by adoption of the attached ordinance.

## **SECTION III. BACKGROUND INFORMATION**

The 1.50 acre annexation site is made up of three parcels located on the north side of SW Fern Street. Bordered by the City of Tigard on three sides, the site is within a 7.79 acre “island” of unincorporated Washington County. The two northern parcels (tax lots 300 and 400) are vacant, and the applicant/owners are requesting annexation for future development. That development is not part of this proposal. The third parcel (tax lot 500) is developed with a single-family home on septic.

Utilities are available in the area and can be extended to serve the site. Current Washington County zoning of the property is R-6; equivalent city zoning will be R-7. Properties to the east are zoned R-6. Properties to the north, south and west are within the City of Tigard and are zoned R-12 (PD), R-7, & R-7(PD).

## **SECTION IV. APPLICABLE CRITERIA, FINDINGS AND CONCLUSIONS**

**City:** Community Development Code Chapters 18.320 and 18.390; Comprehensive Plan Goal 1.1; Goal 11.1 (Policy 4), and Goal 11.3 (Policy 6), Goal 14.2 (Policies 1-4).

**State:** ORS Chapter 222

**Regional:** Metro Code Chapter 3.09

### **A. CITY OF TIGARD COMMUNITY DEVELOPMENT CODE (TITLE 18)**

Staff has determined that the proposal is consistent with the relevant portions of the Community Development Code based on the following findings:

#### **Chapter 18.320.020.B: Approval Process and Standards.**

**Approval Criteria.** The decision to approve, approve with modification, or deny an application to annex property to the City shall be based on the following criteria:

#### **1. All services and facilities are available to the area and have sufficient capacity to provide service for the proposed annexation area;**

The City of Tigard Comprehensive Plan’s Public Facilities and Services Chapter states that for the purposes of the Comprehensive Plan, public facilities and services refer to stormwater management, water supply and distribution, wastewater management, community facilities, and private utilities. In addition the comprehensive Plan Glossary includes public safety, parks, and transportation. All services are available to the proposed annexation site and have adequate capacity to serve existing and future development.

**Water – City of Tigard/Tigard Water District.** The property lies within the Tigard Water Service Area. The applicant states that the site can be served by an existing 6-inch water main in Fern Street. The existing home on tax lot 500 is already served by this line. There is adequate capacity to serve future homes on the vacant parcels.

**Sewer – City of Tigard.** City sanitary and storm is available at the property line of the two undeveloped parcels (tax lots 300 and 400) through a public easement that runs along the site’s northwest boundary. The applicant proposes to extend the public sewer lines 170 feet to the eastern boundary of the site and provide a sanitary lateral for tax lot 500 for future connection. The site slopes down to the north from Fern Street. There is no sewer in Fern Street. Based on information supplied to the applicant by the City of Tigard Public Works Department, there is adequate capacity to serve the future homes.

**Streets – City of Tigard Engineering Division.** The subject property is located on SW Fern Street. The proposed annexation will not affect this access. Future homes will have access to SW Fern Street; however, the applicant will plan for the possible future extension of SW Walnut Lane through the site. The properties are within the Washington County Urban Road Maintenance District and will be removed from the district upon annexation.

**Police – City of Tigard Police Department.** Police services are currently provided by the Washington County Sheriff. If approved, the property will be withdrawn from the Enhanced Sheriff's Patrol District. Jim Wolf of the Tigard Police Department has reviewed the proposed annexation and has no objections.

**Fire – Tualatin Valley Fire and Rescue (TVF&R).** The subject property is in Tualatin Valley Fire and Rescue's (TVF&R's) service area. The TVF&R District currently provides services to site, which will not change following annexation. The Fire District has personnel and equipment in the area that can respond to an emergency incident and implement such actions as may be necessary for fire and/or rescue operations.

**Parks–City of Tigard.** There is an existing public open space on Fern Street near the proposed annexation site. The annexation and development of this property will not adversely impact the city's ability or capacity to provide parks. System Development Charges for Parks will be collected for any future homes constructed on the site.

CONCLUSION: Based upon this review, staff finds that all public services and facilities (as defined by the Comprehensive Plan) are available to the proposed annexation territory and have sufficient capacity to provide service. The proposed annexation will not reduce the level of services within the City of Tigard. This criterion is met.

## **2. The applicable Comprehensive Plan policies and implementing ordinance provisions have been satisfied.**

FINDINGS: The following Comprehensive Plan goals and policies apply to the proposed annexation: Goal 1.1; Goal 11.1, Policy 4; Goal 11.3, Policy 6; and Goal 14, Policy 1- 4. Staff has determined that the proposal has satisfied the applicable Comprehensive Plan policies based on the following findings:

### **Goal 1.1: Citizen Involvement. The City shall provide citizens, affected agencies and other jurisdictions the opportunity to participate in all phases of the planning process.**

The City maintains an ongoing citizen involvement program. To assure citizens will be provided an opportunity to be involved in all phases of the planning process, the City provides notice for Type IV land-use applications. The City posted, mailed and published notice of the public hearing as follows. The City posted the hearing notice at four public places on June 23, 2015: Tigard Library, Tigard City Hall, Tigard Permit Center, and at the subject property on 14033/14047/14065 SW Fern Street. The City published notice of the hearing in *The Tigard Times* for two successive weeks (July 2 and July 9, 2015) prior to the July 14, 2015, public hearing. The City also mailed notice to all interested parties and surrounding property owners within 500 feet on July 22, 2015.

### **Goal 11.1: Public Facilities and Services.**

#### **Policy 4. The City shall require the property to be located within the city limits prior to receiving City stormwater services.**

Stormwater service will be provided by the City but lines will not be extended until the two northern parcels are developed. Drainage will be directed to the north away from SW Fern Street. A downstream analysis will be necessary as part of the subdivision application to determine what improvements must be provided by the applicant to accommodate the increased stormwater.

### **Goal 11.3: Public Facilities and Services.**

#### **Policy 6. The City shall require the property to be located within the city limits prior to receiving City wastewater services.**

City of Tigard sanitary service is available along the northwest boundary of the site and can be extended to serve all three parcels. Future public sanitary lines within the proposed subdivision will be owned and maintained by the City of Tigard. The applicant will not receive City services prior to annexation.

**Goal: 14.2. Implement the Tigard Urban Services Agreement through all reasonable and necessary steps, including the appropriate annexation of unincorporated properties.**

**Policy 1. The City shall assign a Tigard zoning district designation to annexed property that most closely conforms to the existing Washington County zoning designation for that property.**

The applicable Tigard zoning district designations are addressed below in the findings for Section 18.320.020.C.

**Policy 2. The City shall ensure that capacity exists, or can be developed, to provide needed urban level services to an area when approving annexation.**

Capacity has been addressed above, consistent with this policy.

**Policy 3. The City shall approve proposed annexations based on findings that the request:**

**A. can be accommodated by the City's public facilities and services; and**

The availability of the City's public facilities and services has been addressed above, consistent with this policy.

**B. is consistent with applicable state statute.**

As reviewed in this report, staff finds that the provisions of ORS 222 have been met, consistent with this policy.

**Policy 4. The City shall evaluate and may require that parcels adjacent to proposed annexations be included to: A) avoid creating unincorporated islands within the City; B) enable public services to be efficiently and effectively extended to the entire area; or C) implement a concept plan or sub-area master plan that has been approved by the Planning Commission or City Council.**

The subject site lies within a 7.79 acre island of unincorporated Washington County made up of seven (7) parcels. The proposal will result in three of those parcels being annexed to the city. Prior to submittal the applicant approached the property owners within the island to join the annexation. Only one neighboring property owner joined the application. In addition, the City sent invitations to adjacent owners to join the annexation but did not receive any responses. Elimination of the unincorporated island is not possible at this time; however, the proposal does shrink the size of the island to 6.29 acres.

CONCLUSION: Annexation of additional parcels is not necessary at this time. The city has coordinated with all jurisdictions and agencies within/near the annexation site. The City of Tigard has the services/facilities available and at adequate capacity to serve the site. The proposed annexation is consistent with applicable Comprehensive Plan policies. This criterion is met.

#### **Chapter 18.320.020.C**

**Assignment of comprehensive plan and zoning designations.**

**The comprehensive plan designation and the zoning designation placed on the property shall be the City's zoning district which most closely implements the City's or County's comprehensive plan map designation. The assignment of these designations shall occur automatically and concurrently with the annexation. In the case of land which carries County designations, the City shall convert the County's comprehensive plan map and zoning designations to the City designations which are the most similar.**

FINDINGS: All of the subject property is currently zoned R-6 (Washington County). This zone is intended for residential development at no more than 6 units per acre and no less than 5 units per acre. Table 18.320.1 in the TDC summarizes the conversion of the County's plan and zoning designations to City designations which are most similar. According to this table, the City designation most similar to R-6 is R-7 zoning.

CONCLUSION: Upon annexation the property will be zoned R-7, which most closely implements Washington County's comprehensive plan and zoning designations (R-6). This criterion is met.

**Chapter 18.390.060: Type IV Procedure**

Annexations are processed by means of a Type IV procedure, as governed by Chapter 18.390 of the Community Development Code (Title 18) using standards of approval contained in 18.390.020.B, which were addressed in the previous section. Chapter 18.390 requires City Council to hold a hearing on an annexation. It also requires the City to provide notice at least 20 days prior to the hearing by mail and to publish notice at least 10 business days prior to the hearing; the City mailed notice on June 23, 2015, and published public notice in *The Tigard Times* for two successive weeks (July 2 & July 9, 2015) prior to the July 14, 2015 public hearing.

**Additionally, Chapter 18.390.060 sets forth five factors for consideration when making a Type IV decision:**

**1. The Statewide Planning Goals and Guidelines adopted under Oregon Revised Statutes Chapter 197;**

FINDINGS: The city's Comprehensive Plan has been acknowledged by the Land Conservation and Development Commission to be in compliance with state planning goals and as reviewed above, the annexation proposal is consistent with Tigard Comprehensive Plan goals and policies.

CONCLUSION: The proposal is consistent with the city's acknowledged Comprehensive Plan. Therefore, the proposal complies with statewide planning goals, including citizen involvement, public facilities, transportation, and urbanization.

**2. Any federal or state statutes or regulations found applicable;**

FINDINGS:

**ORS 222:**

State law (ORS 222.120(4)(b), ORS 222.125 and ORS 222.170(1)) allows for a city to annex contiguous territory when owners of land in the proposed annexation territory submit a petition to the legislative body of the city. In addition, ORS 222.111(2) allows for a city to act on its own motion to annex contiguous territory. A city is not required to hold an election for such an annexation if it follows the noticing procedures for a public hearing per ORS 222.120.

ORS 222.120 requires the city to hold a public hearing before its legislative body (City Council) and provide public notice to be published once each week for two successive weeks prior to the day of the hearing, in a newspaper of general circulation in the city, and shall cause notices of the hearing to be posted in four public places in the city for the same two week period.

The owners of the subject parcels have signed a petition for annexation to the City. The site is contiguous to the City's boundary. The City mailed notice on June 23, 2015, and published public notice in *The Tigard Times* for two successive weeks (July 2 & July 9, 2015) prior to the July 14, 2015 public hearing and posted the hearing notice for public view on June 23, 2015 in the Tigard Library, Tigard City Hall, Tigard Permit Center, and at the site on SW Fern Street.

CONCLUSION: Staff finds that the provisions of ORS 222 have been met.

**3. Any applicable METRO regulations;**

Chapter 3.09 of the Metro Code (Local Government Boundary Changes) includes standards to be addressed in annexation decisions, in addition to local and state review standards. Staff has reviewed the Metro regulations for Local Government Boundary Changes and addressed the applicable regulations (Metro Code 3.09.045(d) & (e) and 3.09.050) below:

## FINDINGS:

### **Metro 3.09.045 (d) and (e)**

The proposed annexation is not being reviewed through an expedited process, but subsections (d) of Metro Code 3.09.050 requires that the standards of 3.09.045 (d) & (e) be addressed.

**(d) To approve a boundary change through an expedited process, the city shall:**

**(1) Find that the change is consistent with expressly applicable provisions in:**

**(A) Any applicable urban service agreement adopted pursuant to ORS 195.065;**

The Tigard Urban Service Agreement (TUSA) is between the City, County, Metro, and the service Districts for water, sewer, transportation, parks and public safety. The agreement outlines the role, provision, area, and planning/coordination responsibilities for service providers operating in the Tigard Urban Services Area. These services are addressed above at the beginning of this report.

The Urban Planning Area Agreement (UPAA) between the City and the County provides coordination of comprehensive planning and development, defines the area of interest, and includes policies with respect to the active planning area and annexation. The applicable annexation policies include the assignment of comprehensive plan and zoning designations addressed earlier in this report and acknowledgements that the City is the ultimate service provider of urban services within the Tigard Urban Service Area.

The City has followed all processing and notice requirements in the *UPAA*, providing notice to Washington County. The agreement states that “so that all properties within the Tigard Urban Service Area will be served by the City, the County and City will be supportive of annexations to the City.”

**(B) Any applicable annexation plan adopted pursuant to ORS 195.205;**

These statutes outline the process for annexations initiated by a city or district, including public hearings and voting procedures. This statute is not applicable since the annexation was initiated by the property owner. The applicant has submitted a petition to annex signed by both property owners. There are no registered voters at the site.

**(C) Any applicable cooperative planning agreement adopted pursuant to ORS 195.020(2) between the affected entity and a necessary party;**

ORS195.020(2) speaks to cooperative agreements between counties or Metro with each special district that provides an urban service within the boundaries of the county or the metropolitan district. Special districts would include fire, water, school, and sewer districts. These districts are the same within the county and city with the exception of the sewer district, which will be the City of Tigard following development of the subdivision. Planning for these areas will still be considered by the same special districts upon annexation due to existing agreements with the City.

**(D) Any applicable public facility plan adopted pursuant to a statewide planning goal on public facilities and services; and**

The City of Tigard Public Facility Plan was adopted in 1991 in compliance with statewide planning goals and Oregon Administrative Rule 660-11. A revised plan is currently being developed as part of periodic review. New Comprehensive Plan goals and policies for public facilities were adopted in 2008 (Goal 11), and the applicable goals and policies were addressed previously in this report. The proposed annexation is consistent with the Tigard Public Facility Plan.

