

## ORDINANCE No. 179009

Add and modify findings and correct a map for the Portland Aerial Tram Local Improvement District with no change in the local improvement district boundary, allocation of funding amounts or estimates of assessments. (Ordinance; amend Ordinance No. 178675; C-10009)

The City of Portland ordains:

Section 1. The Council finds:

1. Ordinance No. 178675 was passed by City Council on August 18, 2004, forming the Portland Aerial Tram Local Improvement District (LID).
2. Petitions signed by property owners (hereafter "Petitions for Portland Aerial Tram LID") state:

"The LID assessment for project costs of all zones is fixed at \$19,000,000 exclusive of Auditor's costs. Auditor's costs include recording, superintendency and Local Improvement District Construction Fund (LIDCF) interest, which are estimated at \$431,125.12 and will be proportionately allocated based on each zone's share of total project costs."

3. Petitions for Portland Aerial Tram LID are included as Exhibit A in Resolution No. 36225 adopted by City Council on June 10, 2004.
4. Resolution No. 36225 in turn states:

"Be it further resolved, that property owners will provide funding in the fixed amount of \$19,000,000 plus LID costs for Auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126, plus the costs of any extra work on private property, and the remainder shall be funded per the terms of the South Waterfront Central District Project Development Agreement."

5. Any significant or material changes to the estimate of the property owners' assessments during the course of final engineering would require a subsequent hearing per Section 17.08.080 of City Code; however, the City Council reaffirms that the LID costs to be assessed to property owners will be limited to \$19 million, plus Auditor's charges including recording, superintendency and Local Improvement District Construction Fund (LIDCF) interest. The City Council also reaffirms that the costs to be assessed to property owners within each assessment zone are consistent with the amounts in Finding No. 12 of Ordinance No. 178675.

6. Finding No. 15 of Ordinance No. 178675 states that:

“Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution.”

7. Assessments imposed by this LID pursuant to a separate and subsequent assessment ordinance will not be an incurred charge.
8. The original Ordinance submitted for City Council consideration at its July 29, 2004 LID Formation Hearing contained an LID boundary with four (4) internal assessment zones as shown in Exhibit A of this ordinance. The hearing was continued to August 4, 2004 and again to August 12, 2004. At the August 12, 2004 hearing, the City Council directed that a substitute ordinance be brought forward for consideration that did not change the LID boundary or the overall amount of the assessments, but directed that a fifth internal assessment zone be created and that some individual assessments be modified, none of which affected the assessments to be levied in the future on properties currently owned by Swinerton Investments and ZRZ Realty Inc. The substitute Ordinance included a replacement map (Exhibit B of Ordinance No. 178675; attached as Exhibit B of this Ordinance) which included the four assessment zones in South Waterfront but inadvertently omitted the assessment zone on Marquam Hill. Exhibit E of the substitute Ordinance included assessment amounts for the Marquam Hill assessment zone omitted from this map; this ordinance will not change the LID boundary or any of these assessment amounts. It simply clarifies City Council’s original intent to include the Marquam Hill assessment zone in the LID.
9. This amendment to Ordinance No. 178675 does not constitute a major change to scope or cost of improvements per Section 17.08.080 of City Code; however, property owners were sent notice of a hearing on November 23, 2004 based Multnomah County property tax records as of this date.

NOW, THEREFORE, the Council directs:

- a. The City Council reaffirms that the total amount of costs that will be assessed to property owners in this LID after the final assessment hearing required by City Code will not exceed \$19 million plus LID costs for Auditor’s charges, including financing.
- b. Finding No. 15 of Ordinance No. 178675 is amended by replacing the sentence “Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution” with the sentences, “Assessments for local improvements are not subject to the property tax limitation established by Article XI, Section 11b of the

Oregon Constitution. Pursuant to City Code, assessment for this local improvement district will be imposed by a separate and subsequent ordinance."

- c. Directive "c" of Ordinance No. 178675 is amended by replacing the sentence "Properties shall be assessed on a square footage basis within the four zones in the LID as indicated in Exhibit E" with the sentence "Properties shall be assessed on a square footage basis within the five (5) zones in the LID as indicated in Exhibit E."
- d. Exhibit B of Ordinance No. 178675 is replaced in its entirety by the map attached as Exhibit C to this ordinance.

Passed by the City Council, DEC 22 2004

Commissioner Jim Francesconi  
Andrew Aebi:slg  
December 3, 2004  
*Tram Amended Ordinance rev7.doc*

**GARY BLACKMER**  
Auditor of the City of Portland

By

  
Deputy



CITY OF  
**PORTLAND**  
 OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
 1120 S.W. 5th Avenue, Suite 800  
 Portland, Oregon 97204-1914  
 (503) 823-5185  
 FAX (503) 823-7576 or 823-7371  
 TDD 823-6868

Brant  
 Williams  
 Director

Eileen  
 Argentina  
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 Management

Bryant  
 Enge  
 Finance

Don  
 Gardner  
 Engineering &  
 Development

Jeanne  
 Nyquist  
 Maintenance

Laurel  
 Wentworth  
 Planning

**HEARING NOTICE**

Date of Mailing:	November 24, 2004
Auditor's Account Number:	135038
Auditor's Project Number:	C-10009
State ID of Property:	1S1E03DC 500
Property Tax Account Number:	R991030410
Property Address:	PORTLAND OR 97201
Property Legal Description:	SECTION 03 1S 1E; TL 500 5.59 ACRES
Estimated Assessment:	\$92,780.38
To:	OREGON HEALTH & SCIENCE UNIVERSITY 3181 SW SAM JACKSON PARK RD PORTLAND OR 97239

RECEIVED  
 2004 NOV 29 P 4: 30  
 STACY BLAKEMER, AUDITOR  
 CITY OF PORTLAND, OR

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

- 1) Add additional language to further reiterate that property owners' costs are fixed at \$19 million plus LID costs for auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126 consistent with petitions signed by property owners
- 2) Correct a map error
- 3) Modify a finding to delete a reference to incurred cost
- 4) Modify a finding to reaffirm the five zones referenced in the ordinance

Council will consider this item on the Regular Agenda beginning at **9:30 AM on Wednesday, December 15<sup>th</sup>**. City Council will receive testimony at this time. The City Council meeting will be held at Council Chambers in City Hall, 1221 SW Fourth Avenue.

If you have any questions about this item, please contact me at (503) 823-5648 or via e-mail at [andrew.aebi@pdxtrans.org](mailto:andrew.aebi@pdxtrans.org). If you have any questions about the Portland Aerial Tram project, please contact Art Pearce at (503) 823-7791 or via e-mail at [art.pearce@pdxtrans.org](mailto:art.pearce@pdxtrans.org); or Matt Brown at (503) 823-7027 or via e-mail at [matt.brown@pdxtrans.org](mailto:matt.brown@pdxtrans.org).

Sincerely,

*Andrew H. Aebi*

Andrew H. Aebi  
 Local Improvement District Administrator

cc: A. Pearce, M. Brown, M. Harrison, M. Moline, K. Moore-Love, S. Parsons, L. Rees, D. Schmidt, H. Ta

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810 VERMONT AV NW  
WASHINGTON DC 20420

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1325 NW FLANDERS ST  
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TRANSPORTATION ENGINEERING  
ATTN TROLLEY PROGRAM  
120 SW 5TH AV #802  
PORTLAND OR 97204-1971

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1325 NW FLANDERS ST  
PORTLAND OR 97209

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O S F INTERNATIONAL INC  
0715 SW BANCROFT  
PORTLAND OR 97239

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BLOCK 39 LLC ATTN: FINICLE,GARY  
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T & E INVESTMENTS  
690 SW BANCROFT ST  
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LINDQUIST,STUART H & JANICE J  
P O BOX 42135  
PORTLAND OR 97242-0135

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THE LANDING AT MACADAM LLC  
350 BRIDGE PARKWAY  
REDWOOD CITY CA 94065

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DEVELOPMENT  
1120 NW COUCH #600  
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Submitted by  
Andrew Aebi  
12/15/04

179009

U.S. POSTAL SERVICE	CERTIFICATE OF MAILING
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER	
Received From:	
COP-TRANSPORTATION - A AEBI	
1120 SW 5 <sup>th</sup> AVE #800	
PORTLAND OR 97204	
One piece of ordinary mail addressed to:	
ZRZ REALTY CO	
3121 SW Moody AVE	
PORTLAND OR 97239-4500	

