



**OREGON DEPARTMENT OF TRANSPORTATION
RAIL DIVISION
LEASE**

THIS LEASE, made and entered into by and between the **STATE OF OREGON**, acting by and through its **Department of Transportation**, Rail Division, hereinafter called "ODOT-Rail," and the City of Tigard, a municipality organized pursuant to Oregon law hereinafter called "Lessee;" and Portland & Western Railroad, Inc., a New York corporation, hereinafter called "Railroad."

That ODOT-Rail, for and in consideration of the covenants and conditions of Lessee contained in this Lease, does Lease unto Lessee, and Lessee does Lease from ODOT-Rail, on the property of ODOT-Rail located at or near 12345 Main Street, in the City of Tigard, Washington County, Oregon (hereinafter referred to as the "Premises"), in the approximate location illustrated on the drawing attached as "Exhibit A."

1. DEFINITIONS

The term "ODOT-Rail," as used in this Lease, shall include the successors and assigns of ODOT-Rail. The term "Railroad," as used in this Lease, shall apply to the Portland & Western Railroad, Inc., and its successors and assigns.

2. USE AND OCCUPANCY

2.1 Lessee shall use and occupy said Premises for the sole and exclusive purpose of constructing, operating and maintaining a public access bicycle, pedestrian trail and associated improvements substantially in accordance with the schematic plan and narrative (together, the "Trail Plan") attached to this Lease as "Exhibit B". Lessee shall respond to ODOT-Rail's and Railroad's reasonable inquiries regarding the use or condition of the Premises, and ODOT-Rail or the Railroad may enter the Premises at reasonable times to check on same. This Lease is subject to an exclusive easement upon the Rail Line Corridor, as more particularly described in that certain Rail Service Easement dated November 25, 1997 between Burlington Northern and Santa Fe Railway Company and the Portland & Western Railroad, Inc., and on file with ODOT-Rail (the "Easement"). Railroad's Easement upon the Rail Line Corridor is prior to and superior to Lessee's interest in the Premises, and includes the rail facilities, tracks, bridges, culverts, road crossings and signal systems. By executing this Lease, Railroad consents to Lessee's use of the Premises subject to all terms and conditions hereof. Lessee's use of the Premises shall not materially interfere with the rights of the Railroad to operate or develop rail service on the Premises, and Lessee shall not interfere with the reconstruction, maintenance, repair, or use of any Railroad facility, drainage ditch, or related facilities which may be located upon, over, or beneath the Premises, including the free flow of water therethrough.

2.2 If Railroad shall at any time or from time to time find it necessary to make any changes in its grade, alignment, tracks or other property, or to construct any buildings or other structures upon the Rail Line Corridor. Lessee shall, upon no less than 180 days' notice by Railroad, and at Lessee's sole cost and expense, make such changes in the location or installation of Lessee's improvements upon the Premises, which may include the complete removal of Lessee's improvements, as may be necessary per Railroad's determination, to conform to the changes or new construction made or to be made by Railroad.

3. HAZARDOUS WASTE

Lessee shall not cause, permit or suffer any "hazardous waste," as defined in ORS 466.005, to be brought upon, treated, kept, stored, disposed of, discharged, released, produced, manufactured, generated or used upon, about or underneath the Premises or any portion thereof by Lessee, its agents, employees, contractors, or invitees, or any other person. However, Lessee shall have the right to use such materials to the extent necessary for Lessee's operations so long as Lessee provides Railroad with prior written notice of its intended use of any such hazardous materials. Lessee's use of any such hazardous materials shall comply with all federal, state and local laws and regulations then in effect and will further comply with any special requirements as may be reasonably requested by Railroad.

4. NEW IMPROVEMENTS

All improvements performed by Lessee within the Premises shall be done at the sole expense of Lessee. The general contour of the Premises shall not be changed except as indicated in the Trail Plan. No excavation work, or any new, permanent-type improvements or facilities of any nature, other than those indicated in the approved Trail Plan, shall be installed or constructed thereon without prior written consent of ODOT-Rail and Railroad. Notwithstanding the improvements shown in the approved Trail Plan, Lessee shall not construct any improvements within 25 feet laterally of the center line or within 24 feet vertically from the top of the rail or any track, or such greater clearances as may be required by ODOT-Rail or Federal Railroad Administration requirements (the "No-Build Area"), unless such improvement is approved in writing by Railroad and ODOT-Rail. Lessee shall fully pay for all materials joined or affixed to the Premises, shall pay in full all persons who perform labor thereon, and shall not permit or suffer any mechanics, liens or materialmen's liens of any kind or nature to be enforced against the Premises for any work done or materials furnished thereon at Lessee's request.