**(E) Any applicable comprehensive plan; and**

The Tigard Comprehensive Plan applies in this case. Applicable policies are satisfied as addressed previously in this report.

**(2) Consider whether the boundary change would: (A) Promote the timely, orderly and economic provision of public facilities and services; (B) Affect the quality and quantity of urban services; and (C) Eliminate or avoid unnecessary duplication of facilities or services.**

The proposed annexation will allow urban services to be provided to the site for existing and future homes and to future urban development on the sites to the east that may annex in the future. In addition, Tigard Police will serve the site instead of Washington County Sherriff. TVF&R will continue to provide service as it is a county-wide provider.

**(e) A city may not annex territory that lies outside the UGB, except it may annex a lot or parcel that lies partially within and outside the UGB. Neither a city nor a district may extend water or sewer services from inside a UGB to territory that lies outside the UGB.**

The property to be annexed is not outside the UGB. This criterion is not applicable.

**Metro 3.09.050 (b)**

**(b) Not later than 15 days prior to the date set for a change decision, the approving entity shall make available to the public a report that addresses the criteria in subsection (d) below, and that includes at a minimum the following:**

The staff report was available June 29, 2015, fifteen days prior to the public hearing.

**(1) The extent to which urban services presently are available to serve the affected territory including any extra territorial extensions of service;**

As addressed previously in this report, urban services are available and can be extended to the affected territory.

**(2) Whether the proposed boundary change will result in the withdrawal of the affected territory from the legal boundary of any necessary party; and**

The proposed territory will remain within Washington County but will be required to be withdrawn from the Washington County Enhanced Sheriff's Patrol District and Urban Road Service District upon completion of the annexation. This withdrawal is incorporated into the proposed ordinance.

**(3) The proposed effective date of the boundary change.**

The public hearing will take place July 14, 2015. If the Council adopts findings to approve ZCA2015-00001, the effective date of the annexation will be upon filing with the Secretary of State office per Oregon Revised Statutes (ORS 222.180).

**(c) The person or entity proposing the boundary change has the burden to demonstrate that the proposed boundary change meets the applicable criteria.**

The proposed boundary change meets the applicable criteria as demonstrated in this staff report.

**(d) To approve a boundary change, the reviewing entity shall apply the criteria and consider the factors set forth in subsections (d) and (e) of Section 3.09.045.**

The criteria and factors outlined in subsections (d) and (e) of Section 3.09.045 have been previously addressed in this report.

**CONCLUSION:** As shown in the above findings the proposed annexation satisfies the Metro Code regulations related to Local Government Boundary Changes. This criterion is met.

(Tigard CDC 18.390.060 continued)

**4. Any applicable comprehensive plan policies; and**

FINDINGS: Findings addressing the applicable Comprehensive Plan policies were provided previously in this report.

CONCLUSION: As previously demonstrated, the proposed annexation is consistent with all applicable comprehensive plan policies.

**5. Any applicable provisions of the City’s implementing ordinances.**

FINDINGS: Resolution 13-08 extended previously approved incentives for property owners that voluntarily annex into the city limits for reasons that do not include the need for city services. These incentives include waiver of the annexation application fee, assistance with paperwork and, phasing in of increased property taxes. Because the annexation is needed to serve the site for future development, these incentives cannot be extended to the applicant. As demonstrated in previous sections of this report, the proposed annexation is consistent with all other applicable provisions of the Tigard Development Code.

CONCLUSION: Based upon the findings above, all applicable provisions of the city’s implementing ordinances are satisfied

**SECTION VII. AGENCY COMMENTS**

Representatives of **City of Tigard Police and Public Works** reviewed the proposal and had no objections.

**SECTION VIII. PUBLIC COMMENTS**

The City mailed notice to surrounding property owners within 500 feet. No written public comments were received as of June 24, 2015.

*Cheryl Caines*

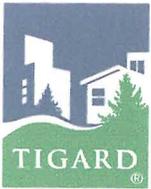
PREPARED BY: Cheryl Caines  
Associate Planner

June 24, 2015  
DATE

*Kenny Asher*

REVIEWED BY: Kenny Asher  
Community Development Director

June 24, 2015  
DATE



**City of Tigard**  
 COMMUNITY DEVELOPMENT DEPARTMENT  
**Master Land Use Application**

**RECEIVED**

APR 27 2015

CITY OF TIGARD  
 PLANNING/ENGINEERING

**LAND USE APPLICATION TYPE**

- Adjustment/Variance (II)
- Comprehensive Plan Amendment (IV)
- Conditional Use (III)
- Development Code Amendment (IV)
- Downtown Design Review (II, III)
- Historic Overlay (II or III)
- Home Occupation (II)

**ANNEXATION**

- Minor Land Partition (II)
- Planned Development (III)
- Sensitive Land Review (II or III)
- Site Development Review (II)
- Subdivision (II or III)
- Zone Change (III)
- Zone Change Annexation (IV)

**NOTE:** For required submittal elements, please refer to your pre-application conference notes.

**PROPOSAL SUMMARY** (Brief description)

ANNEX 14033, 14047, 14065 SW Fern St to City of Tigard

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**PROPERTY INFORMATION** (where proposed activity will occur)

Location (address if available): 2514 BC - 300, 400, 500 14033, 14047, 14065 SW Fern  
 Tax maps and tax lot #: 2514 BC - 300, 400, 500  
 Total site size: 1.5 AC Zoning classification: R-6

**APPLICANT INFORMATION**

Name: WILLIAM ROSACKER  
 Mailing address: 401 KEMPER CREST DR  
 City/state: Newberg, OR Zip: 97132  
 Phone number: 503-550-7744  
 Primary contact name: Bill Rosacker  
 Phone number: 503-550-7744  
 Email: B&C ENC @ MSN.COM

**FOR STAFF USE ONLY**

Case No.: ZCA 2015-00001  
 Related Case No.(s): \_\_\_\_\_  
 Application Fee: \$3,217.00  
 Application accepted:  
 By: LS Date: 4/27/15  
 Application determined complete:  
 By: \_\_\_\_\_ Date: \_\_\_\_\_

I:\CURPLN\Masters\Land Use Applications Rev. 11/25/2014

**PROPERTY OWNER/DEED HOLDER INFORMATION** (Attach list if more than one) ON BACK

Name: WILLIAM + RHONDA ROSACKER ON BACK

Mailing address: 401 KEMPER CREST DR

City/state: NEWBERG OR Zip: 97132

Phone: 503-550-7744 Email: b9cinc@msn.com

When the owner and the applicant are different people, the applicant must be the purchaser of record or a lessee in possession with written authorization from the owner or an agent of the owner. The owners must sign this application in the space provided on the back of this form or submit a written authorization with this application.

**THE APPLICANT(S) SHALL CERTIFY THAT:**

- If the application is granted, the applicant shall exercise the rights granted in accordance with the terms and subject to all the conditions and limitations of the approval.
- All the above statements and the statements in the plot plan, attachments, and exhibits transmitted herewith, are true; and the applicants so acknowledge that any permit issued, based on this application, may be revoked if it is found that any such statements are false.
- The applicant has read the entire contents of the application, including the policies and criteria, and understands the requirements for approving or denying the application(s).

<u>William Rosacker</u> Applicant's signature	<u>WILLIAM ROSACKER</u> Print name	<u>4/21/15</u> Date
--	---------------------------------------	------------------------

_____ Applicant/Agent/Representative's signature	_____ Print name	_____ Date
---	---------------------	---------------

_____ Applicant/Agent/Representative's signature	_____ Print name	_____ Date
---	---------------------	---------------

**SIGNATURES of each owner of the subject property required**

<u>William Rosacker</u> Owner's signature	<u>WILLIAM ROSACKER</u> Print name	<u>4/21/15</u> Date
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<u>Rhonda Rosacker</u> Owner's signature	<u>RHONDA ROSACKER</u> Print name	<u>4/21/15</u> Date
---	--------------------------------------	------------------------

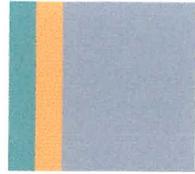
<u>[Signature]</u> Owner's signature	<u>Tosh Loesche</u> Print name	<u>4/21/15</u> Date
---	-----------------------------------	------------------------

<u>[Signature]</u> Owner's signature	<u>Jennifer Loesche</u> Print name	<u>4/21/15</u> Date
---	---------------------------------------	------------------------

**MASTER LAND USE APPLICATION**

WILLIAM AND RHONDA ROSACKER

401 Kemper Crest Dr  
Newberg, Or 97132



RECEIVED

APR 27 2015

CITY OF TIGARD  
PLANNING/ENGINEERING

April 19, 2015

Tigard City Council, Tigard, Or

Dear councilor,

We William and Rhonda Rosacker along with Joshua and Jennifer Loesch hereby apply for the property owned by us at 14033 & 14047 & 14065 SW Fern in Tigard Oregon to be annexed to the city of Tigard for future development.

By including the Loesches in this application there will be no "island" created.

The property is approx. 1.5 ac. currently in Washington County. 14065 has a residence owned and occupied by the Loesches, 14033 and 14047 are undeveloped. It is bordered on the north, west and south by the city and resides in the approximately 13 ac. "Fern Street Island". The sewer is at the west property line and will be extended by us (Rosackers) across the property 170' to the east property line. We will provide a lateral connection to the south lot at 14065 SW Fern For connection when their current septic system fails. We, the Rosackers have invited the Loesche's to join this application and have agreed to pay a large part of their connection costs to apply with us. The water is at Fern St. bordering our lots to the south. The utilities report that they have capacity to serve the future development.

The current zoning per Washington County is "R-6" The City of Tigard designation after annexation will be "R-7". We will not be requesting a change as that will allow us to build 4 or 5 homes on the property. Our intention is to preserve as many of the mature fir trees as possible.

As the council is aware it is desirable to annex this "island" as it meets all of the criteria for annexation and is currently receiving the benefits provided by the City and paying taxes to Washington County.

We have invited the remaining neighbors to join this application and found no interest.

Thank you for your consideration.

*William Rosacker*  
WILLIAM ROSACKER

*Rhonda Rosacker*  
RHONDA ROSACKER





**CERTIFICATION OF REGISTERED VOTERS  
FOR ANNEXATION PURPOSES\***

I hereby certify that the attached petition for the annexation of the territory listed herein to the City of Tigard contains, as of the date listed, the following information:

- 4 Number of signatures of individuals on petition.
- 1 Number of active **registered voters** within the territory to be annexed.
- 1 Number of **VALID signatures of active registered voters** within the territory to be annexed, on the petition.

Tax lot number(s): 2S104BC-300      2S104BC-400  
2S104BC-500      \_\_\_\_\_  
 \_\_\_\_\_

DIVISION:      ELECTIONS  
 COUNTY:      WASHINGTON  
 DATE:      April 27, 2015  
 NAME:      John Montoya  
 TITLE:      Administrative Specialist II

  
 \_\_\_\_\_

(Signature of Election Official)



\*This 'Certification of Registered Voters for Annexation Purposes' DOES NOT, in any way, make the determination if this petition meets the annexation requirements of the city/district listed.

Annexation certification sht rev4-043009



# DOUBLE MAJORITY WORKSHEET FOR ANNEXATION TO THE CITY OF TIGARD

Please list all properties/registered voters included in the proposal. (If needed, use separate sheets for additional listings.)

## \*\*PROPERTIES\*\*

PROPERTY DESIGNATION (Tax Lot Numbers)	NAME OF PROPERTY OWNER	TOTAL ACRES	ASSESSED VALUE OF THE PROPERTY	SIGNED PETITION YES NO
2514 BC - 300	WILLIAM + Rhonda ROSACKER	.49	6250	
2514 BC - 400	WILLIAM + Rhonda ROSACKER	.58	6250	
2514 BC - 500	Jennifer + Joshua Loesche	.48		
<b>TOTALS:</b>				

## \*\*REGISTERED VOTERS\*\*

ADDRESS OF REGISTERED VOTER	NAME OF REGISTERED VOTER	SIGNED PETITION YES NO
14065 SW Fern St	Joshua Loesche	
<b>TOTALS:</b>		

## \*\*SUMMARY\*\*

TOTAL NUMBER OF REGISTERED VOTERS IN THE PROPOSAL: \_\_\_\_\_  
 NUMBER OF REGISTERED VOTERS WHO SIGNED PETITION: \_\_\_\_\_  
 PERCENTAGE OF REGISTERED VOTERS WHO SIGNED PETITION: \_\_\_\_\_  
 TOTAL ACREAGE IN THE PROPOSAL: 1.5 AC  
 ACREAGE SIGNED FOR: 1.5 AC  
 PERCENTAGE OF ACREAGE SIGNED FOR: 100%  
 TOTAL NUMBER OF SINGLE-FAMILY UNITS: 1 14065 SW Fern  
 TOTAL NUMBER OF MULTI-FAMILY UNITS: 0  
 TOTAL NUMBER OF COMMERCIAL STRUCTURES: 0  
 TOTAL NUMBER OF INDUSTRIAL STRUCTURES: 0

i:\curpln\masters\revised\aux\wrkshtr.nst 15-Aug-02

**RECEIVED**

APR 27 2015

CITY OF TIGARD  
 PLANNING/ENGINEERING

RECEIVED

THIS SECTION IS TO BE COMPLETED BY WASHINGTON COUNTY ASSESSOR'S OFFICE

APR 27 2015

CERTIFICATION OF PROPERTY OWNERSHIP

CITY OF TIGARD  
PLANNING/ENGINEERING

(Double Majority Method)

I hereby certify that the attached petition for annexation of the territory described therein to the City of Tigard contains the names of the owners\* of a majority of the land area of the territory to be annexed, as shown on the last available complete assessment role.

NAME: TED FOSTER

TITLE: GIS TECH

ANNEXATION CERTIFIED

BY TF

DEPARTMENT: CARTOGRAPHY

APR 22 2015

COUNTY OF: WASHINGTON

WASHINGTON COUNTY A & T  
CARTOGRAPHY

DATE: 4/22/15

\* indicates that "Owner" means the owner of the title to real property or the contract purchaser of real property.