PS Form 3817, January 2001

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PORTLAND OR. 97204	
One piece of ordinary mail addressed to:	
ZV COMPANY INC	
PO BOX 64686	
TACOMA WA 98466	








PS Form 3817, January 2001

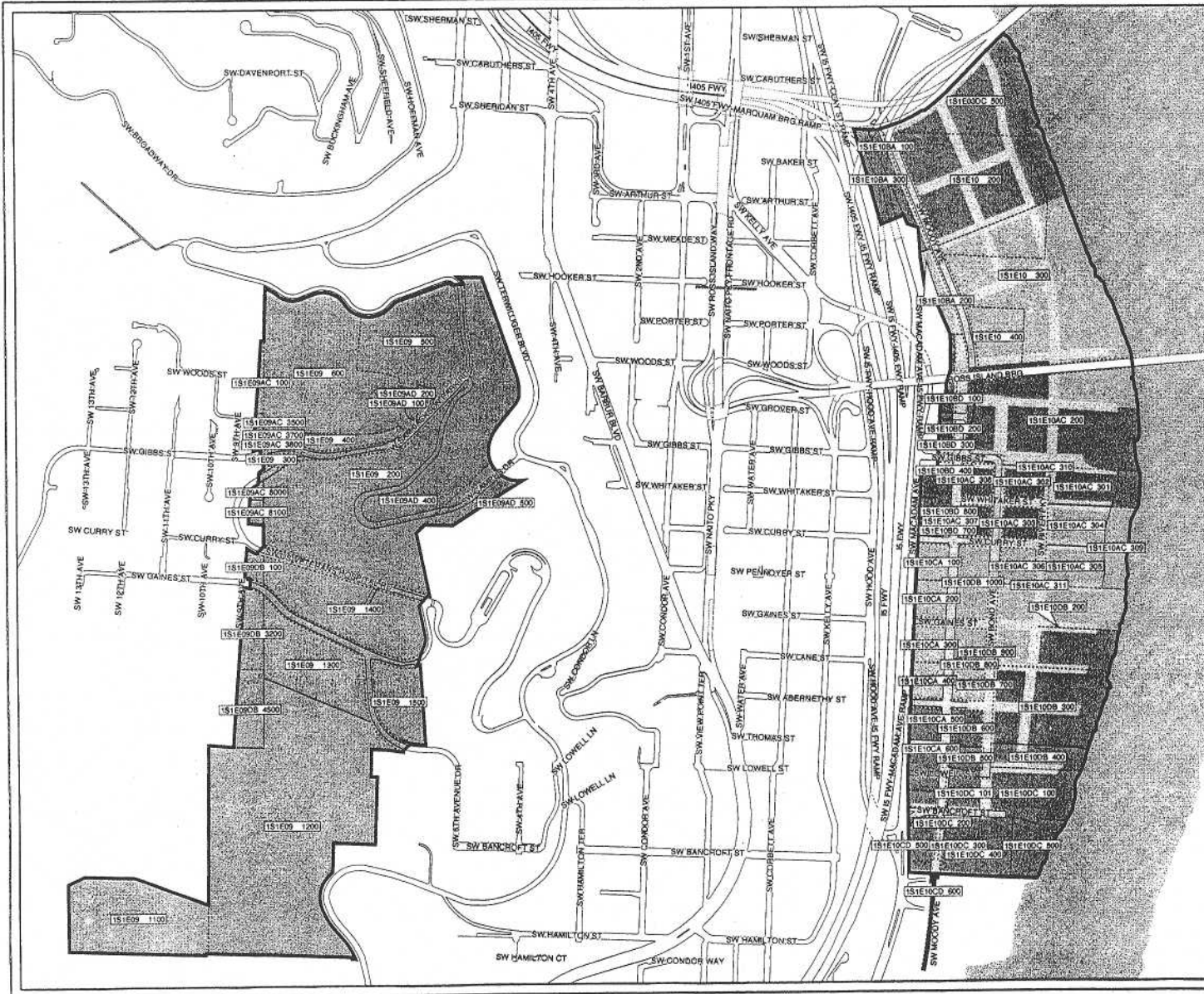
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# Portland Aerial Tram Local Improvement District

## Legend

-  LID Boundary
-  Taxlots Included in LID
- Improvement District Zones**
-  Zone A
-  Zone B
-  Zone C
-  Zone D
-  Area Outside LID











Plot Date: 5/28/04 2:22:05 PM

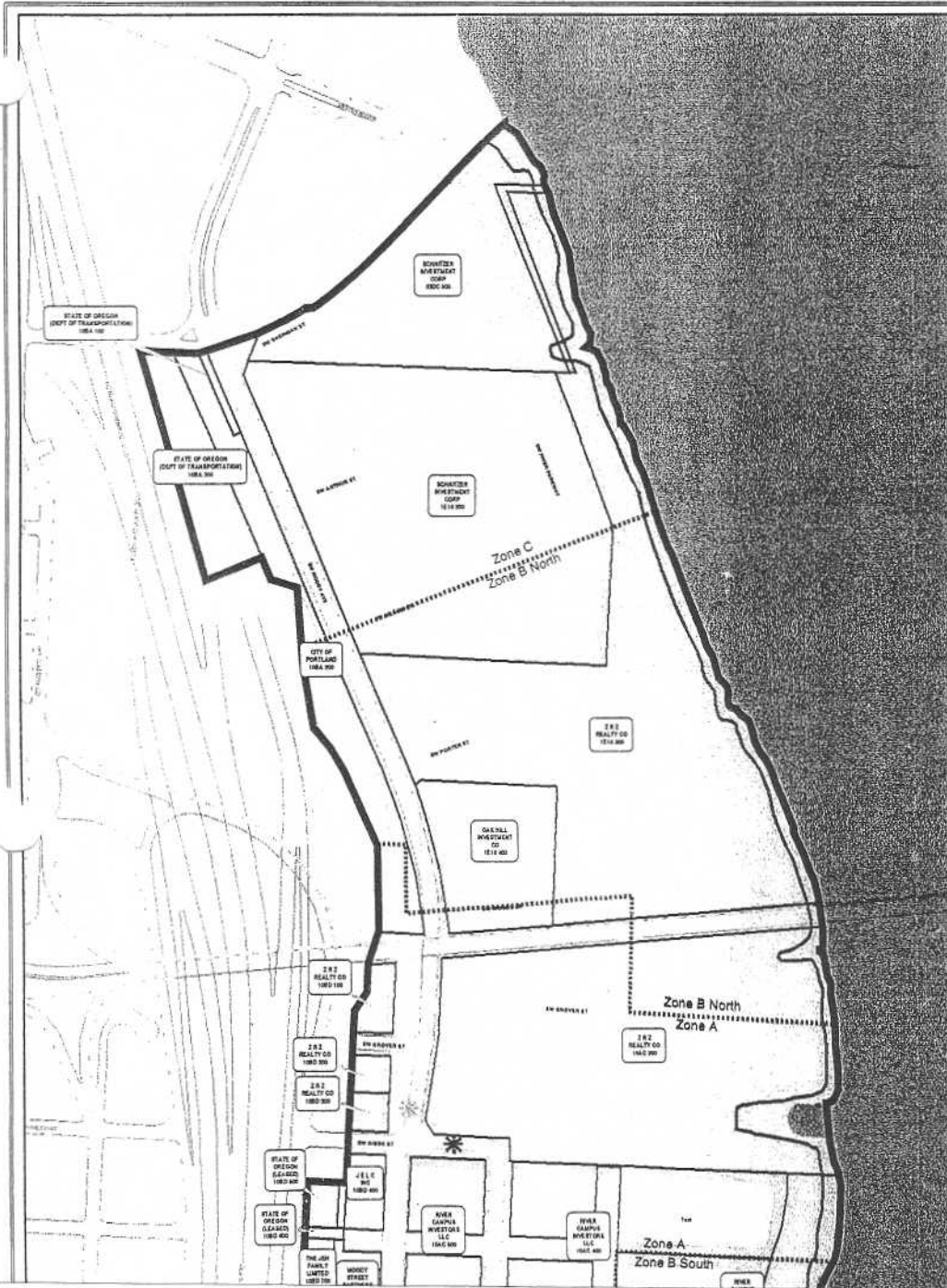
EXHIBIT A  
179009



**Portland Aerial Tram  
Local Improvement District**

**Legend**

-  LID Boundary
-  Taxlots Included in LID
-  Street Network Within LID
-  Greenway Setback
-  Top of Bank Line
-  Easement
-  Streetcar Stop
-  Tram Station