5. TERM OF LEASE

This Lease shall be for the term of ninety-nine (99) years from the last date of signature ("Term"). Upon termination, Lessee remains responsible for taxes and other fees as described below.

6. LEASE RATE

Effective annually on July 1 of each year, the rental fee shall be \$0.00 per annum hereafter until Lease expiration, or a prorated sum thereof in the event of termination without default, payable in advance. Such rate has been agreed upon based on Lessee's agreement to maintain the Premises throughout the Term.

7. FEES, TAXES AND ASSESSMENTS

Lessee will obtain all necessary permits and pay all license fees required for Lessee's use of the Premises and Lessee also agrees to pay, before they become delinquent all taxes, assessments, penalties, liens or fines which may be levied or assessed upon or against the Premises to the extent that they become applicable to improvements constructed by Lessee, or by reason of the existence thereof, or by any reason of Lessee's operations.

8. SUBSURFACE INSTALLATIONS

Absence of markers does not constitute a warranty by ODOT-Rail of no subsurface installations. Lessee shall be liable for any damage caused to subsurface installations.

9. PROPERTY MAINTENANCE

Lessee, at Lessee's own expense, and by coordinating with Railroad for the safety of Lessee, shall remove and keep removed, any vegetation on the Premises which may interfere with the view of trains approaching in either direction. Except as shown in the Trail Plan and on any other site approval granted by ODOT-Rail and Railroad in accordance with the terms of Section 4 above, Lessee shall not place, or permit to be placed, any material, structure, pole, vegetation or temporary obstruction within the No-Build Area. Should the right-of-way be now or hereafter fenced at the location described, Lessee shall, at his own cost and expense, construct, maintain and keep repaired the required fencing.

10. ADVERTISING SIGNS

Unless Lessee obtains ODOT-Rail's prior written consent, no advertising signs, displays or devices may be erected on Premises except for markings or signs that Lessee is required to install in order to comply with legal requirements.

11. LIABILITY

Except as limited by the Oregon Constitution and the Oregon Tort Claims Act, Lessee shall fully release, indemnify and hold harmless and defend ODOT-Rail, its Commissioners, and Railroad, its affiliates, and each of their respective officers, agents, employees and contractors from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, arising out of, or relating to the intentional misconduct, reckless, or negligent acts or omissions of Lessee, or its officers or employees under this Lease.

12. INSURANCE

Lessee shall obtain at its sole expense the insurance specified below prior to performing under this Lease and shall maintain it in full force and at its own expense throughout the duration of this Lease. Lessee shall obtain the following insurance (i) from insurance companies or entities that are authorized to transact the business of insurance and issue coverage in State or (ii) may insure through an insurance pool such as City County Insurance Services, either of which shall be reasonably acceptable to and approved by ODOT-Rail. Furnishing of Insurance by Lessee as provided herein shall neither limit nor expand the Lessee's liability under this Lease, but shall be additional security therefore.

a. WORKERS' COMPENSATION. All employers, including Lessee, that employ subject workers, as defined in ORS 656.027, shall comply with ORS 656.017 and shall provide workers' compensation insurance coverage for those workers, unless they meet the requirement for an exemption under ORS 656.126(2). Lessee shall require and ensure that each of its contractors complies with these requirements.

b. COMMERCIAL GENERAL LIABILITY. Commercial General Liability Insurance covering bodily injury, death and property damage in a form and with coverages that are satisfactory to the State. This insurance shall include personal injury liability, products and completed operations. Coverage shall be written on an occurrence basis. Lessee shall provide proof of insurance of not less than the following amounts as determined by ODOT-Rail:

Bodily Injury/Death and Property Damage:

\$2,000,000 per occurrence limit for any single claimant
\$6,000,000 per occurrence limit for multiple claimants

Such policy shall be endorsed to provide a Waiver of Subrogation in favor of the Railroad.

c. AUTOMOBILE LIABILITY INSURANCE: AUTOMOBILE LIABILITY. Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits for "Commercial General Liability" and "Automobile Liability"). Lessee shall provide proof of insurance of not less than the following amounts as determined by ODOT-Rail:

Bodily Injury/Death and Property Damage:

\$2,000,000 per occurrence limit for any single claimant
\$6,000,000 per occurrence limit for multiple claimants

Such policy shall be endorsed to provide a Waiver of Subrogation in favor of the Railroad.

d. EXCESS/UMBRELLA INSURANCE. A combination of primary and excess/umbrella insurance is acceptable. If you are using excess/umbrella insurance to meet the minimum insurance requirement, your certificate must include a list of the policies that fall under the excess/umbrella insurance. Sample wording is "The Excess/Umbrella policy is excess over General Liability, Auto Liability, etc."

e. ADDITIONAL INSURED. The Commercial General Liability insurance and Automobile Liability insurance required under this Agreement shall include the State of Oregon, Portland & Western Railroad, Inc., and their divisions, officers, employees and agents as Additional Insureds but only with respect to Lessee's activities to be performed under this Agreement. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

f. CERTIFICATE(S) OF INSURANCE. Lessee shall provide to ODOT-Rail and Railroad Certificate(s) of Insurance for all required insurance before entering the Premises. The Certificate(s) must specify the State of Oregon, ODOT-Rail and the Railroad as Additional Insured as required in paragraph f above. Lessee shall pay for all deductibles, self-insured retention and self-insurance, if any. **The Lessee shall immediately notify ODOT-Rail of any change in insurance coverage.**

g. INSURANCE LIMITS. ODOT-Rail and Lessee agree that the insurance limits set out above will automatically change, without need for amendment to this Lease, to the extent the insurance limits provided in ORS 30.271 and 30.273, as adjusted by the State Court Administrator pursuant to ORS 30.271(4) and 30.273(3), exceed the insurance limits in Section 12 of this Lease as of the effective date, after giving Lessee sixty (60) days' notice to submit proof of revised insurance coverage to ODOT-Rail.

13. REMOVAL OF IMPROVEMENTS

Upon the expiration or termination of this Lease, unless ODOT-Rail and Lessee mutually agree to an abandonment in place, Lessee shall remove all improvements (other than those owned by ODOT-Rail) from and off the Leased Premises and restore the same to condition satisfactory to ODOT-Rail; failing in which, ODOT-Rail may perform such work at Lessee's expense. Until such improvements are removed and Premises restored, this Lease, including the payment of rental, shall, at ODOT-Rail's option, remain in full force and effect. However, if the parties mutually agree that Lessee's improvements are to be abandoned in place, legal responsibility for the abandoned facility shall be clearly defined and agreed to in writing. Consequent to abandonment, this Lease shall cease to be effective upon expiration or termination of this Lease.

14. ASSIGNMENT

Lessee shall not assign any of its rights or obligations under this Agreement without first obtaining the written consent of ODOT-Rail. ODOT-Rail's consent to any assignment shall be within ODOT-Rail's sole discretion and shall not relieve Lessee of its duties or obligations under this Agreement. This Agreement is binding upon and shall inure to the benefit of each of the parties, and, except as otherwise provided, their permitted legal successors and assigns. Lessee shall not enter into any sub-lease of the Property.

15. DEFAULT

It shall be an event of default for Lessee to fail to pay any charge within 15 days after it is due; or for Lessee to fail to comply with any other term or condition of the Lease within thirty (30) days after written notice by ODOT-Rail specifying the nature of the default. If the nature of the default is such that more than 30 days is required to affect a cure, Lessee shall not be deemed in default if it has commenced to cure the default within the 30-day period and diligently prosecutes the cure to completion.

16. REMEDIES FOR DEFAULT

16.1. In the event of a default the Lease may be terminated. In the event of termination, regardless of how effected, Lessee shall, by the date of said termination, peaceably and quietly leave, vacate and surrender the Premises in a good, clean and sightly condition. If Premises are not voluntarily surrendered, ODOT-Rail may, without notice, re-enter and take possession of Premises and may, with the use of reasonable force, and with or without legal process, evict and dispossess Lessee from Premises.

16.2. In the event of termination or retaking of possession following default, ODOT-Rail shall be entitled to recover immediately without waiting until the due date of any future rent or until the date fixed for expiration of the Lease term, the following amounts as damages: (1) the loss of rental from the date of default until the termination date of the Lease; and, (2) the reasonable costs of reentry and reletting including without limitation the cost of any cleanup, refurbishing, removal of Lessee's property, or any other expense occasioned by Lessee's default including but not limited to, any repair costs, attorney fees and court costs. Any obligation of ODOT-Rail to pay attorney fees arising under this Lease, or by operation of law, is subject to and within the limitations of Article XI, Section 7 of the Oregon Constitution, and the Oregon Tort Claims Act (ORS 30.260 – 30.300).