THIS SECTION IS TO BE COMPLETED BY WASHINGTON COUNTY ELECTIONS OFFICE

CERTIFICATION OF REGISTERED VOTERS

I hereby certify that the attached petition for annexation of territory described herein to the City of Tigard contains the names of at least a majority of the electors registered in the territory to be annexed.

NAME:

TITLE:

DEPARTMENT:

COUNTY OF:

DATE:

RECEIVED

APR 27 2015

THIS FORM IS TO BE COMPLETED BY WASHINGTON COUNTY ASSESSOR'S OFFICE

CITY OF TIGARD  
PLANNING/ENGINEERING

CITY OF TIGARD  
CERTIFICATION OF LEGAL DESCRIPTION AND MAP

I hereby certify that the description of the property included within the attached petition (located on Assessor's Map 25104 BC) has been checked by me and it is a true and exact description of the property under consideration, and the description corresponds to the attached map indicating the property under consideration.

NAME TED FOSTER  
TITLE GIS TECH  
DEPARTMENT CARTOGRAPHY  
COUNTY OF WASHINGTON  
DATE 4/22/15

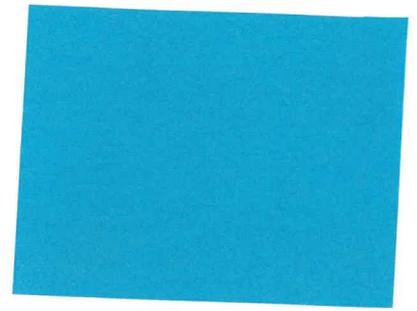
ANNEXATION CERTIFIED

BY TF

APR 22 2015

WASHINGTON COUNTY A & T  
CARTOGRAPHY

Legal description for annexation



Lot 9, Handy Acres, a subdivision in the Northwest quarter of Section 4, Township 2 South, Range 1 West, Willamette Meridian, in the County of Washington and the State of Oregon.

**ANNEXATION CERTIFIED**

BY VF

APR 22 2015

WASHINGTON COUNTY A & T  
CARTOGRAPHY





AIS-2147

7.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 5 Minutes

**Agenda Title:** Authorize the City Manager to Sign a Property Purchase Agreement

**Prepared For:** Steve Martin

**Submitted By:** Steve Martin,  
Public Works

**Item Type:** Resolution

**Meeting Type:** Council Business Meeting - Main

**Public Hearing** No

**Newspaper Legal Ad Required?:**

**Public Hearing Publication**

**Date in Newspaper:**

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**Information**

**ISSUE**

Shall council adopt a resolution authorizing the city manager to execute a purchase and sale agreement to acquire the parcel known as the Lasich property?

**STAFF RECOMMENDATION / ACTION REQUEST**

Staff recommends that council adopts the resolution.

**KEY FACTS AND INFORMATION SUMMARY**

On June 25, 2013, in an executive session on real property, council directed staff to investigate the acquisition of a park properties in the vicinity of River Terrace. Over the next several months, staff investigated two properties and then visited with the council in an April, 2014 executive session to present information on both, one of which was the Lasich property. By September 2014, staff was able to report to the council that the owner of the Lasich property was a willing seller, and staff was directed to obtain an appraisal, along with level I and II environmental site assessments (ESAs). The owner continues to be very interested in selling to the city and negotiations have gone well.

At its March 9, 2015 executive session, the Park and Recreation Advisory Board (PRAB) recommended that staff continue toward a purchase of the property, and staff again received direction from the council later that month to continue toward a purchase and sale agreement.

The property is located adjacent to the west side of Roy Rogers Road at the intersection of Beef Bend Road, and immediately north of the Tualatin River Wildlife Refuge. It is 28.4 acres of fairly flat, open land, with access to the Tualatin River, making it an exceptional piece of land for a future community park, with public access for canoes and kayaks.

The property is currently zoned as "exclusive farm use" (EFU) and lies outside of city limits and Tigard's

urban growth boundary (UGB). Staff has every reason to expect that the land will be brought into the UGB in the future. The property is not designated as rural or urban reserve, but is adjacent to the boundary of the urban reserve area. Further, the property is situated near major roads and is easily accessible. Until the property is brought into the UGB, it can be used for passive recreation purposes, with no formal park amenity improvements.

The purchase and sale agreement (PSA) allows the city time to make payments in escrow toward the purchase price of \$1.4 million over the course of three years. The owner will lease the property back from the city over the three years and remove the greenhouses during that time.

The highlights of this purchase agreement are:

- The purchase price will be at the appraised price of \$1.4 million.
  - The purchase will use the remaining park and open space bond funds (not including downtown funds).
  - Other funding will be from park system development charges.
- The payments on the purchase will be made over three years.
  - Down payment of \$500,000.
  - Payments at the end of the first and second year will be \$150,000 each.
  - The third year payment—the remainder of purchase price—will be approximately \$600,000.
- The present owner will lease back the property from the city for \$1 per year.
  - Owner will continue to own equipment and modular buildings.
  - Owner will remove greenhouses and sell remainder of azalea crop.
  - Owner will remove equipment.
  - Owner will remove his modular building or sell to city for \$1.

Other permanent buildings and sheds to remain with the property.

## **OTHER ALTERNATIVES**

The council could choose to not pass the resolution to acquire the property.

## **COUNCIL OR CCDA GOALS, POLICIES, MASTER PLANS**

The acquisition of this property meets the goals of acquiring large open spaces and parks in the River Terrace area. It helps meet the PRAB goals of acquiring meaningful parcels of land for future parks and open space for Tigard citizens.

## **DATES OF PREVIOUS CONSIDERATION**

- June 25, 2013 executive session: Council directed staff to investigate potential park properties in the vicinity of River Terrace.
  - April 22, 2014 executive session: Staff presented information about the Lasich parcel.
  - September 9, 2014 executive session: Staff presented further information and received direction to proceed with appraisal and environmental site assessments on the Lasich property.
  - March 23, 2015 executive session: Staff provided an update as to negotiations toward a purchase and sale agreement.
  - June 23, 2015 executive session: Staff provided a final update and council gave direction to bring the purchase and sale agreement to the July 14, 2015, business meeting for approval.
-

### **Fiscal Impact**

**Cost:** \$1,400,000

**Budgeted (yes or no):** Yes

**Where Budgeted (department/program):** Park CIP

#### **Additional Fiscal Notes:**

The initial payment of \$500,000 is budgeted in the Parks CIP with Park Bond and Park SDCs. Funding for the remaining three years of payments will be budgeted in the five year CIP with Park SDCs.

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### **Attachments**

Resolution

Location Map

Survey Map

Contract of Sale

Lease for Mr. Kenny

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CITY OF TIGARD, OREGON  
TIGARD CITY COUNCIL  
RESOLUTION NO. 15-

A RESOLUTION AUTHORIZING THE CITY MANAGER TO SIGN PURCHASE AND SALE DOCUMENTS FOR THE PURCHASE OF THE PROPERTY KNOWN AS THE LASICH PROPERTY

---

WHEREAS, the Park and Recreation Advisory Board recommended the purchase of the property on Lasich Lane; and

WHEREAS, Bill Kenny, the owner of the property, is a willing seller to the city; and

WHEREAS, the 28.4-acre property will benefit the citizens of Tigard, both now and in the future; and

WHEREAS, the Tigard City Council agrees that this purchase is in the best interests of Tigard for future park and open space.

NOW, THEREFORE, BE IT RESOLVED by the Tigard City Council that:

SECTION 1: The city manager is authorized to sign all necessary documents for purchase of the property owned by Bill Kenny, and commonly referred to as the "Lasich property."

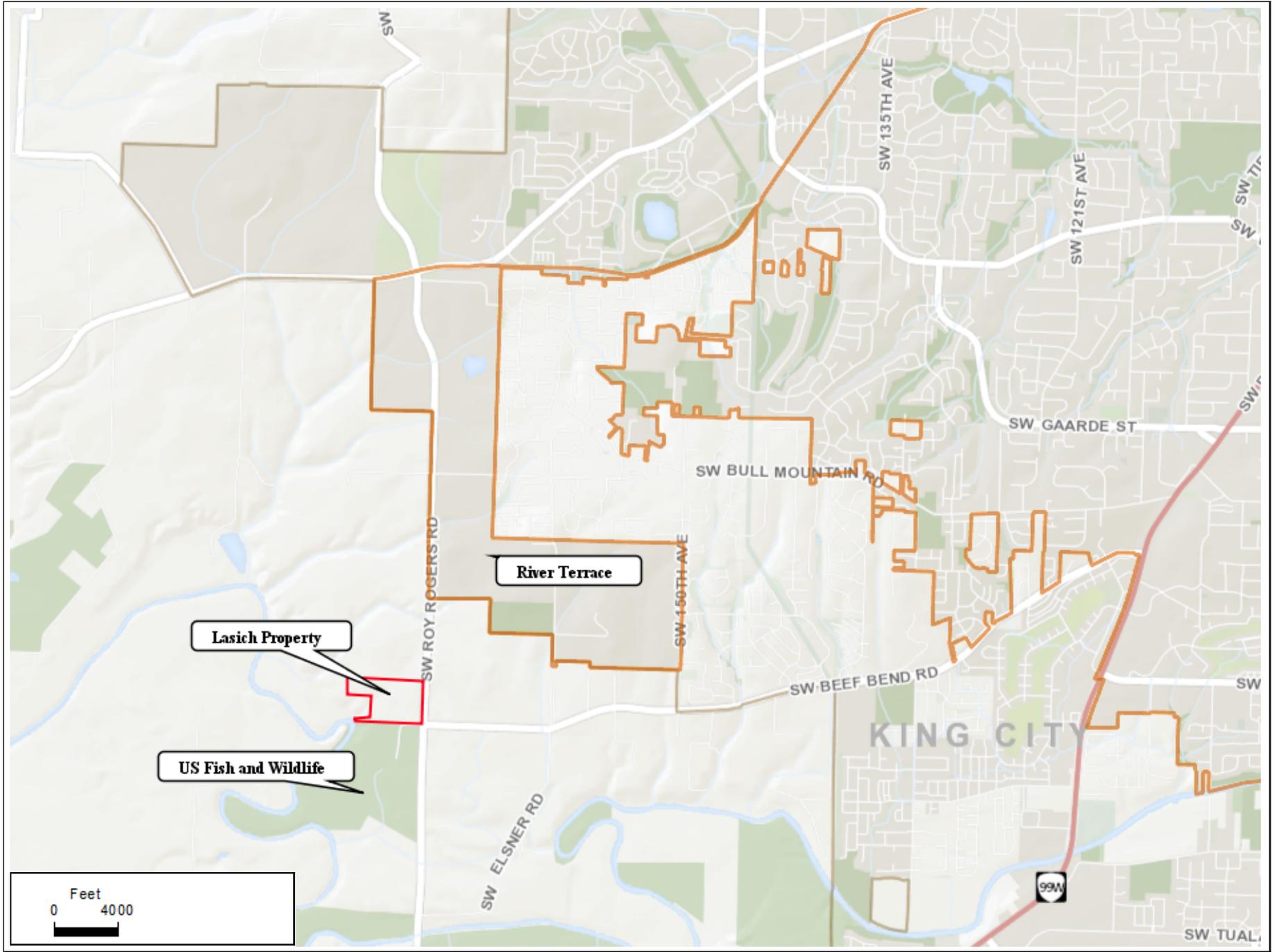
SECTION 2: This resolution is effective immediately upon passage.

PASSED: This \_\_\_\_\_ day of \_\_\_\_\_ 2015.

\_\_\_\_\_  
Mayor - City of Tigard

ATTEST:

\_\_\_\_\_  
City Recorder - City of Tigard



Lasich Property

US Fish and Wildlife

River Terrace

KING CITY



SW ROY ROGERS RD

SW 150TH AVE

SW 135TH AVE

SW 121ST AVE

SW GAARDE ST

SW BULL MOUNTAIN RD

SW BEEF BEND RD

SW ELSNER RD

99W

SW TUAL



AFTER RECORDING RETURN TO:

City of Tigard  
City Hall  
13125 SW Hall Blvd  
Tigard OR 97223

City of Tigard  
City Hall  
13125 SW Hall Blvd  
Tigard OR 97223

UNTIL A CHANGE IS REQUESTED  
SEND TAX STATEMENTS TO:  
(NO CHANGE)

*This space provided for recorder's use.*

---

**CONTRACT OF SALE  
AND ESCROW INSTRUCTIONS**

This Contract of Sale (this "Contract") is made as of \_\_\_\_\_, 2015 between William B. Kenny, an individual ("Seller") whose address is \_\_\_\_\_ and City of Tigard, an Oregon municipal corporation ("Purchaser") whose address is 13125 SW Hall Blvd, Tigard, OR 97223.

**RECITALS**

Seller owns the real property including land and improvements thereon located in Washington County, Oregon, and described in the attached and incorporated Exhibit A, subject to certain encumbrances (the "Real Property").

Purchaser agrees to purchase and Seller agrees to sell the Real Property excepting the Retained Property as defined below. The term "Subject Property" is used herein to describe the property the Purchaser is purchasing, which is comprised of the Real Property minus the Retained Property. Seller shall retain title to the manufactured dwelling currently owned by Seller and the improvements known as "Ranges 1 through 8" (described on the attached and incorporated Exhibit B ("Retained Property")) and all personal property subject to the terms of a lease (the "Lease") with Purchaser as lessor on the terms and conditions set forth below:

**AGREEMENT**

NOW THEREFORE the parties agree as follows:

**ARTICLE 1**  
**PURCHASE PRICE AND PAYMENT**

**1.1 Total Purchase Price.** Purchaser promises to pay Seller as the total purchase price for the Subject Property the sum of One Million Four Hundred Thousand and No/100 (\$1,400,000 (US)), less any credits as provided for in this Agreement, which together with the terms and conditions set forth herein constitutes the true and actual consideration for the conveyance (“Purchase Price”).

**1.2 Payment of Total Purchase Price.** The total Purchase Price will be paid as follows:

**1.2.1 Down Payment.** On or before the Closing Date, as defined in Section 4.1, Purchaser will pay to Collection Escrow established pursuant to Section 1.5, \$500,000 as a Down Payment. The Down Payment will be credited against the total Purchase Price. The Down Payment shall be treated as a scheduled payment, applied as set forth in Section 4.4 and 4.5, and the remainder shall remain in Escrow and available for disbursement as provided in 4.5, until the Maturity Date.