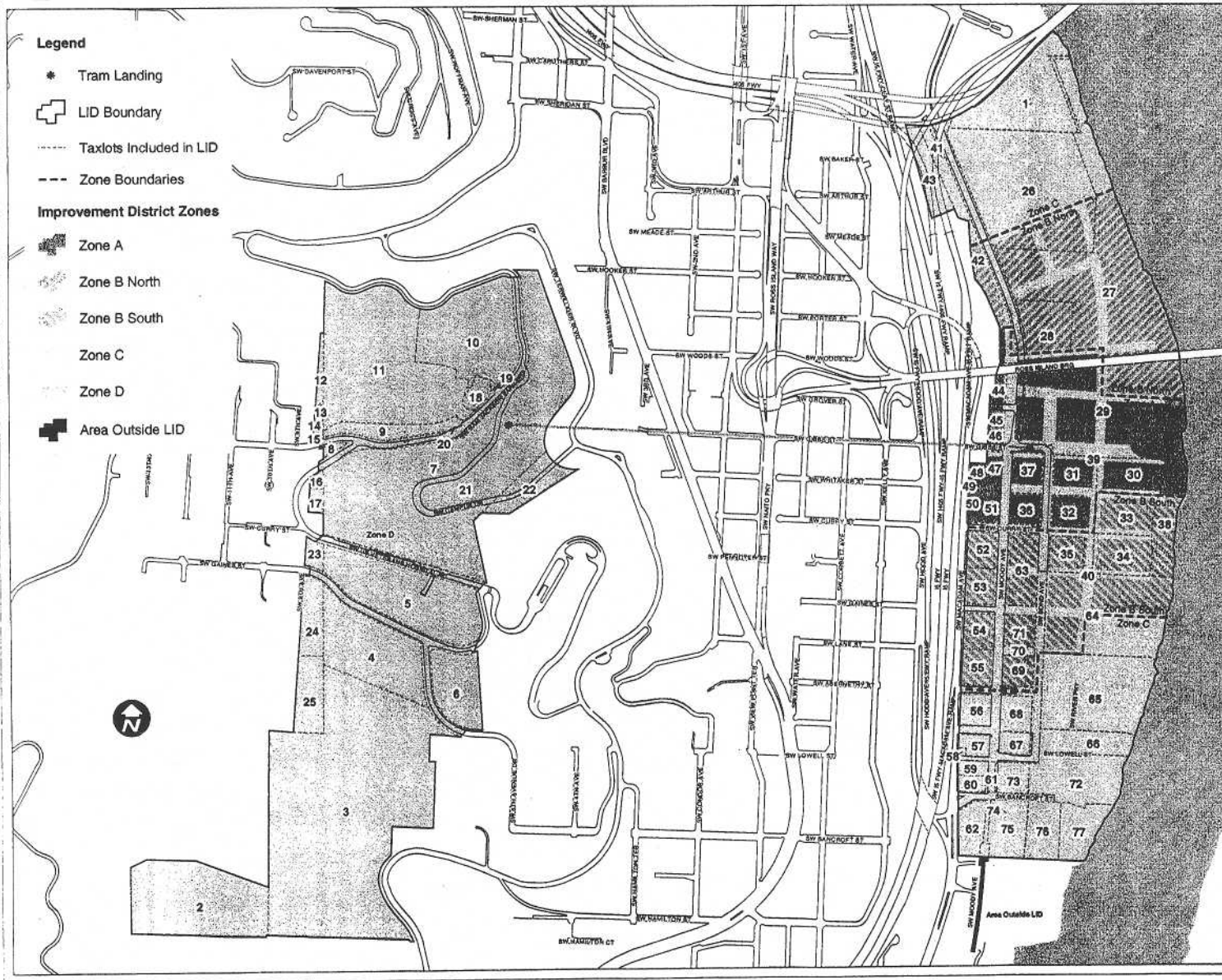
# Portland Aerial Tram Local Improvement District

## Legend

- \* Tram Landing
- ⊕ LID Boundary
- Taxlots Included in LID
- Zone Boundaries

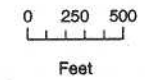
## Improvement District Zones

- Zone A
- Zone B North
- Zone B South
- Zone C
- Zone D
- Area Outside LID



## Taxlots Key

STATE_ID	STATE_ID	STATE_ID	STATE_ID
1 1S1E03DC 500	40 1S1E10AC 311		
2 1S1E09 1100	41 1S1E10BA 100		
3 1S1E09 1200	42 1S1E10BA 200		
4 1S1E09 1300	43 1S1E10BA 300		
5 1S1E09 1400	44 1S1E10BD 100		
6 1S1E09 1500	45 1S1E10BD 200		
7 1S1E09 200	46 1S1E10BD 300		
8 1S1E09 300	47 1S1E10BD 400		
9 1S1E09 400	48 1S1E10BD 500		
10 1S1E09 500	49 1S1E10BD 600		
11 1S1E09 600	50 1S1E10BD 700		
12 1S1E09AC 100	51 1S1E10BD 800		
13 1S1E09AC 3500	52 1S1E10CA 100		
14 1S1E09AC 3700	53 1S1E10CA 200		
15 1S1E09AC 3800	54 1S1E10CA 300		
16 1S1E09AC 8000	55 1S1E10CA 400		
17 1S1E09AC 8100	56 1S1E10CA 500		
18 1S1E09AD 100	57 1S1E10CA 600		
19 1S1E09AD 200	58 1S1E10CD 100		
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21 1S1E09AD 400	60 1S1E10CD 300		
22 1S1E09AD 500	61 1S1E10CD 400		
23 1S1E09DB 100	62 1S1E10CD 500		
24 1S1E09DB 3200	63 1S1E10DB 1000		
25 1S1E09DB 4500	64 1S1E10DB 200		
26 1S1E10 200	65 1S1E10DB 300		
27 1S1E10 300	66 1S1E10DB 400		
28 1S1E10 400	67 1S1E10DB 500		
29 1S1E10AC 200	68 1S1E10DB 600		
30 1S1E10AC 301	69 1S1E10DB 700		
31 1S1E10AC 302	70 1S1E10DB 800		
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33 1S1E10AC 304	72 1S1E10DC 100		
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35 1S1E10AC 306	74 1S1E10DC 200		
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**ORIGINAL**

**Before the City of Portland Council  
Regarding Amendment to Ordinance No. 178675  
December 15, 2004**

**Testimony of Christopher L. Reive**

Good morning. My name is Christopher Reive. I am a lawyer and I am here this morning on behalf of ZRZ Realty Company and Zidell Marine (together, "ZRZ").

As you are probably aware, ZRZ has commenced litigation before the Oregon Tax Court, the Circuit Court, and the Land Use Board of Appeals naming the City of Portland as a party and concerning the formation of the Portland Aerial Tram Local Improvement District, assessments made under this LID's enabling Ordinance, and the Development Agreement for the South Waterfront Central District Project. I am ZRZ's lawyer in each of those matters – but, I am not here to discuss the status of any of those cases.

Instead, I am here, first, to clarify that ZRZ is not opposed to redevelopment plans for the City's waterfront, or the Aerial Tram. ZRZ is, however, opposed to the method the City has adopted to apportion and assess the costs of constructing the Tram and ZRZ has remonstrated against this LID, which is part of the record of this Ordinance.

The Portland Aerial Tram LID is now again before you to correct some of the errors that were committed in its initial adoption. My purpose is to explain, and perhaps convince you, that this LID formation remains flawed, notwithstanding the amendments that have been proposed to you in this new ordinance. In other words, this proposed ordinance neither addresses nor corrects fundamental flaws in the City's approach to the construction of the Tram.

First, the Aerial Tram is a transportation bridge over the I-5 freeway, Barbur Blvd and other impediments to travel between the south waterfront and the OHSU facilities on the Hill. Transportation bridges, whether they be vehicular, pedestrian or otherwise, are not proper projects for LID financing. This is primarily because the benefits that arise from such transportation links inure to the public generally and not to adjacent landowners.