17. TERMINATION

Either Party may terminate this Lease at-will upon first providing the other Party not less than 180 days prior written notice of such intent to terminate.

18. AVAILABLE FUNDING/CONTINUING AUTHORITY

The State of Oregon's obligations under this Lease are conditioned upon ODOT-Rail receiving funding, appropriations, limitations, allotments, other expenditure authority, and continued programmatic authority sufficient to allow ODOT-Rail, in the exercise of its reasonable administrative discretion, to meet its obligations under this Lease. Nothing in this Agreement is to be construed as permitting any violation of Article XI, section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon.

19. NOTICES

19.1. The State (for notice is):

Rail Division Administrator
ODOT Rail Division
555 13th Street NE Ste 3
Salem, OR 97301-4179

The Railroad (for notice is):
Portland & Western Railroad, Inc.
200 Hawthorne Ave SE # C-320
Salem, OR 97301

The Lessee (for notice is):

City Manager
City of Tigard
13125 SW Hall Blvd.
Tigard, OR 97223

19.2. Any notice required or permitted to be given under this Lease shall be delivered to the address shown above by registered or certified mail (postage prepaid) or by overnight courier. Either party has the right to change the above address, or to add additional addressees, by delivery of written notice to the other party.

19.3. Any notice delivered by one party to the other is effective, and deemed to be delivered, upon receipt by the addressee.

20. COMPLETE AGREEMENT

This contract constitutes the entire contract between the parties. No waiver, consent, modification or change, or terms of this contract shall bind either party unless in writing and signed by both parties. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this contract. Lessee, by the signature below, hereby acknowledges reading this contract, understanding it, and agreeing to be bound by its terms and conditions.

21. COUNTERPARTS

This Agreement may be executed in several counterparts, by facsimile, or otherwise, all of which when taken together shall constitute one agreement binding on the parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.

22. APPROVALS

State of Oregon, by and through its
DEPARTMENT OF TRANSPORTATION

CITY OF TIGARD

By _____
Rick Crager, State Right of Way Manager

By _____
Martha Wine, City Manager

Date _____

Date _____

By: _____
H.A. (Hal) Gard, Rail Division Administrator

Date _____

PORTLAND & WESTERN RAILROAD, INC.
a New York corporation

By: _____
Joel N. Haka, President

Date _____





Tigard Street Trail & Public Space

DATE: *November 7, 2013*

What improvements are proposed?

A preliminary trail alignment will be prepared to explore site opportunities and address the alignment considerations from ODOT Rail. Completion of this trail segment will include the multi-use pathway, a public space near the Chamber of Commerce building on Main Street, and other trail user amenities such as benches, trees, landscaping, lighting, and signage.

Improvements proposed include the following:

❖ TRAIL Amenities:

- 12-foot wide hard surface, multi-modal path from Main Street to Tiedeman Avenue
- 6-foot high fencing along trail for safety (minimum 25 feet from rail tracks)
- Railroad history and interpretive signage
- Plantings

❖ Public Space Amenities:

- Modular in concept consisting of hard surface, benches, lighting, and planters
- Temporary art work
- More decorative fencing around the public space
- Expanded parking area adjacent to Chamber of Commerce building

Why are we doing this project?

The City is in cooperation with Tri-Met to promote pedestrian movements between residential areas and transit facilities, including the Tigard bus transit center and the WES commuter rail station. This also provides a connection to Fanno Creek Trail, a regional trail that connects Portland, Beaverton, Tigard, and Tualatin. The eastern terminus of this project would be at Main Street, adjacent to the Chamber of Commerce building. Pedestrians and bicyclists would be directed from the path onto the sidewalk (away from the rail tracks) and to the street crossing at Main and Tigard Streets (to be upgraded with the Main Street Green Street project). The alignment would also make use of existing sidewalks and a bicycle/pedestrian bridge on Tigard Street to connect to the Fanno Creek Trail; and at the eastern terminus, a connection to the Summer Creek Trail that is under design. The Tigard Street Trail will allow a safe, wide, multi-modal, off street path adjacent to a section of Tigard Street that has few sidewalks or pedestrian amenities.

Exhibit B



WALKER MACY

City of Tigard - TIGARD STREET TRAIL Proposed Plan



Exhibit B