**1.2.2 Interest Rate and Scheduled Payment Dates.** Interest on the remaining balance of \$ 900,000 (less credits, if any) will accrue at the rate of 2% per annum from the Closing Date.

Purchaser shall pay to the Collection Escrow provided for in Section 4.5 the unpaid balance of the Purchase Price as follows:

**1.2.2.1** \$150,000 on or before the first anniversary of the Closing Date.

**1.2.2.2** \$150,000 on or before the second anniversary of the Closing Date.

**1.2.2.3** The entire remaining balance of the purchase price, including accrued but unpaid interest on or before the third anniversary of the Closing Date (hereafter Maturity Date.)

**1.3 Prior Liens.**

**1.3.1.** Seller is the borrower under one or more mortgages in favor of the United States Department of Agriculture (USDA), the most recent of which is dated November 9, 2011, Washington County, Oregon recording No. 2011-080410 and securing various promissory notes as provided for therein and listed in the Preliminary Title Report dated March 12, 2015 issued by First American Title (collectively the USDA Prior Liens). The USDA Prior Liens shall be paid in full at Closing as provided in Section 4.5.

**1.3.2.** Seller is the Grantor under that certain Deed of Trust and Fixture Filing dated May 15, 2003, in favor of Northwest Farm Credit Services and recorded May 16, 2003 as fee no 2003-078071 Washington County, Oregon, as modified on August 20, 2012, recorded August 23, 2012 as fee no. 2012-069468 (collectively the “NFCA Prior Lien”). Collection Escrow shall make payments to Northwest Farm Credit Services as such payments become due

as provided in Section 4.5 from the amounts deposited in the Collection Escrow by Purchaser. The USDA Prior Lien and NFCA Prior Lien are collectively referred to as “Prior Liens”.

**1.4 Prepayments.** Purchaser may, at its sole discretion, prepay all or any portion of the unpaid principal without penalty. All prepayments will be applied as provided in Section 4.5. Prepayment of a partial amount will not excuse Purchaser from making the regular payments when due under this Contract until the remaining balance has been paid in full.

**1.5 Collection and Payment Escrow:** The parties shall open a collection and payment escrow established by the parties within thirty (30) days of the execution of this Contract (the “Collection Escrow”) by depositing with Collection Escrow a fully executed copy of this Contract for use as escrow instructions. Collection Escrow shall execute the Consent of Collection Escrow, attached as Exhibit ‘C’ or in substantially such form and deliver a copy to the parties. The parties hereby authorize Collection Escrow to take necessary steps for the Closing of this transaction as provided in this Contract. Seller or Purchaser may jointly or severally prepare additional escrow instructions. This Contract or any amendment hereto, shall control in the event of discrepancy in such instructions. Collection Escrow shall make payments as provided in Section 4.5. The Collection Escrow shall be: \_\_\_\_\_ Attn: \_\_\_\_\_.

## **ARTICLE 2 TAXES AND LIENS**

**2.1 Taxes and Assessments.** Purchaser shall pay when due the ad valorem real property taxes and governmental or other assessments that are levied against the Real Property on or after the Closing date. The ad valorem real property taxes in excess of \$2000 each tax year shall be credited against the Purchase Price. Seller shall pay the personal property taxes and governmental or other assessments that are levied against the personal property when due.

**2.2 Liens and Encumbrances.** Seller will keep the Real Property free from all liens and encumbrances that may be imposed on the Real Property after the date this Contract is executed unless otherwise approved by Purchaser, which approval shall not unreasonably be withheld provided that the remaining balance of the Purchase Price is sufficient to pay such lien and any other prior liens.

**2.3 Classification.** The Real Property is classified 5515 Specially Assessed – Zoned Farmland – Improved. Seller will be responsible for continuing that classification, and will pay when due any additional taxes, penalties, or interest resulting from any disqualification of the Real Property from such classification and special assessment arising from or after the Closing Date and not attributable to Purchaser.

**2.4 Tax Statements.** Within 30 days of the date taxes are due, Purchaser will provide Seller with written evidence reasonably satisfactory to Seller that all ad valorem real property taxes and assessments on the Real Property have been paid. Within 30 days of the date taxes on personal property are due, Seller will provide Purchaser with written evidence reasonably satisfactory to Purchaser that all taxes and assessments on the personal property have been paid when due. Seller will submit this evidence after each required payment of taxes and assessments.

## ARTICLE 3 CONTINGENCY PERIOD

**3.1 Contingencies.** Purchaser shall have 30 days from the date of execution of this Contract to determine whether, in Purchaser's sole, absolute, and arbitrary discretion the Subject Property, including but not limited to the condition of title, water availability and access to the Tualatin River is suitable ("Contingency Period"). If Purchaser is unable to satisfy itself as to any matter regarding the property within such 30 days, Purchaser shall be entitled to an additional 30 days upon written notice to Seller. If Purchaser concludes the Subject Property is not suitable for any reason, Purchaser may terminate this Contract by delivering written notice of termination to Seller prior to the expiration of the Contingency Period, including any extension thereof, and any Down Payment shall be returned to Purchaser by the Collection Escrow. Failure of Purchaser to provide such notice by the close of the Contingency Period shall constitute acceptance.

**3.2 Right of Entry.** Seller hereby grants to Purchaser, its agents and contractors, the right to enter onto the Real Property during the Contingency Period between the hours of 8:00 a.m. to 5:00 p.m. Monday through Friday, except State holidays, to conduct reasonable inspections and testing, including environmental, geotechnical and other testing to evaluate whether the property is suitable for Purchaser's use. In consideration of such access, within the limits of the Oregon Tort Claims Act, Purchaser shall save, hold harmless and indemnify Seller against any claims arising from such access except to the extent such claims arise out of the gross negligence or willful misconduct of Seller; provided, further, that in no event shall Purchaser be required to indemnify Seller with respect to any pre-existing conditions of the Real Property. Purchaser shall reasonably repair or return any disturbed area to its original condition.

**3.3 Seller's Records.** Within 10 days of the date of execution of this Contract, Seller shall provide to Purchaser copies of any and all documents held or reasonably known to Seller that address the status of the Real Property, including but not limited to its physical condition, title or encumbrances, surveys, water rights, tenancies or access (the "Property Records").

**3.4 Condition of Title, Permitted Exceptions.** In addition to the 30 day general Contingency Period provided for in Section 3.1, and any extension thereof, the parties shall have the following timeframe in which to resolve any title issues. Within 10 days of the execution of this Contract, Seller shall provide Purchaser with a preliminary title report issued by the Collection Escrow, describing title to the Real Property and including legible copies of all recorded documents described in the preliminary title report and plotted easements (collectively, the "Preliminary Report"). On or before expiration of the Contingency Period, or any extension thereof, or 30 days after actual receipt of the Preliminary Report or any supplement thereto ("Supplemental Report"), whichever is later, Purchaser shall deliver written notice of approval or disapproval of matters disclosed in the Preliminary Report or Supplemental Report, which approval or disapproval shall be in Purchaser's sole and absolute discretion. Failure of Purchaser to deliver notice of disapproval of any matters disclosed in the Preliminary Report or Supplemental Report within such thirty (30) day period shall be deemed rejection of all such matters. Unless waived, the approved matters disclosed in the Preliminary Report or any Supplemental Report along with the standard printed exceptions on a form of title insurance policy shall be the "Permitted Exceptions" included as exceptions in the Title Policy.

**3.4.1 Right to Cure Disapproval of Preliminary Report or Supplemental Report.** If Purchaser delivers notice of disapproval pursuant to Section 3.4 above, Seller may elect in writing, within ten (10) days thereafter, to agree to remove or otherwise cure, to Purchaser's reasonable satisfaction, any disapproved item(s) prior to Closing.

**3.4.2 Failure to Cure Disapproved Items.** If Seller gives Purchaser written notice within the ten (10) day period that Seller will remove or otherwise cure a disapproved matter, but Seller is unable to remove such disapproved matter at or before Closing, Purchaser may elect to either: (i) terminate this Contract and receive a full refund of any Down Payment or (ii) waive in writing its prior disapproval of such item and accept title subject to such previously disapproved item, by delivering written notice of Purchaser's election to Seller prior to Closing. If Seller either: (i) gives Purchaser timely notice within such ten (10) day period that Seller has elected not to attempt to remove or otherwise cure all of the disapproved item(s) or (ii) fails to notify Purchaser within such ten (10) day period whether or not Seller will remove or otherwise attempt to cure the disapproved item(s), Purchaser shall have ten (10) days after Purchaser's receipt of Seller's notice to notify Seller in writing of Purchaser's election to (a) waive in writing its prior disapproval of such item(s) and accept title subject to such previously disapproved item(s) or (b) terminate this Contract, in which event any Down Payment shall be refunded to Purchaser. If Purchaser shall fail to notify Seller timely of its election to proceed under clause (a) above, Purchaser shall be deemed to have elected to terminate this Contract, in which event any Down Payment shall be refunded to Purchaser.

**3.5 Post-Closing Contingency.** Notwithstanding any other provision of this Contract, if Seller has failed to remove the Retained Property, and the manufactured dwelling owned by Seller's foreman as provided in Section 6.2, on or before the date that is 30 days prior to the Maturity Date provided for in Section 1.2.2, Purchaser may elect to:

**3.5.1** Terminate this Contract and receive from Seller all amounts paid by Purchaser, including any amounts paid on any obligation of Seller. Purchaser may maintain an action against Seller for any such amounts not paid; or

**3.5.2** Remove the Retained Property and the manufactured dwelling owned by Seller's foreman. Purchaser's cost of such removal shall be deducted from the amount of the Purchase Price. Purchaser may maintain an action against Seller for any costs remaining.

**3.5.3** If Seller has removed the Retained Property and manufactured dwelling owned by Seller's foreman but any lien for the cost of removal has been imposed or an outstanding amount of the cost of removal remains due, Purchaser may direct the Collection Escrow to pay such obligation from the amount due Seller or Purchaser may pay the amount due and receive a credit against the final Purchase Price. Purchaser may maintain an action against Seller for any costs remaining.

## **ARTICLE 4 CLOSING and ESCROW**

**4.1 Closing Date.** This transaction shall close no later than sixty (60) days after expiration of the Contingency Period unless first terminated as provided in Article 3, or shall

Close on a later date mutually agreed otherwise by the parties. As used in this Contract, the Closing Date means the date on which this Contract or a memorandum of this Contract is recorded. The closing will occur in the offices of the Collection Escrow.

#### **4.2 Responsibility of Parties At Closing:**

**4.2.1** Purchaser shall deposit the Down Payment with the Collection Escrow specified in Section 1.2.1.

**4.2.2** Seller shall deposit with the Collection Escrow a statutory warranty deed conveying the Subject Property to Purchaser free of encumbrances except those accepted by Purchaser as provided in Section 3.4 and the normal and customary exceptions, and shall have received a commitment for the issuance of a Purchaser's policy of title insurance as described in Article 9. Notwithstanding expiration of the Contingency Period, in the event that Seller has caused, permitted or suffered any additional encumbrances on the Subject Property, Purchaser may:

**4.2.2.1** Delay Closing for such time as Purchaser deems reasonable and direct Seller to remove the encumbrance;

**4.2.2.2** Accept the encumbrance, with or without a credit against the Purchase Price as agreed by the parties;

**4.2.2.3** Terminate this Contract and receive from Seller any Down Payment paid.

**4.2.3** Seller shall deposit with Collection Escrow, a signed assignment to Purchaser of the lease for the DEQ monitoring station and all right to payments thereunder in a form substantially conforming to Exhibit D).

**4.2.4** The parties shall execute the Lease attached as Exhibit E.

**4.2.5** Seller shall execute and deposit with Collection Escrow such documents as may reasonably be necessary to assign or transfer any water rights, well certificates or similar items.

**4.2.6** Seller shall provide a Certificate of Non-Foreign Status, pursuant to Section 1445(b)(2) of the Internal Revenue Code, certifying that Seller is a non-foreign person.

**4.2.7** Seller shall provide reasonable documentation that all tenancies, including those held by Oregon Azaleas, are terminated, as of the Closing Date.

**4.2.8** The parties shall sign, acknowledge and deposit into Collection Escrow the Memorandum of Contract attached as Exhibit F.

**4.2.9** The parties shall sign, acknowledge and deposit into Collection Escrow the Memorandum of Lease.

**4.3 Prorates and Closing Costs.** Except as otherwise provided in this Contract, all items to be prorated, will be prorated as of the Closing date. Seller shall pay the title insurance

premium and Purchaser and Seller each shall each pay one-half of escrow fee, and recording fees for recording the documents provided for below. Seller will be responsible for and must pay at closing any transfer, excise, or sales tax assessed on the sale contemplated by this Contract.

**4.4 Delivery and recording.** Within 10 days of Closing, Collection Escrow shall:

**4.4.1** Deliver duplicate originals of the executed Memorandum of Contract, Lease, Certificate of Non-Foreign Status, and Assignment of DEQ Lease to each party;

**4.4.2** Pay the remaining balance of the USDA mortgage in its entirety, including any penalties, prepayment penalties or other costs, obtain, record a satisfaction of mortgage, and deliver a copy to each Party;

**4.4.3** Deliver a copy of any documents assigning or transferring water rights, well certificates and other documents associated with Closing to each Party.

**4.4.4** Cause the Memorandum of Contract, Memorandum of Lease, Assignment of DEQ Lease to be recorded in the property records for Washington County and the assignment or transfer of water rights and similar documents to be filed with the State.

**4.5 Collection and Payment Escrow.** In accordance with Section 1.5 above, all payments to Seller must be made to Collection Escrow. The costs of setting up and administering the Collection Escrow will be evenly divided between Purchaser and Seller. Collection Escrow shall accept the payments and apply them as follows:

- a. First to any unpaid amount due to the Collection Escrow;
  - b. Second, on Closing, payment directly to the USDA to fully satisfy the USDA Mortgage as provided in Section 4.4 ;
  - c. Third, payment directly to Northwest Farm Credit Services as payments become due;
  - d. Fourth to any credits due to Purchaser under this Contract;
  - e. Fifth to any other liens or encumbrances placed on or suffered by Seller, including any lien for unpaid personal property taxes or for the cost of removing the Retained Property and the manufactured dwelling owned by Seller's foreman, unless such lien arises from the action or inaction of Purchaser; and
  - f. Sixth, the remaining balance to Seller on the Maturity Date.
- Collection Escrow shall not less than annually provide the Parties with a statement showing the receipts from Purchaser and disbursements by Collection Escrow.