LIDs are proper where private interests receive the substantial share of the measurable benefits of the project, and this is fair because the private interests bear the risk and the cost of the result. In this particular case, however, the focus is on public rather than private benefit. The benefits that may result from the construction of the Tram clearly inure first and primarily to its major user, OHSU and its affiliates. These are inherently public entities, not private.

- OHSU is a public corporation.

- The upper elevation end of the Tram will serve OHSU, the veterans hospital (a federally owned facility) and other public hospital facilities.
- OHSU would not have committed to construct its developments at the lower elevation end of the Tram without the rights it negotiated in the Development Agreement. Much of the land at the lower elevation is dedicated to OHSU related uses; the Development Agreement specifically contemplates such uses; and, a deed transferring a significant parcel of land in the district from its prior owner to OHSU sets forth CC&Rs that restrict the uses of that land to uses within the mission statement of OHSU. (Copy attached as an Exhibit to this testimony)

Second, the ultimate cost of the Tram is unknown. The estimates that the City has relied upon in the planning stages have increased substantially, and there are no accurate numbers available upon which you can base any determination that benefits of the final project will at least equal the costs the project will impose on those subject to assessment within the LID.

Third, the Aerial Tram LID boundary is currently proposed to be comprised of two separate and unconnected areas. In order to incorporate these disparate areas into one district, the contiguous land between them must also be included, as is required by the City's Charter and ORS chapter 223. This current property description, instead, excludes those properties in between and purports to deny the owners of those properties the right to remonstrate against the Tram. This device also shifts the financial burden of development occurring and planned in the upper district to the property in the lower district.

Another effect of describing the boundary of the LID as two separate land areas is that large portions of the Tram infrastructure will exist outside those boundaries. Specifically, the Tram will pass over land that under the current boundary description is not included in the district. LID financing may be spent only on improvements located within the boundaries of the local improvement district. The failure to include such land makes the project an inappropriate candidate for LID financing.

The City Charter contemplates that the two areas be joined by incorporating the properties lying under the Tram's path within the district boundary. Charter Section 9-701 provides that those parcels, and other parcels in the district need not be assessed if they do not receive a benefit from the tram.

Fourth, the recent Oregon Court of Appeals decision in *Jaqua v City of Springfield*, 193 Or App 573, 91 P3d 817 (2004), requires compliance with the Transportation Planning Rule. (Copy attached as an Exhibit to this testimony). As applied to the south waterfront, contemporaneous with the planned development, the City must:

- (1) Limit land uses in the south waterfront to be consistent with the planned function, capacity and performance of the existing transportation system,

- (2) Fund transportation facilities adequate to satisfy the needs of the development proposed in the south waterfront,
- (3) Alter the land use designation densities and design requirements of the south waterfront to reduce automobile demand and meet transportation through other modes, or
- (4) Amend the Transportation System Plan to modify the planned function capacity and performance standards to accept greater automobile congestion to promote other modes of transportation.

One of these actions must occur concurrently with the development of the south waterfront, or the development may not proceed, at all.

Fifth, it is not clear whether the City has followed appropriate notice procedures to afford all interested parties an opportunity to remonstrate. Specifically, ZRZ is not able to determine the date on which notice of this proceeding was given to it, and has not had sufficient time to prepare the evidence it would have offered, if sufficient time were available. As set forth in my attached Affidavit of Christopher L. Reive, it appears from the materials received that notices were mailed to ZRZ in an envelope bearing the City's postage meter postmark date of November 23, 2004. (Affidavit of Christopher L. Reive, Exh. B) However, the "Hearing Notice" documents enclosed bore a date of November 24, 2004. (Affidavit of Christopher L. Reive, Exh. C). The Notices were received by ZRZ on December 6, 2004, some 13 days after the curious postmark. I, as an attorney for ZRZ who had previously requested notice of the proposed ordinance then in draft, received my first written notice on the same day, December 6, 2004. This was affirmed by statements from the City's attorney, Mark Moline, to me on December 1, 2004, and again on December 3, 2004, that the text of the proposed ordinance was not available on those dates. In light of these statements, and the inconsistencies of the dates on the Notices and the postmark, neither ZRZ nor can affirm that timely and appropriate Notice of these proceedings was given.

Sixth, to the extent the City has made any assessment of the economic benefits and costs of the proposed Tram to the properties located within the proposed boundaries of the LID, it relies on the unqualified reports of E.D.Hovee & Company, an economic services provider. Although ORS 674.100 requires that all appraisals of real property be performed by licensed or certified real estate appraisers, neither E.D. Hovee & Company, nor its principal, Mr. Eric Hovee, are on the State of Oregon's list of licensed or certified appraisers provided by the State of Oregon. The City may not rely upon uncertified and unlicensed appraisals of the value of the ZRZ properties to establish the benefit allegedly conferred by the Tram. This failure to obtain such a qualified appraisal results in a record that contains no credible evidence to support a finding that any benefit will accrue to the ZRZ property as a result of the LID and/or construction of the Tram. Moreover, there is no objective basis or methodology for apportioning assessments that are not based on quantified benefits accruing to each property.

ZRZ hereby tenders its offer to provide such a qualified appraisal, and requests that the City defer any decision on this proposed ordinance and keep its record open for a sufficient time to allow performance of such an appraisal.

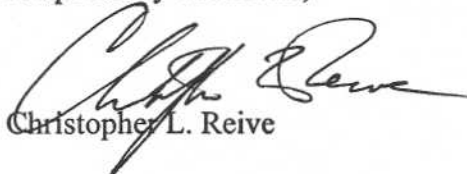
Seventh, the City adopted the Development Agreement and its subsequent amendments and then incorporated the terms of those agreements into this LID without adequate public notice or opportunity to participate and comment on its terms. ZRZ is not a party to the Development Agreement, is disproportionately burdened by the costs that will be assessed under the apportionment formula of the LID, and has therefore been denied right to due process of law.

For the purpose of ensuring a complete record of all of the City's proceedings related to Portland Aerial Tram Local Improvement District, ZRZ respectfully demands that all emails and other communications circulated among, sent to, or received by City Council members that relate to the LID (including all terms of the assessment methodology that are also terms of the South Waterfront Central District Project Development Agreement and all amendments thereto) be included in the record of this matter in a timely fashion and that the record remain open to permit ZRZ to address any issues discussed therein. In addition, to the extent not already provided by the City staff to the City Council, ZRZ respectfully requests that the record of all prior hearings on the first adoption of this Ordinance be adopted into this record, by reference.

Finally, ZRZ offers, places before the Council, and specifically requests that the Council take into account during its deliberations on the issues ZRZ has raised herein, the entire South Waterfront Central District Development Agreement, including the First, Second and Third Amendments thereto.

On behalf of ZRZ Realty and Zidell Marine, I thank the City Council for its attention to these concerns.

Respectfully submitted,



Christopher L. Reive

## AFFIDAVIT OF CHRISTOPHER L. REIVE

STATE OF OREGON            )  
   ) ss.  
 County of Clackamas        )

I, Christopher L. Reive, being first duly sworn, depose and say:

1. I am one of the attorneys for ZRZ Realty Company and Zidell Marine. I am a member of the Oregon State Bar, and I practice law in the states of Oregon and Washington with the firm of Jordan Schrader PC. I make this affidavit based upon my personal knowledge, and I am competent to testify to the matters stated in this affidavit.

2. This firm represents ZRZ in a lawsuit entitled *ZRZ Properties, LLC v. City of Portland*, Multnomah County Circuit Court Case No. 0410-10604 concerning the Local Improvement District ("LID") to fund the Portland Aerial Tram ("PAT"), which is a subject at the city council meeting scheduled for December 15, 2004.

3. Mark Moline is one of the City of Portland's attorneys. On or about December 1, 2004, I spoke with Mark Moline concerning the City's intent to amend Ordinance No. 178675 (the LID ordinance). Mr. Moline said the language of the amended ordinance was not available on December 1<sup>st</sup> for my review. He advised that City staff was still refining the language and he would forward the amendment to the ordinance to me as soon as possible.