**4.6 Maturity Date.** On the date that is 60 days prior to the Maturity Date (or such earlier date as directed by the agreement of the parties), the Collection Escrow shall provide each

party with a statement indicating payments received in escrow, payments made by escrow, credits due Purchaser and the final payoff amount. Upon final payment by Purchaser of the Purchase Price, less any credits due Purchaser, Collection Escrow shall deliver to Purchaser the Warranty Deed executed by Seller conveying the Subject Property to Purchaser.

## **ARTICLE 5 POSSESSION AND EXISTING TENANCIES**

**5.1 Possession.** Purchaser will be entitled to quiet possession of the Subject Property from and after \_\_\_\_\_, 20\_\_\_\_, subject to the assigned and assumed DEQ lease, and the Lease entered into by the parties and attached as Exhibit \_\_\_\_\_. Seller shall maintain ownership and possession of the Retained Property.

**5.2 Assignment and Assumption of Leases; Existing Tenancies.** The DEQ Monitoring Station lease, and right to payment thereunder, shall be transferred or assigned to Purchaser at Closing. All other tenancies shall be terminated on or before the Closing Date. Seller may not assign or sublet any interest in the Real Property except as may be provided in the Ground Lease. Seller represents and warrants to Purchaser that, except as disclosed herein, all such leases and tenancy agreements have been terminated and there is no lease, tenancy or occupancy that would interfere with Purchaser's interest in, possession and use of the Subject Property.

## **ARTICLE 6 MAINTENANCE, ALTERATIONS AND REMOVAL OF RETAINED PROPERTY**

**6.1 No Purchaser Obligation.** Except as may be provided in the Lease, Purchaser shall have no obligation to maintain or repair any of the Real Property. Purchaser shall not permit any waste nor make any substantial improvements or alterations without the prior written consent of Seller, which shall not be unreasonably withheld.

**6.2 Removal of Retained Property.** No later than the Maturity Date, Seller shall at its sole expense and risk remove from the Property all of the Retained Property, the manufactured dwelling owned by Seller's foreman; and all herbicides, pesticides, petroleum products or other hazardous materials and leave the Property free of debris. Seller shall cut and cap the irrigation lines serving ranges 1 through 8. No later than 90 days prior to the Maturity Date, Seller shall provide to Purchaser a plan demonstrating that such removal will be accomplished as provided for herein. The removal shall be done in compliance with all applicable laws, including but not limited to environmental laws, rules and regulations related to asbestos, pesticides or any hazardous substance.

**6.3 Option to Purchase Seller's Manufactured Dwelling; Removal of Manufactured Dwelling.** Prior to the Maturity Date, Purchaser may in its sole and absolute discretion purchase the manufactured dwelling owned by Seller for \$1.00, or provide Seller with 60 days notice and opportunity from the Maturity Date to remove the manufactured home at Seller's expense. If Seller fails or refuses to remove the manufactured home prior to the deadline, as consideration for the option to Purchase, Purchaser may deem the manufactured

dwelling abandoned and cause it to be used, sold, demolished or otherwise disposed of at Purchaser's sole expense. The parties shall in good faith execute such bills of sale, title transfers or other documents as may reasonably be necessary to effectuate and document disposition of the manufactured dwelling.

## **ARTICLE 7 INDEMNIFICATION**

**7.1 Seller's Indemnification of Purchaser.** Seller will forever indemnify, reimburse, and hold Purchaser harmless and, at Purchaser's election, defend Purchaser for, from, and against any and all claims, costs, expenses (including attorney fees), losses, damages, fines, charges, actions, or other liabilities of any description arising out of or in any way connected with Seller's conduct with respect to the Property, any condition of the Property or third-party claims related to the Property to the extent that the same exists on the Closing Date and is not caused or contributed to by Purchaser, or Seller's breach of any warranty or representation made by Seller in this Contract. In the event of any litigation or proceeding brought against Purchaser and arising out of or in any way connected with any of the above events or claims, against which Seller agrees to defend Purchaser, Seller will, on notice from Purchaser, vigorously resist and defend such actions or proceedings in consultation with Purchaser through legal counsel reasonably satisfactory to Purchaser.

**7.2 Purchaser's Indemnification of Seller.** Within the limits of the Oregon Tort Claims Act, Purchaser shall hold harmless, indemnify and defend Seller for and against any negligent act of Purchaser arising from Purchaser's access to the Real Property or Purchaser's obligations under this Contract.

**7.3 Indemnification Scope.** Whenever this Contract obligates a party to indemnify, hold harmless, or defend the other party, the obligations will run to the invitees, agents, and employees/directors, officers, agents, partners and employees of such other party and will survive any termination or satisfaction of this Contract. Such obligations with respect to the acts or omissions of either party will include the acts or omissions of any director, officer, partner, agent, employee, contractor, tenant, invitee, or permittee of such party. The provisions of this Section 7 shall survive the deed.

## **ARTICLE 8 REPRESENTATIONS, WARRANTIES, AND COVENANTS OF SELLER**

Seller represents and warrants to Purchaser as follows:

**8.1 Covenants of Title.** Seller is the owner of good, marketable and insurable fee title to the Subject Property free of all liens and encumbrances except those accepted by Purchaser and the normal and customary exceptions shown on the title report and will defend such title from the lawful claims of persons claiming superior title.

**8.2 Authority.** Seller has obtained all requisite authorizations for the execution and delivery by Seller of this Contract and the performance of the transactions contemplated by this

Contract, and the execution and delivery of this Contract are made pursuant to such authorizations. Seller is not a foreign person as defined in Internal Revenue Code Section 1445(f) (3).

**8.3 No Brokers.** Seller has not employed any broker or finder in connection with the transactions contemplated by this Contract and has taken no action, which action would give rise to a valid claim against Purchaser for a brokerage commission, finder's fee, or other like payment.

**8.4 Litigation.** Except as otherwise disclosed to Purchaser in writing, there are no pending claims or litigation or threats of claims or litigation or other matters of which Seller is aware or by the exercise of reasonable diligence of which Seller should be aware that could adversely affect Purchaser's title, use, or enjoyment of the Subject Property.

**8.5 Hazardous Substances.** Except as specifically and expressly disclosed herein or in the Property Records, Seller has no knowledge of any Hazardous Materials located on, in or under the Real Property. To Seller's knowledge, no Hazardous Materials have been generated, disposed of, deposited or released (or caused to be generated, disposed of or released) on, within, under, about or from the Real Property. To Seller's knowledge, no other party or person has used, stored, transported, generated, disposed of or released on, within, under, about or from the Real Property any Hazardous Materials. Without limiting the foregoing, neither Seller nor, to Seller's knowledge, any other party, has installed, operated or maintained any underground storage tanks on or adjacent to the Real Property, and the Real Property is not now, and has never been, in violation and is not currently under investigation for the violation of any Environmental Laws. To Seller's knowledge, there is no lead paint on the Real Property. Seller hereby assigns to Purchaser as of the Closing, to the extent assignable, all claims, counterclaims, defenses or actions, whether at common law or pursuant to any other applicable federal or state or other laws, if any, that Seller may have against third parties to the extent relating to the existence of Hazardous Materials in, at, on, under or about the Real Property.

**8.6 Compliance with Laws.** The Real Property and every portion of it, and all activities conducted on the Real Property, are in compliance with all applicable federal, state, and local statutes, regulations, and ordinances. Seller is not aware of and has not received notice of any past violation of any applicable federal, state, or local statutes, regulations, or ordinances.

**8.7 Permits and Licenses.** Seller holds no permits, authorizations, licenses, or other documents relating to or required for the operation of the Subject Property, except as disclosed herein. Seller will cooperate with Purchaser in obtaining any permits, consents, authorizations, or licenses necessary to the operation or use of the Subject Property by Purchaser; however, Seller will not be required to incur any expense relating thereto unless Purchaser has first advanced funds sufficient to cover all Seller's reasonably anticipated out-of-pocket expenses; furthermore, Seller will promptly refund to Purchaser any excess funds so advanced, and Purchaser will reimburse Seller for any shortfall in funds so advanced.

**8.8 No Further Contracts.** There are no contracts, leases, or agreements relating to the Real Property, except as otherwise set forth in this Contract and Exhibit G that will be binding on the Real Property after the Closing Date.

**8.9 No Wetlands or Fill.** As of the Closing Date, the Real Property contains no wetlands or other water bodies or any fill currently subject to regulation under section 404 of the Clean Water Act (33 USC § 1344) or ORS 196.600 to 196.990 and will not be in violation of these laws or regulations.

**8.10 No Claims.** As of the Closing Date, Seller has not received any notice, and does not have actual knowledge, of any pending or threatened claim, action, demand, suit, proceeding, hearing, or governmental study or investigation against or involving the Real Property or Seller's business operations on the Real Property, including any related in any way to the fill or removal of the material in or from any wetland located on the Real Property.

**8.11 Disclosure.** Seller has fully disclosed in writing and provided to Purchaser all material information in Seller's possession or that Seller owns or controls that relates to the Subject Property, its condition, and the title to the Subject Property.

**8.12 Survival.** Each and every Seller's representation, whether in this Section or elsewhere in this Contract, shall survive Closing and the Deed, are material and relied on by Purchaser and are true as of the Closing Date.

## **ARTICLE 9 TITLE INSURANCE (PURCHASER'S POLICY)**

Seller will cause to be furnished to Purchaser at Seller's expense a purchaser's title insurance policy in the amount of the full Purchase Price within 10 days after the Closing Date, insuring Purchaser against loss or damage sustained by Purchaser by reason of the unmarketability of Seller's title, or liens or encumbrances affecting the Property, excepting matters contained in the usual printed exceptions in such title insurance policies, those created or suffered by Purchaser, and the Permitted Exceptions.

## **ARTICLE 10 EXISTING ENCUMBRANCE**

**10.1 Obligation to Pay.** The Real Property is currently subject to Prior Liens. Seller represents, warrants, and covenants to Purchaser that (1) Seller has obtained all consents and approvals, if any, required under the Prior Liens for placement of this Contract against the Property, (2) no default exists under the Prior Liens and to the best of Seller's knowledge no event has occurred or failed to occur and no condition exists or does not exist that, with or without notice and the passage of time, could ripen into such a default. Seller will obey and observe all the terms of such instrument, except for those matters that are to be performed by Purchaser under the terms of this Contract. If either Seller or Purchaser receives notice from or on behalf of the holder of the Prior Liens of breach of any of the terms of the Prior Lien or of any actual or pending arbitration, suit, acceleration, foreclosure, or realization against the Property by the holder of the Prior Lien, the party receiving the notice will immediately forward a copy of the notice to the other party.

**10.2 Obligations of Purchaser.** Purchaser will not cause or suffer any act or failure to act that if attributed to Seller might cause a default under any of the provisions of the Prior Lien.

## **ARTICLE 11 CONDEMNATION**

If all or any portion of the Real Property is condemned or otherwise taken for public use after the Closing Date, the proceeds of the condemnation award or settlement will be paid to the Collection Escrow. Collection Escrow shall apply that portion of the proceeds attributable to the Subject Property as provided in Section 4.1, with any amount remaining after payment of the Purchase Price remitted to Purchaser. The proceeds attributable to the Retained Property will be held to guarantee any obligations of Seller, including removal of the Retained Property and other property. Seller shall be entitled to all remaining proceeds attributable to Retained Property and on the Maturity Date.

## **ARTICLE 12 DEED**

On the Maturity Date and Purchaser's performance of all other terms, conditions, and provisions of this Contract, Seller shall cause Collection Escrow to record the Deed conveying the Subject Property free and clear of all liens and encumbrances except the "Permitted Exceptions", and excepting any liens or encumbrances placed on the Subject Property by Purchaser subsequent to Closing date.

## **ARTICLE 13 DEFAULT**

**13.1 Time.** Time is of the essence of this Contract.

**13.2 Events of Default by Purchaser.** A default will occur under any of the following circumstances:

- (1) Purchaser's failure to make any payment, including taxes, when due.
- (2) Any default under the NFCA Prior Lien attributable to Purchaser.
- (3) Purchaser's failure to perform any other obligations contained in this Contract

when due.

**13.3 Seller's Remedies on Default.** In the event of a default, Seller shall first provide Purchaser with written notice and 30 days opportunity to cure the default or take reasonably satisfactory steps toward cure. Upon Purchaser's failure to cure, Seller may take any one or more of the following steps:

- (1) Declare the entire balance of the Purchase Price and interest immediately due and payable.

(2) Specifically enforce the terms of this Contract.

**13.4 Events of Default by Seller.**

(1) Seller's failure to remove the Retained Property, the manufactured dwelling owned by Seller's foreman, and other items at its sole expense as provided for in this Contract.

(2) Causing or suffering any lien or assessment to be placed on the Real Property unless first approved by Purchaser.

(3) Any material violation of the Lease.

(4) Seller's failure to perform any other obligations contained in this Contract when due.

**13.5 Purchaser's Remedies on Default.** In the event of a default, Purchaser shall first provide Seller with written notice and 30 days opportunity to cure the default or take reasonably satisfactory steps toward cure. Upon Seller's failure to cure, Purchaser may take any one or more of the following steps:

(1) Terminate this Contract and receive full reimbursement for any amounts paid by Purchaser, including but not limited to: property taxes, amounts applied to the prior loans or to any liens or assessments not the responsibility of Purchaser. Collection Escrow shall deliver the remaining funds in the escrow to Purchaser. Purchaser may bring an action against Seller for any amount previously released by Collection Escrow or otherwise not reimbursed to Purchaser. Purchaser shall assign or otherwise transfer back to Seller the water rights and the Assignment.

(2) Cause the Retained Property and manufactured dwelling owned by Seller's foreman to be removed and the cost thereof deducted from the Purchase Price otherwise due Seller. Any amount not satisfied from the Purchase Price shall be a debt owing to Purchaser.

(3) Pay or direct the Collection Escrow to pay any past due amount that is the obligation of Seller, including purchasing insurance as provide in the Lease. Any such payments shall be first deducted from the remaining Purchase Price due, and if not satisfied, shall be a debt owing to Purchaser.

(4) Specifically enforce the terms of this Contract.

**13.6 Remedies Not Exclusive.** The remedies provided above are nonexclusive and in addition to any other remedies provided by law.

\_\_\_\_\_  
Seller's Initials

\_\_\_\_\_  
Buyer's Initials

**ARTICLE 14  
WAIVER**

The failure of either party at any time to require performance of any provision of this Contract will not limit the party's right to enforce the provision, nor will any waiver of any

breach of any provision constitute a waiver of any succeeding breach of that provision or a waiver of that provision itself.

**ARTICLE 15  
PRIOR AGREEMENTS**

This Contract and the Lease are the entire, final, and complete agreements of the parties pertaining to the Real Property, and supersede and replace all prior or existing written and oral agreements between the parties or their representatives relating to the Real Property.

**ARTICLE 16  
NOTICE**

Any notice under this Contract must be in writing and will be effective when actually delivered in person or deposited in the U.S. mail, registered or certified, postage prepaid and addressed to the party at the address stated in this Contract or such other address as either party may designate by written notice to the other:

For Seller: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For Purchaser: Marty Wine, City Manager  
City of Tigard  
13125 SW Hall Blvd.  
Tigard, Oregon 97223

With a Copy to: Jordan Ramis, PC  
Two Centerpointe Drive, 6<sup>th</sup> Floor  
Lake Oswego, OR 97035

**ARTICLE 17  
APPLICABLE LAW**

This Contract will be governed by, and construed in accordance with, the laws of the state of Oregon. Venue for any action arising out of this Contract shall be the Circuit Court for Washington County or the US District Court for the State of Oregon.

**ARTICLE 18  
COSTS AND ATTORNEY FEES**

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Contract, or if suit or action

is instituted in a bankruptcy court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert Seller's interest in a bankruptcy proceeding, including any appeal, the party not prevailing must pay the prevailing party's attorney fees, costs and disbursements, including but not limited to consultants, expert witnesses, title related and any other sums that the court or arbitrator may determine to be reasonable.

## **ARTICLE 19 INTERPRETATION**

As used in this Contract, the singular includes the plural, and the plural the singular. The masculine and neuter each include the masculine, feminine, and neuter, as the context requires. All captions used in this Contract are intended solely for convenience of reference and in no way limit any of the provisions of this Contract. Each party has been represented by counsel or been advised to retain counsel, accordingly this Contract shall not be construed against in favor or against any party, including the party drafting the provision(s) at issue.

## **ARTICLE 20 SURVIVAL OF COVENANTS**

Any covenant the full performance of which is not required before the Closing or final payment of the Purchase Price and delivery of the Deed will survive the Closing and the final payment of the Purchase Price and the delivery of the Deed and be fully enforceable thereafter in accordance with their terms.

## **ARTICLE 21 CONDITION OF PROPERTY**

Except as provided otherwise in this Contract or the Lease, Purchaser accepts the Subject Property in its present condition, AS IS, WHERE IS, including latent defects, without any representations or warranties from Seller or any agent or representative of Seller, expressed or implied, except for such warranties that may arise by law under the Deed and except as otherwise specifically set forth in this Contract. Purchaser agrees that Purchaser has ascertained, from sources other than Seller or any agent or representative of Seller, the condition of the Subject Property its suitability for Purchaser's purposes, and the applicable zoning, building, housing, and other regulatory ordinances and laws affecting the Subject Property. Purchaser accepts the Subject Property with full awareness of these ordinances and laws as they may affect the present use or any intended future use of the Subject Property. Except for such warranties that may arise by law under the Deed and except as otherwise specifically stated in this Contract, including the Property Records or other written material provided to Purchaser, Seller has made no representations with respect to such condition or suitability of the Subject Property or such

laws or ordinances.

**ARTICLE 22**  
**ASSIGNMENT AND BENEFICIARIES**

This Contract may not be assigned or transferred except with the written authorization of the other party, which shall not be unreasonably refused. This Contract is for the sole benefit of the parties and there are no third party beneficiaries. It is binding on the heirs, successors and assigns of the parties and nothing herein shall prohibit or preclude assignment or transfer of Seller's interest to either or both of Seller's daughters in the event of Seller's incapacity or death.

**ARTICLE 23**  
**MEMORANDUM OF CONTRACT**

On the Closing Date, the parties will cause a memorandum of this Contract in substantially similar form to the one attached as Exhibit \_\_\_\_, to be recorded in the real property records of Washington County, Oregon.

**ARTICLE 24**  
**STATUTORY DISCLAIMER**

The following disclaimer is made pursuant to ORS 93.040(2):

THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, ORS 195.301 AND ORS 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009 AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR ORS 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, ORS 195.301 AND ORS 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO

9 AND 17, CHAPTER 855, OREGON LAWS 2009 AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

IN WITNESS WHEREOF, the parties have caused this Contract to be executed in duplicate as of the day and year first above written.

Seller:

Purchaser:

/s/ \_\_\_\_\_

/s/ \_\_\_\_\_

[seller's name]

[purchaser's name]

ACKNOWLEDGMENTS

(INDIVIDUAL)

STATE OF \_\_\_\_\_ )  
 ) ss.

County of \_\_\_\_\_ )

This record was acknowledged before me on \_\_\_\_\_, 20\_\_ by  
\_\_\_\_\_.

[STAMP, IF REQUIRED]

/s/ \_\_\_\_\_

Notary Public for Oregon

My commission expires: \_\_\_\_\_

(REPRESENTATIVE CAPACITY)

STATE OF \_\_\_\_\_ )  
 ) ss.

County of \_\_\_\_\_ )

This record was acknowledged before me on \_\_\_\_\_, 20\_\_, by \_\_\_\_\_ as  
[*type of authority, e.g., officer, trustee*] of \_\_\_\_\_ [*name of party on behalf of  
whom instrument was executed*].

[STAMP, IF REQUIRED]

/s/ \_\_\_\_\_

Notary Public for Oregon

My commission expires: \_\_\_\_\_

After recording return to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Until a change is requested, all tax statements must be sent to the following address:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**MEMORANDUM OF CONTRACT OF SALE**

This Memorandum of Contract of Sale (this “Memorandum”) is made as of \_\_\_\_\_, 20\_\_ between \_\_\_\_\_ [if an entity, state type and jurisdiction of organization of entity] (“Seller”) whose address is \_\_\_\_\_ and \_\_\_\_\_ [if an entity, state type and jurisdiction of organization of entity] (“Purchaser”) whose address is \_\_\_\_\_.

Pursuant to a Contract of Sale dated [\_\_\_\_\_, 20\_\_ / this same date] (“Contract”), Seller sold to Purchaser Seller’s interest in that certain property in \_\_\_\_\_ County, Oregon, more particularly described in the attached Exhibit A. The terms upon which Seller has sold the Property to Purchaser are set forth in the Contract, to which reference is made for all purposes. The true and actual consideration for this conveyance is \$\_\_\_\_\_. Purchaser will pay such amount, with interest, according to the terms of the Contract, under which the final payment of principal and interest is due on \_\_\_\_\_, \_\_\_\_\_. [comply with ORS 93.030, ORS 93.640, and ORS 93.710(3)].

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON’S RIGHTS, IF ANY, UNDER ORS 195.300, ORS 195.301 AND ORS 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR ORS 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS

AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, ORS 195.301 AND ORS 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

Property Tax Account No. \_\_\_\_\_

This Memorandum must be recorded in the Official Records of \_\_\_\_\_ County, Oregon in order to give notice of the existence of the Contract. This Memorandum will not be deemed or construed to define, limit, or modify the Contract, or any provision thereof, in any manner.

IN WITNESS WHEREOF, the parties have caused this Memorandum to be executed as of the day and year first above written.

Seller:

Purchaser:

/s/ \_\_\_\_\_

/s/ \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_ )

This instrument was acknowledged before me on \_\_\_\_\_, 2014, by

\_\_\_\_\_ as \_\_\_\_\_ of \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: \_\_\_\_\_

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_ )

This instrument was acknowledged before me on \_\_\_\_\_, 2014, by

\_\_\_\_\_ as \_\_\_\_\_ of \_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: \_\_\_\_\_

## LEASE

This Lease (Lease) is entered into by and between the City of Tigard, a municipal corporation (Lessor) and \_\_\_\_\_(Lessee) (collectively the Parties) for the real property and certain improvements located at 16147 SW Roy Rogers Rd. in Sherwood, Oregon and legally described on Exhibit 'A' attached hereto (collectively, the Premises)

## RECITALS

1. The Parties have entered into a land sale contract (Contract) pursuant to which Lessor is purchasing the land and improvements (Lessor's Property), excepting those improvements and a manufactured home that remain in the ownership of Lessee as shown in Exhibit 'B' (Lessee's Property) .

2. Lessee desires to continue to occupy the Premises for its existing commercial nursery business and to continue to use that portion of the Premises devoted to residential use with two manufactured homes. (the Residential Land).

3. Contingent on the Closing of the Contract, Lessor consents to such continued occupancy subject to the terms and conditions of this Lease until the Maturity Date as that term is used in the Contract or such other time as this Lease is terminated as provided for herein.

4. The Parties acknowledge and agree that the Premises is not a manufactured home dwelling park or facility as defined by law.

## AGREEMENT

Now, therefore, the parties agree as follows:

### Section 1. Lease Term and Rent

1.1 Starting on the date Lessor acquires title to Lessor's Property as provided in the Contract (the "Commencement Date"), Lessor's Property will be leased to Lessee for a term of three years (the "Term"), unless earlier terminated pursuant to the terms of this Lease.

1.2 Lessee shall pay to Lessor the sum of \$1.00 per year, payable on the Commencement Date and each anniversary of the Commencement Date.

1.3. Lessor shall pay the ad valorem real property taxes on the land and all improvements, subject to the credit provided for in the Contract. Lessee shall pay all personal property taxes, excise or business taxes.

### Section 2. Maintenance and Improvements

2.1 Except for taxes as provided in Section 1.3, Lessee shall be responsible for all costs relating to the Premises, including improvements and manufactured homes and including but not limited to utilities, maintenance, garbage collection and disposal, recycling, cable television, direct

satellite or other video subscription services, Internet access or usage, and telephone, repairs, interior and exterior structural repairs and insurance. Lessee shall maintain Lessor's Property in at least as good as condition as it was on the Commencement Date, including but not limited to routine minor maintenance and repairs, mowing and debris removal. It is expressly agreed that this provision is entered into in good faith and not for purposes of evading Lessor's legal obligations.

2.2 Lessee, as the owner thereof, shall be solely responsible for maintaining and repairing the Premises, including but not limited to all improvements and personal property, the manufactured homes, well and related pump and water lines, and the septic systems serving the property. Lessor shall have no responsibility whatsoever for maintenance, repair, condition, safety or legal compliance of the Premises.

2.3 Lessee shall not cause or suffer any contamination or waste of the Premises.

2.4 Lessor assumes no responsibility for, makes no representations regarding, and does not warrant the availability, quality or quantity of the water or any other utilities available to the Premises.

### **Section 3. Liens and encumbrances.**

3.1 Notwithstanding Lessee's ownership of certain improvements on the Premises, Lessee shall not permit or suffer any lien or other encumbrance to attach to all or any part the Premises, other than for ad valorem real property taxes, without the prior written consent of Lessor. If any such lien not authorized by Lessor is filed against the Premises, Lessee will immediately inform Lessor and cause the same to be discharged of record within sixty (60) days after the date of its filing by payment, deposit, or bond. Lessee shall provide Lessor with written evidence reasonably satisfactory to Lessor that all such liens have been discharged.

3.2 Nothing in this Lease may be deemed to be, or be construed in any way as constituting, the consent or request of Lessor, express or implied, by inference or otherwise, to any person, firm, or corporation for the performance of any labor or the furnishing of any materials for any construction, rebuilding, alteration, or repair of or to Lessor's Property including any, or as giving Lessee any right, power, or authority to contract for or permit the rendering of any services or the furnishing of any materials that might in any way give rise to the right to file any lien against Lessor's interest in the Premises. Lessee is not intended to be an agent of Lessor for any purpose, including the construction, repair or maintenance of the Premises.

3.3 Lessee will pay and discharge, or cause to be paid and discharged when due all personal property taxes, excise taxes, business and occupation taxes that become due and payable during the term of this Lease. Within 30 days of the due date, Lessee shall provide Lessor with written evidence reasonably satisfactory to Lessor that all taxes and assessments that are the obligation of Lessee have been paid when due.

## **Section 4. Insurance**

4.1 During the term of this Lease, Lessee will maintain commercial general liability insurance with limits of not less than \$ 1,000,000 per Occurrence and \$2,000,000 in the General Aggregate. This commercial general liability insurance shall be endorsed to provide primary coverage and not require contribution by any insurance maintained by Lessor. The insurance required above must cover all risks arising directly or indirectly out of Lessee's activities on the Premises or the condition of any Improvements or Personal Property on the Premises. Such policy will be endorsed with Lessor as an additional insured, must be written in such form, with such terms and by such insurance companies reasonably acceptable to Lessor. Lessee will deliver to Lessor a copy of such policy and coverage endorsements of coverage from each insurer. Lessee shall not cancel or substantially modify any such insurance without providing a minimum of 30 days' written notice to Lessor.

4.2 Lessee shall maintain casualty insurance on Lessor's Property in the amounts and on such terms as shown in Exhibit 'C'. It is expressly agreed that Lessor has no obligation whatsoever to insure the Premises or any portion thereof. In the event of a casualty loss to all or some of Lessor's Property, Lessor shall be entitled to that portion of the proceeds from Lessee's casualty insurance sufficient to repair or replace the subject Lessor Property or the fair market value thereof, whichever is less. Lessor shall, however, not be obligated to repair or replace any structure or other improvement but shall take reasonable and appropriate steps to secure and render safe any damaged Lessor improvement. Lessee shall be under no obligation insure Lessee's Property or to reconstruct, repair or rebuild any such improvement lost or damaged due to casualty, but shall be obligated to make any damaged Lessee's Property safe and secure and to remove all Lessee's Property as provided in Section 7.