4. On or about December 3, 2004, I again spoke to Mr. Moline by telephone and I asked about the status of the proposed new ordinance. He told me that he would be providing a copy of the proposed ordinance to the judge in a lawsuit filed by ZRZ in the Oregon Tax Court against the City of Portland, Case No. 4701.

5. In a copy of a letter to Judge Breithaupt, Oregon Tax Court Judge, dated December 6, 2004, attorney Moline attached the City's "clean-up Ordinance," a copy of which is attached to this affidavit and marked Exhibit A.

6. Attached hereto and marked Exhibit B is a true copy of the outside of an envelope showing the postmarked date of November 23, 2004 and addressed to ZRZ Realty Company. Within that envelope were several copies of a document entitled "Hearing Notice" dated November 24, 2004. Copies of the hearing notices for each ZRZ tax lot are attached hereto and marked Exhibit C. Final notices of hearing were dated November 24, 2004.

7. On or about December 6, 2004, I received a phone call from my client, who advised that he had just received the envelope full of the hearing notices (Exhibits B and C), on December 6, 2004 in the mail.

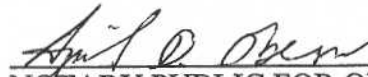
8. The "clean-up Ordinance" was not received by the court or by anybody in this matter until Mr. Moline forwarded it to Judge Breithaupt on December 6, 2004.

9. The foregoing is true as I verily believe.

  
\_\_\_\_\_  
Christopher L. Reive

SUBSCRIBED AND SWORN to before me this 14<sup>th</sup> day of December, 2004.



  
\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission Expires: 7/25/2005



179009

CITY OF  
**PORTLAND, OREGON**  
OFFICE OF CITY ATTORNEY

Linda Meng, City Attorney  
1221 S.W. 4th Avenue, Suite 430  
Portland, Oregon 97204  
Telephone: (503) 823-4047  
Fax No.: (503) 823-3089

December 6, 2004

VIA FACSIMILE MESSAGE

HON. HENRY C. BREITHAUPT  
OREGON TAX COURT  
1163 STATE STREET  
SALEM, OR 97301

Re: *ZRZ Properties, LLC v. City of Portland*  
Oregon Tax Court Case No. 4701  
Your File No. 48890-34274

Dear Judge Breithaupt:

The above case is currently scheduled for a telephone conference call for Tuesday, December 7, 2004, at 9:30 a.m.

I am writing to advise the Court of a development which the City believes will make this case moot. The attorneys for the other parties agree that I should notify you by letter of this development prior to tomorrow's conference call.

By way of background, on August 18, 2004, the City of Portland City Council formed the Portland Aerial Tram Local Improvement District (LID). The LID formation Ordinance unfortunately, as well as erroneously, included the following language:

"Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon constitution."

In apparent response to this language, plaintiff filed its Petition in this Court. The gist of plaintiff's claim is that the assessments for the local improvements are not "an incurred charge." The City agrees.

December 6, 2004

Page 2

As a result, the City intends to file a "clean-up Ordinance." The Ordinance, among other things, includes the following language:

"... by replacing the sentence 'Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution' with the sentences, 'Assessments for local improvements are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution. Pursuant to City Code, assessment for this local improvement district will be imposed by a separate and subsequent ordinance.'"

The City intends to file this Ordinance on Thursday, December 9, 2004. The Ordinance would then be heard by City Council on Wednesday, December 15, 2004.

A copy of the "clean-up Ordinance" is attached for your information and review. A copy of the "clean-up Ordinance" was previously transmitted to the attorneys for ZRZ Properties, together with Oregon Health Sciences University and River Campus Investors LLC.

Very truly yours,

*Mark R. Moline /jt*

Mark R. Moline  
Senior Deputy City Attorney

MRM:jlt  
Attachment

- c. (with attachment)  
Linly Rees  
Edward H. Trompke  
Christopher Reive  
Bruce Cahn

179009

**ORDINANCE No.**

Amend to add and modify findings and to correct a map for the Portland Aerial Tram Local Improvement District with no change in the local improvement district boundary, allocation of funding amounts or estimates of assessments. (Ordinance; amend Ordinance No. 178675; C-10009)

The City of Portland ordains:

Section 1. The Council finds:

1. Ordinance No. 178675 was passed by City Council on August 18, 2004, forming the Portland Aerial Tram Local Improvement District (LID).
2. Petitions signed by property owners (hereafter "Petitions for Portland Aerial Tram LID") state:

"The LID assessment for project costs of all zones is fixed at \$19,000,000 exclusive of Auditor's costs. Auditor's costs include recording, superintendency and Local Improvement District Construction Fund (LIDCF) interest, which are estimated at \$431,125.12 and will be proportionately allocated based on each zone's share of total project costs."

3. Petitions for Portland Aerial Tram LID are included as Exhibit A in Resolution No. 36225 adopted by City Council on June 10, 2004.
4. Resolution No. 36225 in turn states:

"Be it further resolved, that property owners will provide funding in the fixed amount of \$19,000,000 plus LID costs for Auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126, plus the costs of any extra work on private property, and the remainder shall be funded per the terms of the South Waterfront Central District Project Development Agreement."

5. Any significant or material changes to the estimate of the property owners' assessments during the course of final engineering would require a subsequent hearing per Section 17.08.080 of City Code; however, the City Council reaffirms that the LID costs to be assessed to property owners will be limited to \$19 million, plus Auditor's charges including recording, superintendency and Local Improvement District Construction Fund (LIDCF) interest. The City Council also reaffirms that the costs to be assessed to property owners within each assessment zone are consistent with the amounts in Finding No. 12 of Ordinance No. 178675.

EXHIBIT APAGE 3 OF 8

179009

6. Finding No. 15 of Ordinance No. 178675 states that:
- “Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution.”
7. Assessments imposed by this LID pursuant to a separate and subsequent assessment ordinance will not be an incurred charge.
8. The original Ordinance submitted for City Council consideration at its July 29, 2004 LID Formation Hearing contained an LID boundary with four (4) internal assessment zones as shown in Exhibit A of this ordinance. The hearing was continued to August 4, 2004 and again to August 12, 2004. At the August 12, 2004 hearing, the City Council directed that a substitute ordinance be brought forward for consideration that did not change the LID boundary or the overall amount of the assessments, but directed that a fifth internal assessment zone be created and that some individual assessments be modified, none of which affected the assessments to be levied in the future on properties currently owned by Swinerton Investments and ZRZ Realty Inc. The substitute Ordinance included a replacement map (Exhibit B of Ordinance No. 178675; attached as Exhibit B of this Ordinance) which included the four assessment zones in South Waterfront but inadvertently omitted the assessment zone on Marquam Hill. Exhibit E of the substitute Ordinance included assessment amounts for the Marquam Hill assessment zone omitted from this map; this ordinance will not change the LID boundary or any of these assessment amounts. It simply clarifies City Council's original intent to include the Marquam Hill assessment zone in the LID.
9. This amendment to Ordinance No. 178675 does not constitute a major change to scope or cost of improvements per Section 17.08.080 of City Code; however, property owners were sent notice of a hearing on November 23, 2004 based Multnomah County property tax records as of this date.

**NOW, THEREFORE, the Council directs:**

- a. The City Council reaffirms that the total amount of costs that will be assessed to property owners in this LID after the final assessment hearing required by code will not exceed \$19 million plus LID costs for Auditor's charges, including financing.
- b. Finding No. 15 of Ordinance No. 178675 is amended by replacing the sentence “Local improvement district assessments are an incurred charge and are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution” with the sentences, “Assessments for local improvements are not subject to the property tax limitation established by Article XI, Section 11b of the Oregon Constitution. Pursuant to City Code, assessment for this local improvement district will be imposed by a separate and subsequent ordinance.”

179009

- c. Directive "c" of Ordinance No. 178675 is amended by replacing the sentence "Properties shall be assessed on a square footage basis within the four zones in the LID as indicated in Exhibit E" with the sentence "Properties shall be assessed on a square footage basis within the five (5) zones in the LID as indicated in Exhibit E."
- d. Exhibit B of Ordinance No. 178675 is replaced in its entirety by the map attached as Exhibit C to this ordinance.