## **Section 5. Indemnification**

5.1. The parties stipulate that as the most recent owner of the Premises, and the continuous occupant thereof, Lessee is more knowledgeable about the condition of the Premises, including all improvements and personal property, than is Lessor, including any latent defects or dangerous conditions. Lessee has exclusive possession and control over the Premises subject to the terms and conditions of this Lease. Accordingly, except as expressly provided in 5.2, Lessee shall save, hold harmless, reimburse, indemnify and defend Lessor, its officers, agents and employees from and against any and all claims, costs, expenses (including attorney fees), damages, fines or other liabilities arising out of or in any way connected to the from the condition of the land, the improvements or personal property or arising from or in any way connected to Lessee's activities on the land, including but not limited to the activities of its officers, employees, agents, contractors, customers and invitees.

5.2. Notwithstanding the foregoing, and subject to the limits of the Oregon Tort Claims Act, Lessor shall hold harmless, reimburse indemnify and defend Lessee, its officers, agents and employees from and against any and all claims, costs, expenses (including attorney fees), damages,

fines or other liabilities arising out of or in any way connected to Lessor's negligent actions, including modifications to the Premises.

5.3 The obligations of this Section 5 shall survive expiration or termination of this Lease.

## **Section 6. Sub-tenancies**

Lessee may sublet or permit occupancy of any portion of the Premises for lawful use provided that the terms of any sublease, tenancy or occupancy shall be consistent with the terms of and not exceed the expiration of this Lease. Regardless of whether any formal lease has been entered into or any tenancy established, Lessee shall deliver Lessor's property to Lessor at the conclusion or termination of this Lease free and clear of any and all tenancies and occupants whether by right, sufferance or hold-over. Lessee shall save, hold harmless and defend Lessor, its officers, employees and agents against any and all claims or damages whatsoever arising from any person occupying the property under claim of right or authority from Lessee, regardless of the merits of such claim and including arising from an action by Lessor to remove any occupant. This obligation shall survive expiration or termination of this Lease.

## **Section 7. Title to and Removal of Improvements and Personal Property**

7.1 Title to all Lessee's Property and the personal property on the Premises is and will remain in Lessee. Lessee will be entitled, for all taxation purposes, to claim cost-recovery deductions and the like on Lessee's Property and personal property.

7.2 No later than the expiration of the term of this Lease, Lessee shall at its sole expense and risk remove all of Lessee's Property, the manufactured dwelling owned by Lessee's foreman and all personal property from the Premises, including all herbicides, pesticides, petroleum products or other hazardous materials and leave the Premises clean of debris. Lessee shall cut and cap the irrigation lines serving Lessee's Property. No later than 90 days prior to the termination date, Lessee shall provide to Lessor a plan demonstrating that such removal will be accomplished as provided for herein. The removal shall be done in compliance with all applicable laws, including but not limited to environmental rules and regulations related to asbestos, herbicides, pesticides or any hazardous substance.

7.3 In addition to and not in lieu of any remedy provided for in the Contract, should Lessee fail to satisfy its obligation under Section 7.2, Lessor may complete the removal and shall have an action against Lessee for all costs thereof, including internal staff time and overhead.

## **Section 8. Compliance with all laws**

8.1 Lessee shall use the Premises only for a commercial nursery propagation business, together with residential use of the two manufactured homes, in the same manner and to an extent comparable with its existing operation. Except to the extent of winding down its operations,

Lessee shall not substantially expand or modify its operations without the prior written consent of Lessor.

8.2 Lessee shall use the Premises for only a lawful purpose, shall employ best practices common to the industry and shall fully comply with all applicable laws, ordinances, rules and regulations. .

### **Section 9. Lessor's Access to the Premises**

Lessee will permit Lessor, or its representative to enter the Premises and the Improvements with advance notice and at reasonable times during usual business hours for purposes related to eventual occupancy of the Premises by Lessor and to inspect for compliance with this Lease and the Contract. Lessor shall not interfere with the operations of Lessee.

### **Section 10. Condemnation.**

10.1 If all the Premises and the Improvements are taken or condemned by right of eminent domain or by purchase in lieu of condemnation, or if in Lessee's sole judgment the taking or condemnation of any portion of the Premises or the Improvements substantially interferes with Lessee's ability to operate its business on the Premises, then Lessee may terminate this Lease on date on which the condemning authority takes possession.

10.2 The rights and interests of the parties to proceeds of any settlement or award will be determined as provided in the Contract.

### **Section 11. Default and Remedies**

11.1 Time is of the essence of this Lease.

11.2 Events of default by Lessee:

- (1) Failure to pay the taxes, other than the ad valorem real property taxes when due.
- (2) Failure to remove Lessee's Property, and the manufactured dwelling owned by Lessee's foreman at its sole expense as provided for in the Contract and this Lease.
- (3) Causing or suffering any lien or assessment to be placed on the property unless first approved by Purchaser.
- (4) Failure to maintain required insurance.
- (5) Lessee becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary petition in bankruptcy, is adjudged bankrupt or a receiver is appointed for Lessee's properties; the filing of any involuntary petition of bankruptcy and Lessee's failure to secure a dismissal of the petition within seventy-five (75) days after filing; or the attachment of or the levying of execution on the leasehold interest and Lessee's failure to secure discharge of the attachment or release of the levy of execution within thirty (30) days.

(6) Failure to perform any other obligations contained in this Lease.

11.3 In the event of a default, Lessor shall first provide Lessee with written notice and 30 days opportunity to cure the default or take reasonably satisfactory steps toward cure. Upon Lessee's failure to cure, Lessor may take any one or more of the following steps:

(1) At any time and without further notice reenter the Premises either by summary eviction proceedings or by any suitable action or proceeding at law, or otherwise, and may repossess the same, and may remove any person from the Premises, to the end that Lessor may exclusively have, hold, and enjoy or relet the Premises.

(2) Regardless of whether Lessor retakes possession of or relets the Premises, Lessor has the right to recover its damages, including without limitation all legal expenses, all costs incurred by Lessor in restoring the Premises or otherwise preparing the Premises for reletting or reuse, including securing or removing Lessee's Property, the foreman's manufactured dwelling and any personal property.

(3) Specifically enforce the terms of this Lease.

(4) Terminate this Lease.

11.4 Events of default by Lessor:

Lessor shall be in default if, after 30 days written notice from Lessee and opportunity to cure, Lessor fails to perform its obligations under this Lease, including payment of the ad valorem real property taxes when due..

. Upon Lessor's failure to cure, Lessee may take one or more of the following steps:

(1) Terminate this lease, but nothing herein shall excuse Lessee from its obligation to remove Lessee's Property, personal property and the foreman's manufactured dwelling as provided in Section 7 or its obligations under the Contract.

(2) Specifically enforce the terms of this Lease.

## **Section 12. Termination and Surrender**

12.1 This Lease shall terminate on the earlier of:

a. Three years from the Commencement Date.

b. Termination of the Contract. It is acknowledged that this Lease is contingent on the Contract being in full force and effect.

c. Termination for breach as provided for in Section 11.

d. Mutual agreement of the parties.

12.2 On termination or expiration of this Lease, Lessee shall vacate, surrender and deliver the Premises, free and clear of all sublets, tenancies, occupancies or encumbrances except those approved by or the responsibility of Lessor and in full compliance with Section 7.

**Section 13. Estoppel Certificate**

Within fifteen (15) days after a request made by the other party, the party to whom the request was made will, without charge, give a certification in writing to any person, firm, or corporation reasonably specified by the requesting party stating (a) that this Lease is then in full force and effect and unmodified, or if modified, stating the modifications; (b) that Lessee is not in default in the payment of Rent to Lessor, or if in default, stating the default; (c) that as far as the maker of the certificate knows, neither party is in default in performing or observing any other covenant or condition to be performed or observed under this Lease, or if either party is in default, stating the default; (d) that as far as the maker (if Lessor) of the certificate knows, no event has occurred that authorized, or with the lapse of time will authorize, Lessee to terminate this Lease, or if such an event has occurred, stating the event; (e) that as far as the maker of the certificate knows, neither party has any offsets, counterclaims, or defenses, or, if so, stating them; (f) the dates to which Rent has been paid; and (g) any other matters that may be reasonably requested by the requesting party.

**Section 14. Waiver**

The failure of either party at any time to require performance of any provision of this Lease will not limit the party's right to enforce the provision, nor will any waiver of any breach of any provision constitute a waiver of any succeeding breach of that provision or a waiver of that provision itself.

**Section 15. Merger**

This document and the Contract are the entire, final, and complete agreements of the parties pertaining to the Premises, and supersede and replace all prior or existing written and oral agreements between the parties or their representatives relating to the Premises.

**Section 16. Notice**

Any notice under this Lease must be in writing and will be effective when actually delivered in person or deposited in the U.S. mail, registered or certified, postage prepaid and addressed to the party at the address stated in this Contract or such other address as either party may designate by written notice to the other:

For Lessee: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For Lessor:

With a Copy to: Jordan Ramis, PC  
Two Centerpointe Drive, 6th Floor  
Lake Oswego, Or. 97035

**Section 17. Governing Law and Venue.**

This Lease will be governed by, and construed in accordance with, the laws of the state of Oregon. Venue for any action arising out of this Contract shall be the Circuit Court for Washington County or the US District Court for the State of Oregon.

**Section 18. Attorney Fees and Costs.**

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Lease, or if suit or action is instituted in a bankruptcy court for a United States District Court to enforce or interpret any of the terms of this Lease, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert a party's interest in a bankruptcy proceeding, including any appeal, the party not prevailing must pay the prevailing party's attorney fees, costs and disbursements, including but not limited to consultants, expert witnesses, title related and any other sums that the court or arbitrator may determine to be reasonable.

**Section 19. Interpretation**

As used in this Lease, the singular includes the plural, and the plural the singular. The masculine and neuter each include the masculine, feminine, and neuter, as the context requires. All captions used in this Lease are intended solely for convenience of reference and in no way limit any of the provisions of this Lease. This Lease shall be construed to operate consistently, and not in conflict, with the Contract. Each party has been represented by counsel or been advised to retain counsel, accordingly this Lease shall not be construed against in favor or against any Party, including the Party drafting the provision(s) at issue.

**Section 20. Assignment and Beneficiaries**

This Lease may not be assigned or transferred except with the written authorization of the other party, which shall not be unreasonably refused except that nothing shall prohibit assignment or transfer to either or both of Lessor's daughters in the event of Lessee's incapacity or death. This Lease is for the sole benefit of the parties and there are no third party beneficiaries. It is binding on the heirs, successors and assigns of the parties.

**Section 21. Condition of Property**

Except as provided otherwise in this Lease, Lessee accepts the Lessor's Property in its present condition, **AS IS, WHERE IS**, including latent defects, without any representations or warranties



STATE OF \_\_\_\_\_ )  
 ) ss.  
County of \_\_\_\_\_ )

This record was acknowledged before me on \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_ as  
[*type of authority, e.g., officer, trustee*] of \_\_\_\_\_ [*name of party on behalf of  
whom instrument was executed*].

AIS-2275

8.

**Business Meeting**

**Meeting Date:** 07/14/2015

**Length (in minutes):** 30 Minutes

**Agenda Title:** Referral of Ballot Measure to Voters for Community Center

**Prepared For:** Marty Wine

**Submitted By:** Carol Krager, City Management

**Item Type:** Update, Discussion, Direct Staff

**Meeting Type:** Council Business Meeting - Main

**Public Hearing** No

**Newspaper Legal Ad Required?:**

**Public Hearing Publication**

**Date in Newspaper:**

**Information**

**ISSUE**

Should the City Council refer a measure to Tigard voters authorizing the City to issue general obligation bonds for a community center operated by the YMCA? City Council will consider ballot title language to authorize a proposed measure for the November 2015 election.

**STAFF RECOMMENDATION / ACTION REQUEST**

If the Council chooses to refer a measure to voters, draft language for Ballot Title and Explanatory Statement, as attached to this Agenda Item Summary, is recommended as drafted by the city attorney, and reviewed by the City of Tigard's bond counsel.

If the Council chooses to refer a measure to voters for a November 3, 2015 election, the last day for the Council to file ballot title with City Recorder for publication is August 14.

If the City Council chooses to name the operator of a future facility as the YMCA as part of a bond measure proposal, staff seeks direction from City Council to successfully negotiate an operational agreement with the YMCA should precede the referral of a bond measure to voters.

**KEY FACTS AND INFORMATION SUMMARY**

On May 12, the City Council received a presentation and briefing from Daxko Consulting for a jointly-funded survey conducted for the City of Tigard and YMCA. The City Council has received citizen communication indicating a desire for a center operated by the YMCA in Tigard. The survey showed the level of support for YMCA services in Tigard and estimated the likelihood of respondents to join at various price levels. The survey forecast YMCA facility membership at 1,694 memberships at the highest price and 3,012 memberships at the lowest price in the future, using a reduction factor.

At the Council's meeting of May 26, Council consensus existed to refer a bond measure on the November 2015 ballot to Tigard voters to build a community center in Tigard. Council guidance from May 26 discussion

included:

- A voter-approved capital bond measure of about \$30 million (equivalent to \$10/month for a Tigard home of average value)
- A building size of about 60,000 square feet
- Building features to include a swimming pool and facilities for fitness
- A time limit to build a facility (four years was suggested)
- Some distance from downtown Tigard

Based on this guidance, the City Attorney provided draft language for a November, 2015 ballot measure for Council consideration at the Council meeting of June 2. The Council discussed and asked for amendments to the language and recommended language is attached.

Council questions that were discussed on June 2 included:

- Councilor Woodard provided alternative ballot measure language for the record. A memo from the City Manager to the City Council was provided in response on June 6.
- From the audience, the CEO of the Columbia-Willamette, Bob Hall, provided a sample agreement and some articles from the Sherwood city ballot measure for Council consideration. Council consensus did not exist on June 2 to pursue completion of an agreement with the YMCA at that time.
- The City Council discussed the amount of funding to be included in the ballot title, including what may happen if the bond amount is not enough to cover the cost of building a facility? The Council agreed on an amount of \$34.5 million for the bond measure.
- The City Council discussed the potential risks that the city may face in mentioning a facility operator (specifically the YMCA) in the ballot title language. On the advice of the City Attorney, the City must provide clear information to voters as to the relationship with the YMCA regarding the agreement with it as a non-profit provider of recreation services. If the city issues bonds to build a facility, the measure must describe its plan and levy taxes to pay the debt, and the city's bond counsel must be able to issue an unqualified opinion as to the city's ability to repay the debt. The City Council asked to explore whether language about an operator "like" the YMCA or a non-profit provider, or other examples could be added to ballot title language. Although the city conducted a survey with the YMCA and survey responses focused specifically on a City-YMCA partnership, the City would still bear the risk in issuing bonds if a YMCA is named as an operator, since today there is no formal relationship between the YMCA and Tigard. A written opinion of the City Attorney is attached to this Agenda Item Summary. A written opinion of the city's bond attorney is also attached to this Agenda Item Summary.
- The Council asked about the state law regarding matters on the ballot for election and what the city's actions can be. The City's role is to provide neutral, factual education and information and no public resources may be used to advocate for or against the measure. A campaign outside of city hall could form in the community that would be permitted to advocate for or against a position for the ballot measure.
- The City Council discussed the various risks, and risk tolerance, and protections for the city, that the city would face with placing this measure on the ballot, and what the city would be required to do, depending on the ballot measure language that is referred to voters. The City Council asked whether risk insurance can be obtained on behalf of the city if there is some possibility the operator cannot sustain its operations. Finance and Information Services Director LaFrance has provided the Council with a memo explaining what bond insurance entails, attached to this Agenda Item Summary.
- Draft ballot title language was distributed to the City Council on June 2. It is revised according to Council's direction for consideration at this City Council meeting.
- The City Manager reminded the Council that if the YMCA is not named in the ballot title, and if the city wants to consider all operators of a facility, there are still facility planning questions regarding the site, size and facility program questions that will need to be resolved, whether a November ballot measure is sent to voters or not. If the City wants to consider the YMCA as the sole operator of the facility, the decision would not be subject to state Purchasing and Contracting Rules, but the City Attorney recommends that the city proceed with an exemption from the rules for that decision under PCR 10.110,

Individual Exemptions. (More information about this can be provided to the City Council after a decision about the ballot measure is made.)

- The Finance and Information Services Director noted that bonds will not be issued until this study work for the site, size and facility program is refined. The City Council noted that the ballot title should note that property taxes are assessed after bonds are issued.

Attached to this Agenda Item Summary is more information regarding the City Council's questions, including:

- Draft ballot title language as recommended by the City Attorney and City's bond attorney
- City Attorney opinion regarding naming the YMCA (Jordan Ramis)
- Bond Counsel opinion clarifying naming the YMCA (Hawkins, Delafield & Wood)
- Information about bond insurance (Finance & Information Services memo)
- Draft timelines for election, facility planning, and bond issuance (to be presented on July 14)

## **OTHER ALTERNATIVES**

The City Council could take time to further refine a proposal to refer to Tigard voters. This could include providing more definition as to the cost, programming, location, and partnership opportunities for a future community center facility.

The City Council could direct an agreement with the YMCA be negotiated before referring a question to Tigard voters.

The Council could take no action.

## **COUNCIL OR CCDA GOALS, POLICIES, MASTER PLANS**

2015-16 City Council Goals

Provide Recreation Opportunities for the People of Tigard: explore feasibility of partnership opportunities, including Tualatin Hills Park & Recreation District, YMCA and other city or nonprofit opportunities; establish facility partnership if feasible.

## **DATES OF PREVIOUS CONSIDERATION**

The City Council agreed to contribute funding to a survey of voters for demand for YMCA services in November, 2014. The survey results regarding demand for the YMCA's services in Tigard was presented on May 12, 2015 and discussed by the City Council on May 19, 2015. City Council discussed whether to refer a measure to voters and draft bond measure language on May 12, May 19, 2015 and June 2, 2015.

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### **Attachments**

Draft Ballot Title Lanaguage

City Attorney opinion

Bond Counsel opinion

Bond Insurance memo

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Caption [The caption is limited to 10 words which reasonably identifies the subject of the measure]

Authorizes General Obligation Bonds For Tigard Community Center

Question [The first sentence of the question is limited to 20 words, and must plainly state the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure. The second sentence is required, and does not count towards the 20 word limit.]

Shall The City Of Tigard Be Authorized To Issue Up To \$34,500,000 Of General Obligation Bonds For A Community Center?

If the bonds are approved, they will be payable from taxes on property or property ownership that are not subject to the limits of sections 11 and 11b, Article XI of the Oregon Constitution.

Summary [The summary is limited to 175 words, and is required to be a concise and impartial statement summarizing the measure and its major effect. The summary also must include a reasonably detailed, simple and understandable description of the use of proceeds. The City is also required to draft an explanatory statement if the County is producing a voters' pamphlet.]

This Measure would authorize the City to issue up to \$34,500,000 of general obligation bonds to pay for capital costs to provide a community center, including to acquire property and construct a community center, parking lot and related amenities, and finance issuance costs. The primary purpose of the community center is to provide community event space, athletic, fitness and recreational facilities.

The City expects the community center to be operated by a non-profit organization. This measure is estimated to result in a tax of \$0.51 per \$1,000 of assessed value per year, or approximately \$122 per year on a home assessed at \$240,000.

The bonds may be issued in multiple series and each series may mature over no more than 21 years. Property taxes are assessed after bonds are issued.

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## LEGAL MEMORANDUM

TO: Tigard City Council

FROM: Shelby Rihala

DATE: July 6, 2015

RE: Community Center Ballot Measure  
File No. 50014-36799

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The City has requested an opinion as to whether the City may, or should, name the YMCA as the operator of the community center in the ballot title from an elections law perspective. It is our opinion that the City should not.

The ballot title consists of a 10-word caption, a 20-word question that plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure, and a 175-word summary setting forth its major effect. The ballot title must be concise and impartial. Courts have further interpreted the state's election laws to strike down misleading content in ballot titles and are "critical of using wording drawn from a proposed measure in a caption if that wording 'is not neutral and might mislead voters into supporting the proposal without understanding its true effects.'" *Rasmussen v. Kroger*, 350 Or 271, 278 (2011), citing *Caruthers v. Kroger*, 347 Or 660, 668 (2010).

Because the YMCA is the presumptive operator of the proposed community center, the question has been posed whether the ballot title can identify that possibility. For example, the ballot title could include a statement that "the community center would be operated by a nonprofit entity, such as the YMCA." The reference to the YMCA may be seen by some as providing clarity, but there is also the potential that it could be viewed as misleading because the City does not yet have an agreement with the YMCA naming it as the operator. If a voter bases his or her support of the measure on the fact that the YMCA would be the operator and an agreement is not reached, the ballot title misled the voter.<sup>1</sup> Additionally, if the ballot title states that the community center will be operated by a non-profit, that may preclude the City from being considered as an operator.

A more significant risk to the City is that a person would challenge the City's ballot title as misleading. While Oregon elections laws provide a statutory process for filing ballot title

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<sup>1</sup> This does not include any bond consequences, which are being separately addressed by City bond counsel.

July 6, 2015  
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challenges, the City has adopted its own process pursuant to its home rule authority. TMC 1.12.030 allows a person to petition to City Council seeking a different ballot title and “stating the reasons the title filed is insufficient, not concise, or unfair.” The Code says City Council’s review is final and it does not provide for an additional appeal option.

The risk of a ballot title challenge is significant in that it could potentially delay the City’s ability to place the measure on the November election pending the resolution of the appeal and the City’s redrafting of the ballot title. Though there is no guarantee that the City’s ballot title will not be appealed, careful drafting can significantly reduce that risk. The recommendation of the city attorney is to avoid referencing the YMCA in the ballot title for the reasons discussed above.

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**MEMORANDUM**

Via Email: [toby@tigard-or.gov](mailto:toby@tigard-or.gov)

TO: Toby LaFrance

FROM: Gülgün U. Mersereau & Harvey W. Rogers, Bond Attorneys

DATE: July 1, 2015

RE: Referring to the YMCA in the Ballot Title for the Community Center General Obligation Bonds

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We are writing to confirm our advice regarding including a reference to the YMCA as the expected operator of the community center in the ballot title for that project.

The City does not have a binding agreement with the YMCA that obligates the YMCA to operate the proposed community center on terms that are acceptable to the City. The City therefore cannot be certain that, if the bonds are approved, the City will be able to enter into an acceptable agreement with the YMCA to operate the community center. The ballot measure therefore cannot simply state that the YMCA “will operate” the community center without significant risk to the City, as outlined in our memorandum to the City dated June 1, 2015 and attached here.

However, the City can refer to the YMCA in the ballot title, as long as the reference is accurate. For example, if the City has had discussions with the YMCA about the terms under which the YMCA would operate the community center, and those terms appear to be acceptable to the City, the ballot title may say that the City “expects” the YMCA to operate the community center.

If the City and the YMCA do not share a reasonably accurate understanding of the terms under which the YMCA would operate the community center, then the ballot title could use one of the following phrases:

- “The City expects a non-profit organization, like the YMCA, will operate the community center”, or
- “The City expects the initial operator of the community center to be a non-profit organization, like the YMCA.”

These alternates make it clear that another entity may operate the community center.

**MEMORANDUM**

Via Email: [toby@tigard-or.gov](mailto:toby@tigard-or.gov)

TO: Toby LaFrance

FROM: Gülgün Mersereau & Harvey Rogers, Bond Attorneys

DATE: June 1, 2015

RE: Ballot Title for Community Center Bonds

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You have asked us to identify potential limitations in the proposed ballot title for community center general obligation bonds.

We reviewed the email from Jordan Ramis circulating the draft ballot title and agree with that firm's assessment that it is difficult to draft a ballot title for a project that is in the preliminary planning stages. Those difficulties and the corresponding risks to the City are outlined below. At the bottom of this memorandum we include a marked version of the ballot title. Our comments are aimed at trying to mitigate some of the risks to the City.

Is the amount authorized sufficient to pay for the community center?

If \$30,000,000 is not sufficient to pay for the proposed project as presented in the ballot title, the City will need to find another source to pay for the additional portion of the project.

Does the description of the project in the ballot title accurately reflect the final project?

As stated below, the ballot title must include a concise and impartial statement summarizing the measure and its major effect. The ballot title must also include a reasonably detailed, simple and understandable description of the use of proceeds.

We understand the details of the project have yet to be developed. Given that, the description of the project should remain general in the ballot title in order for the City to avoid making promises in the ballot title that it may not be able to keep.

Including details of the project in the ballot title could severely limit the City's flexibility. For example, if the City states in the ballot title that the community center will be operated by the YMCA and it turns out that the YMCA is not able to operate the facility, is not able to operate the facility for the life of the facility or is not able to operate the entire facility, the City will

likely not be able to issue the bonds. Alternatively, if the YMCA stops operating the facility after the bonds are issued, then the City may not be able to levy a tax to pay debt service on the bonds because the project substantially differs from what was presented in the ballot title.

Does the ballot title accurately reflect the impact of the levy on property owners?

If the City obtains authority to issue general obligation bonds, it will have the authority to impose a levy annually in an amount necessary to pay debt service on the bonds. That amount is dependent on many factors—the interest rate at which the bonds sell, the assessed value of property in the City in each year of assessment, the debt service structure of the bonds, the delinquency rate, etc. Given this, the City should only state the levy impact as an estimate as it is unknowable until the year of each levy.

#### Comments to draft

##### Caption

~~Authorizes Up To \$30,000,000 Of Bonded Indebtedness~~ General Obligation Bonds For Tigard Community Center

[The caption is limited to 10 words which reasonably identifies the subject of the measure]

##### Question

~~Shall The City Of Tigard Be Authorized City Council Authorize Up To To Issue Up To \$30,000,000 Of General Obligation Bonds For A Community Center Operated By the YMCA?~~  
If the bonds are approved, they will be payable from taxes on property or property ownership that are not subject to the limits of sections 11 and 11b, Article XI of the Oregon Constitution.

[The first sentence of the question is limited to 20 words, and must plainly state the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure. The second sentence is required, and does not count towards the 20 word limit.]

##### Summary

~~This Measure would authorize the Tigard City Council to incur issue up to \$30,000,000 of general obligation bonds indebtedness to pay for capital costs to provide a community center, including to acquire property and construct a community center, parking lot and related amenities, and finance issuance costs. T~~  
with the primary purpose of the community center is to provideing athletic and recreational facilities.

~~The community center would be operated by the YMCA~~  
City expects the community center to be operated by a non-profit organization.

~~The term of the bonds is X. The cost of the bond is \$X per \$1,000 of assessed property value. For a house assessed at \$200,000 the cost is \$X annually.~~

[This measure is estimated to result in a tax of \$0. per \$1,000 of assessed value per year, or approximately \$ per year on a home assessed at \$ .]

The bonds may be issued in multiple series and each series may mature over no more than years. [The maximum term is not legally required to be included in city measures, but is often included in ballot titles for cities because voters are used to see the maximum]

[The summary is limited to 175 words, and is required to be a concise and impartial statement summarizing the measure and its major effect. The summary also must include a reasonably detailed, simple and understandable description of the use of proceeds. The City is also required to draft an explanatory statement if the County is producing a voters' pamphlet.]



## City of Tigard Memorandum

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To: Marty Wine, City Manager

From: Toby LaFrance, Finance and Information Services Director

Re: Purpose of Bond Insurance

Date: July1, 2015

At the Council meeting on June 2, 2015, Council asked about bond insurance. The question was raised during discussions of the potential ballot title for a community center. When discussing the ballot title language potential risks were raised and would bond insurance protect the city?

I have conducted conversations to confirm the purpose of bond insurance with the Pat Clancy, Tigard's Financial Advisor and the Nikolai Sklaroff, our Lead Underwriter from Wells Fargo on our two water bond issues. The purpose of bond insurance is to protect the investors, not the city. In the scenario discussed with Council where the city may be unable to levy property tax to pay the bonds due to our inability to fulfill potential statements made in the bond title, the bond insurance company would aid the investors. They would essentially become a collection agency on the investor's behalf and come after the city's assets to insure the investors their return.