Passed by the City Council,

Commissioner Jim Francoconi  
Andrew Aebislg  
December 3, 2004  
*Tran Amended Ordinance rev7.doc*








**GARY BLACKMER**  
Auditor of the City of Portland  
By

Deputy

EXHIBIT A  
PAGE 5 OF 8

### Portland Aerial Tram Local Improvement District

#### Legend

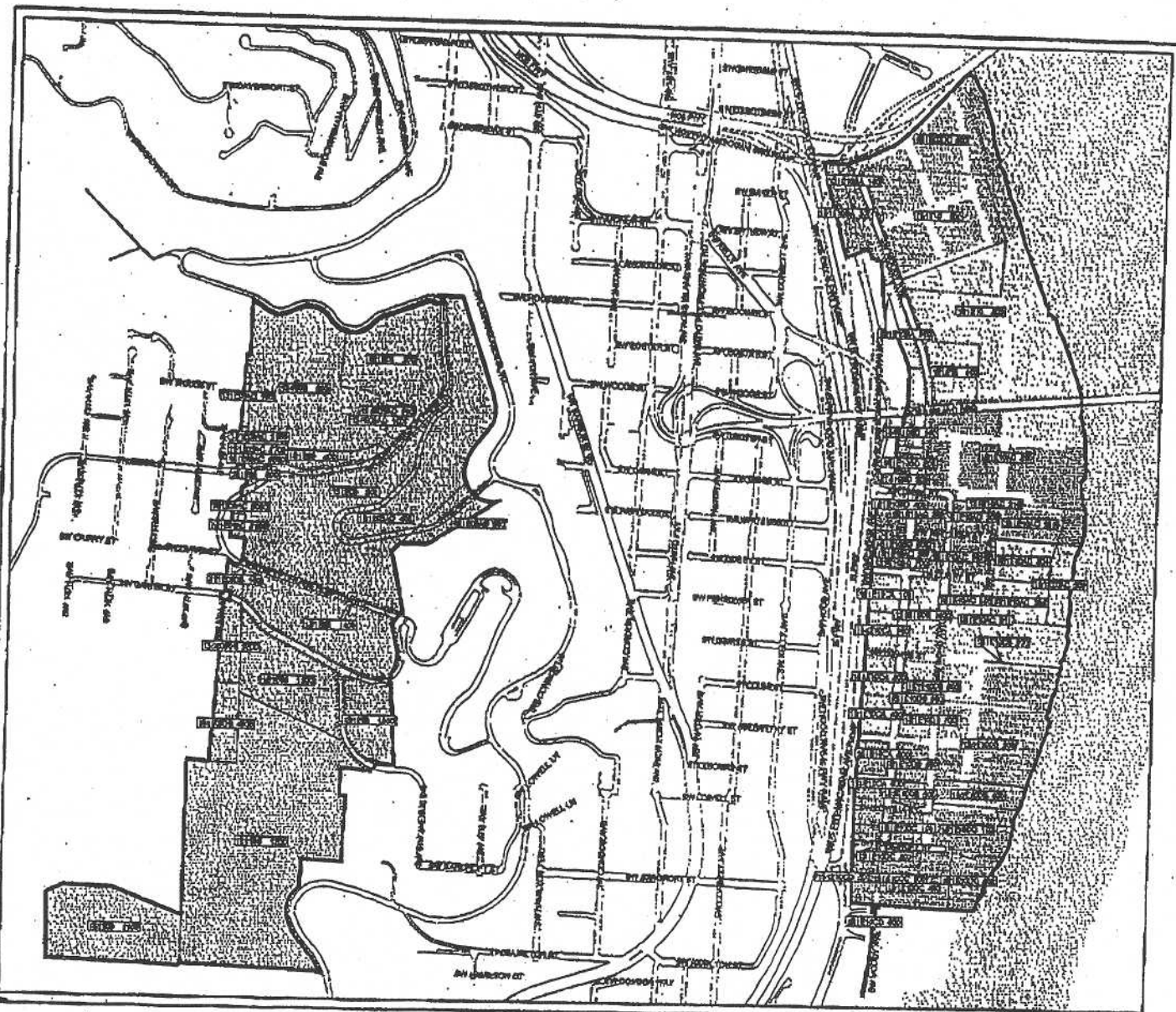
-  LID Boundary
-  Taxlots included in LID
- Improvement District Zones**
-  Zone A
-  Zone B
-  Zone C
-  Zone D
-  Area Outside LID



Plot Date: 6/28/04 2:22:06 PM

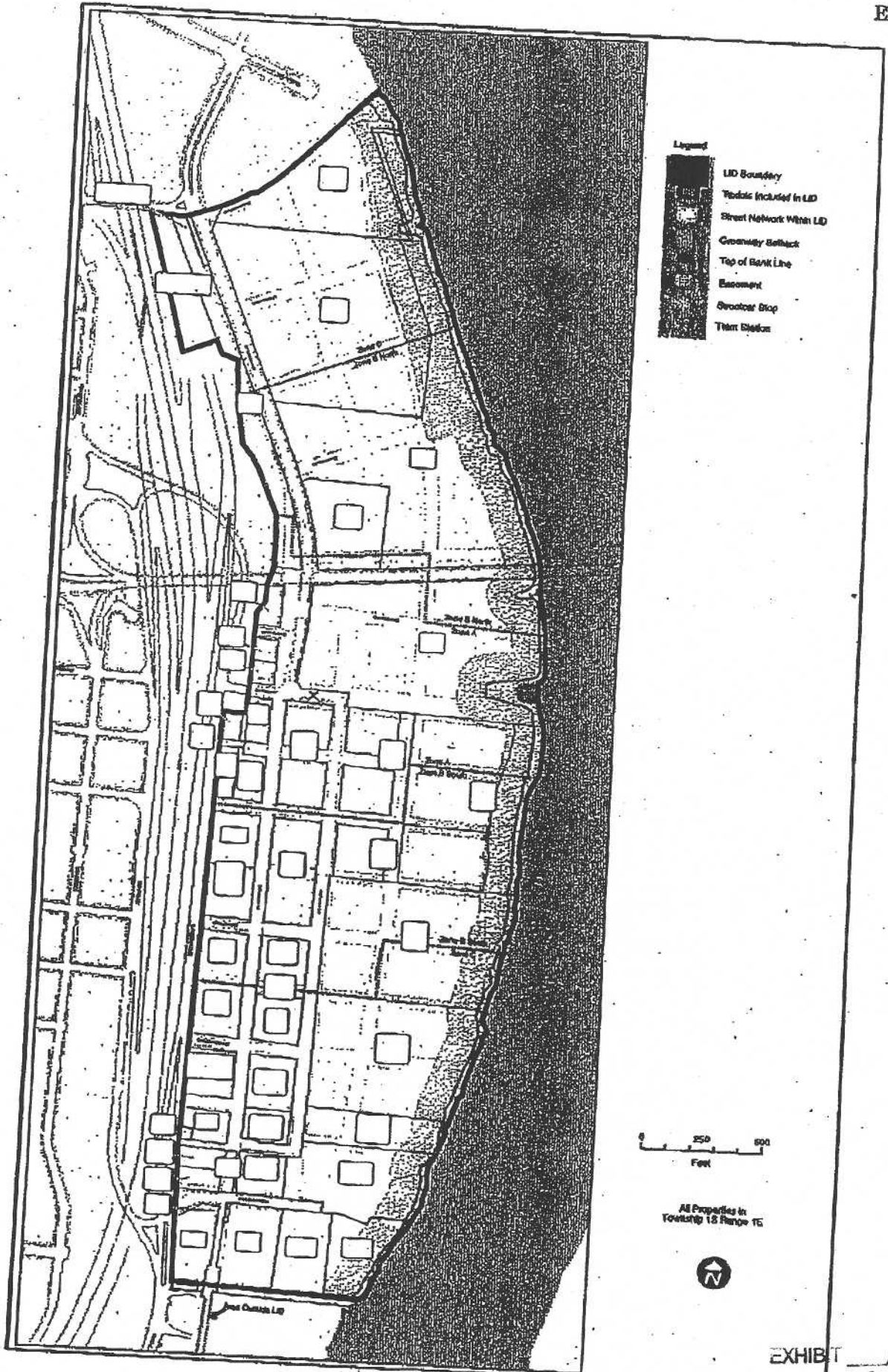
179009

EXHIBIT



179009

EXHIBIT B



- Legend
- LID Boundary
  - Totals Included in LID
  - Street Network Within LID
  - Gateway Backlot
  - Top of Bank Line
  - Easement
  - Sewer Stop
  - Water Station



All Properties in Township 15 Range 16



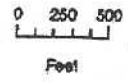
EXHIBIT  
PAGE

A  
7 of 8

# Portland Aerial Tram Local Improvement District

## Textlots Key

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2 1S1E08 1100	41 1S1E10BA 100	80 1S1E10DB 200	109 1S1E10DC 600
3 1S1E08 1200	42 1S1E10BA 200	81 1S1E10DB 300	110 1S1E10DC 700
4 1S1E09 1300	43 1S1E10BA 300	82 1S1E10DB 400	111 1S1E10DB 800
5 1S1E09 1400	44 1S1E10BD 100	83 1S1E10DB 900	112 1S1E10DB 900
6 1S1E09 1600	45 1S1E10BD 200	84 1S1E10DB 1000	113 1S1E10DB 1000
7 1S1E09 200	46 1S1E10BD 300	85 1S1E10DB 200	114 1S1E10DB 300
8 1S1E09 300	47 1S1E10BD 400	86 1S1E10DB 400	115 1S1E10DB 400
9 1S1E09 400	48 1S1E10BD 500	87 1S1E10DB 500	116 1S1E10DB 500
10 1S1E09 500	49 1S1E10BD 600	88 1S1E10DB 600	117 1S1E10DB 600
11 1S1E09 800	50 1S1E10BD 700	89 1S1E10DB 700	118 1S1E10DB 700
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13 1S1E09AC 200	52 1S1E10CA 100	91 1S1E10DB 900	120 1S1E10DB 900
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17 1S1E09AC 4100	56 1S1E10CA 500	95 1S1E10DB 400	124 1S1E10DB 500
18 1S1E09AD 100	57 1S1E10CA 600	96 1S1E10DB 500	125 1S1E10DB 600
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32 1S1E10AC 303	71 1S1E10DB 900	110 1S1E10DB 1000	139 1S1E10DB 1000
33 1S1E10AC 304	72 1S1E10DB 100	111 1S1E10DB 1000	140 1S1E10DB 1000
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38 1S1E10AC 309	77 1S1E10DC 500	116 1S1E10DB 1000	145 1S1E10DB 1000
39 1S1E10AC 310		117 1S1E10DB 1000	146 1S1E10DB 1000



179009  
EXHIBIT C

- Legend**
- ★ Tram Landing
  - ⊕ LID Boundary
  - Taxlots Included in LID
  - - - Zone Boundaries
- Improvement District Zones**
- Zone A
  - Zone B North
  - Zone B South
  - Zone C
  - Zone D
  - Area Outside LID



179009



AMOUNT

\$0.60

U.S. POSTAGE  
PAID  
PORTLAND, OR  
97205  
NOV 23 04  
00099288-12  
97239

9261



 CITY OF  
**PORTLAND**  
OFFICE OF  
**TRANSPORTATION**  
1120 S.W. 5th Avenue, Suite 800  
Portland, Oregon 97204-1914

**ZRZ REALTY CO**  
**3121 SW MOODY AVENUE**  
**PORTLAND OR 97239-4500**

EXHIBIT B  
PAGE 1 OF 1



# ANDERSEN CONSTRUCTION CO.

Corporate Headquarters  
6712 N Cutter Circle  
Portland, Oregon 97217

PH: 503.283.6712 FX: 503.283.3607

ROUTED TO: JRB  
EHT CUR

## FAX COVER SHEET

TO: Chris Rive, EA Transp

FROM: 7 Pieces

COMPANY:

DATE:

FAX NUMBER:

TOTAL NO. OF PAGES INCLUDING COVER:

PHONE NUMBER:

SENDER'S REFERENCE NUMBER:

REFERENCE:

YOUR REFERENCE NUMBER:

- URGENT
- FOR REVIEW
- PLEASE COMMENT
- PLEASE REPLY
- PER YOUR REQUEST

NOTES/COMMENTS:

Check out Post Mark Last Page -  
Two days before notice: Arrived 2:00 PM 12/15

CORPORATE HEADQUARTERS  
6712 NORTH CUTTER CIRCLE PORTLAND, OREGON 97217 PH: 503.283.6712 FX: 503.283.3607  
STATE LICENSES  
OREGON: 6305 WASHINGTON: HAAND\*099MA CALIFORNIA: 153 IDAHO: 0663 ALASKA: 11751

EXHIBIT C  
PAGE 1 OF 6



CITY OF  
**PORTLAND**  
OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
1120 S.W. 5th Avenue, Suite 800  
Portland, Oregon 97204-1914  
(503) 823-5185  
FAX (503) 823-7576 or 823-7371  
TDD 823-6868

Brant  
Williams  
Director

Eileen  
Argentina  
System  
Management

Bryant  
Engel  
Finance

Don  
Gardner  
Engineering &  
Development

Jeanne  
Nyquist  
Maintenance

orth  
ig

HEARING NOTICE

Date of Mailing: November 24, 2004  
Auditor's Account Number: 135063  
Auditor's Project Number: C-10009  
State ID of Property: 1S1E10 300  
Property Tax Account Number: R991100010  
Property Address: 3121 W/ SW MOODY AVE  
PORTLAND OR 97239  
Property Legal Description: SECTION 10 1 S 1 E; TL 300 15.69 ACRES  
Estimated Assessment: \$588,040.58  
To: Z R Z REALTY CO  
3121 SW MOODY AVE  
PORTLAND OR 97239-4500

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

- 1) Add additional language to further reiterate that property owners' costs are fixed at \$19 million plus LID costs for auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126 consistent with petitions signed by property owners
- 2) Correct a map error
- 3) Modify a finding to delete a reference to incurred cost
- 4) Modify a finding to reaffirm the five zones referenced in the ordinance

Council will consider this item on the Regular Agenda beginning at 9:30 AM on Wednesday, December 15<sup>th</sup>. City Council will receive testimony at this time. The City Council meeting will be held at Council Chambers in City Hall, 1221 SW Fourth Avenue.

If you have any questions about this item, please contact me at (503) 823-5648 or via e-mail at [andrew.aebi@pdxtrans.org](mailto:andrew.aebi@pdxtrans.org). If you have any questions about the Portland Aerial Tram project, please contact Art Pearce at (503) 823-7791 or via e-mail at [art.pearce@pdxtrans.org](mailto:art.pearce@pdxtrans.org); or Matt Brown at (503) 823-7027 or via e-mail at [matt.brown@pdxtrans.org](mailto:matt.brown@pdxtrans.org).

Sincerely,

*Andrew H. Aebi*

Andrew H. Aebi  
Local Improvement District Administrator

EXHIBIT C  
PAGE 2 OF 6



CITY OF  
**PORTLAND**  
 OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
 1120 S.W. 5th Avenue, Suite 800  
 Portland, Oregon 97204-1914  
 (503) 823-5185  
 FAX (503) 823-7576 or 823-7371  
 TDD 823-6868

Brant  
 Williams  
 Director

Eileen  
 Argentina  
 System  
 Management

Bryant  
 Engle  
 Finance

Don  
 Gardner  
 Engineering &  
 Development

Jeanne  
 Nyquist  
 Maintenance

Laurel  
 Worth  
 ing

### HEARING NOTICE

Date of Mailing: November 24, 2004  
 Auditor's Account Number: 135067  
 Auditor's Project Number: C-10009  
 State ID of Property: 1S1E10AC 200  
 Property Tax Account Number: R991100420  
 Property Address: 3121 SW MOODY AVE  
 PORTLAND OR 97239  
 Property Legal Description: SECTION 10 1S 1E; TL 200 13.98 ACRES, LAND & IMPS  
 TL 200  
 Estimated Assessment: \$1,421,788.54  
 To: Z R Z REALTY CO  
 3121 SW MOODY AV  
 PORTLAND OR 97239

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

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Sincerely,

*Andrew H. Aebi*

Andrew H. Aebi  
 Local Improvement District Administrator

EXHIBIT C  
 PAGE 3 OF 6



CITY OF  
**PORTLAND**  
 OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
 1120 S.W. 5th Avenue, Suite 800  
 Portland, Oregon 97204-1914  
 (503) 823-5185  
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Brant  
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 Management

Bryant  
 Engle  
 Finance

Don  
 Gardner  
 Engineering &  
 Development

Ieanne  
 Nyquist  
 Maintenance

Laurel  
 Orth

HEARING NOTICE

Date of Mailing: November 24, 2004  
 Auditor's Account Number: 135006  
 Auditor's Project Number: C-10009  
 State ID of Property: 1S1E10BD 100  
 Property Tax Account Number: R140910080  
 Property Address: NWC/SW GROVER & SW MOODY AVE  
 PORTLAND OR 97239  
 Property Legal Description: CARUTHERS ADD; TL 100 LOT 1-4 BLOCK 101  
 Estimated Assessment: \$72,487.99

To: Z R Z REALTY CO  
 3121 SW MOODY AVE  
 PORTLAND OR 97239-4500

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

- 1) Add additional language to further reiterate that property owners' costs are fixed at \$19 million plus LID costs for auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126 consistent with petitions signed by property owners
- 2) Correct a map error
- 3) Modify a finding to delete a reference to incurred cost
- 4) Modify a finding to reaffirm the five zones referenced in the ordinance

Council will consider this item on the Regular Agenda beginning at 9:30 AM on Wednesday, December 15<sup>th</sup>. City Council will receive testimony at this time. The City Council meeting will be held at Council Chambers in City Hall, 1221 SW Fourth Avenue.

If you have any questions about this item, please contact me at (503) 823-5648 or via e-mail at [andrew.aebi@pdxtrans.org](mailto:andrew.aebi@pdxtrans.org). If you have any questions about the Portland Aerial Tram project, please contact Art Pearce at (503) 823-7791 or via e-mail at [art.pearce@pdxtrans.org](mailto:art.pearce@pdxtrans.org); or Matt Brown at (503) 823-7027 or via e-mail at [matt.brown@pdxtrans.org](mailto:matt.brown@pdxtrans.org).

Sincerely,

*Andrew H. Aebi*

Andrew H. Aebi  
 Local Improvement District Administrator

EXHIBIT C  
 PAGE 4 OF 6



CITY OF  
**PORTLAND**  
OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
1120 S.W. 5th Avenue, Suite 800  
Portland, Oregon 97204-1914  
(503) 823-5185  
FAX (503) 823-7576 or 823-7371  
TDD 823-6868

- Brant Williams  
Director
  
- Eileen Argentina  
System Management
  
- Bryant Engle  
Finance
  
- Don Gardner  
Engineering & Development
  
- Jeanne Nyquist  
Maintenance
  
- John Smith  
Planning

**HEARING NOTICE**

Date of Mailing: November 24, 2004  
 Auditor's Account Number: 135007  
 Auditor's Project Number: C-10009  
 State ID of Property: 1S1E10BD 200  
 Property Tax Account Number: R140911250  
 Property Address: SW/C SW MOODY & SW GROVER ST  
 PORTLAND OR 97239  
 Property Legal Description: CARUTHERS ADD; LOT 1&2 BLOCK 119  
 Estimated Assessment: \$51,983.16

To: Z R Z REALTY CO  
 3121 SW MOODY AVE  
 PORTLAND OR 97239-4500

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

- 1) Add additional language to further reiterate that property owners' costs are fixed at \$19 million plus LID costs for auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126 consistent with petitions signed by property owners
- 2) Correct a map error
- 3) Modify a finding to delete a reference to incurred cost
- 4) Modify a finding to reaffirm the five zones referenced in the ordinance

Council will consider this item on the Regular Agenda beginning at **9:30 AM on Wednesday, December 15<sup>th</sup>**. City Council will receive testimony at this time. The City Council meeting will be held at Council Chambers in City Hall, 1221 SW Fourth Avenue.

If you have any questions about this item, please contact me at (503) 823-5648 or via e-mail at [andrew.aebi@pdxtrans.org](mailto:andrew.aebi@pdxtrans.org). If you have any questions about the Portland Aerial Tram project, please contact Art Pearce at (503) 823-7791 or via e-mail at [art.pearce@pdxtrans.org](mailto:art.pearce@pdxtrans.org), or Matt Brown at (503) 823-7027 or via e-mail at [matt.brown@pdxtrans.org](mailto:matt.brown@pdxtrans.org).

Sincerely,

*Andrew H. Aebi*  
Andrew H. Aebi  
Local Improvement District Administrator

EXHIBIT   C    
PAGE   5   OF   6



CITY OF  
**PORTLAND**  
 OFFICE OF  
**TRANSPORTATION**

Jim Francesconi, Commissioner  
 1120 S.W. 5th Avenue, Suite 800  
 Portland, Oregon 97204-1914  
 (503) 823-5185  
 FAX (503) 823-7576 or 823-7371  
 TDD 823-6868

Brant  
 Williams  
 Director

Eileen  
 Argentina  
 System  
 Management

Bryant  
 Engle  
 Finance

Don  
 Gardner  
 Engineering &  
 Development

Jeanne  
 Nyquist  
 Maintenance

Arthur  
 King

### HEARING NOTICE

Date of Mailing: November 24, 2004  
 Auditor's Account Number: 135008  
 Auditor's Project Number: C-10009  
 State ID of Property: 1S1E10BD 300  
 Property Tax Account Number: R140911270  
 Property Address: NW/C SW MOODY & SW GIBBS ST  
 PORTLAND OR 97239  
 Property Legal Description: CARUTHERS ADD; LOT 3&4 BLOCK 119  
 Estimated Assessment: \$39,078.96

To: Z R Z REALTY CO  
 3121 SW MOODY AVE  
 PORTLAND OR 97239-4500

The City Council will consider an amendment to Ordinance #178675 that formed the Portland Aerial Tram Local Improvement District. **No change to the boundary as petitioned, scope of the project, allocation or amount of the estimated assessments will be included in this ordinance.** This ordinance is simply a "housekeeping" ordinance. This ordinance will:

- 1) Add additional language to further reiterate that property owners' costs are fixed at \$19 million plus LID costs for auditor's charges including financing currently estimated at \$431,126 for a total of \$19,431,126 consistent with petitions signed by property owners
- 2) Correct a map error
- 3) Modify a finding to delete a reference to incurred cost
- 4) Modify a finding to reaffirm the five zones referenced in the ordinance

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If you have any questions about this item, please contact me at (503) 823-5648 or via e-mail at [andrew.aebi@pdxtrans.org](mailto:andrew.aebi@pdxtrans.org). If you have any questions about the Portland Aerial Tram project, please contact Art Pearce at (503) 823-7791 or via e-mail at [art.pearce@pdxtrans.org](mailto:art.pearce@pdxtrans.org); or Matt Brown at (503) 823-7027 or via e-mail at [matt.brown@pdxtrans.org](mailto:matt.brown@pdxtrans.org).

Sincerely,

*Andrew H. Aebi*

Andrew H. Aebi  
 Local Improvement District Administrator

EXHIBIT C  
 PAGE 6 OF 6

After recording, return to:

Mr. Al Zimmerman *PLU 6-30-04*  
1121 SW Salmon Street *Carole Beck*  
Suite 200  
Portland, OR 97205-2021

Until a change is requested, all tax  
Statements should be sent to:

Mr. Al Zimmerman  
1121 SW Salmon Street  
Suite 200  
Portland, OR 97205-2021

Recorded in MULTNOMAH COUNTY, OREGON  
C. Swick, Deputy Clerk  
A31 13 ATTD  
Total : 81.00  
2004-118550 06/30/2004 09:18:27am

STATUTORY BARGAIN AND SALE DEED

DATED: June 30, 2004

BETWEEN: SCHNITZER INVESTMENT CORP.,  
an Oregon corporation  
3200 NW Yeon Street  
Portland, OR 97210

("Grantor")

AND: OREGON HEALTH AND SCIENCE  
UNIVERSITY FOUNDATION,  
a public benefit corporation under  
the Oregon non-profit corporate law  
1121 SW Salmon Street, Suite 200  
Portland, OR 97205-2021

("Grantee")

Grantor conveys to Grantee, the real property described on attached Exhibit A,  
subject to the Restrictive Covenants attached as Exhibit B.

THIS INSTRUMENT WILL 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

*B*



179009

THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY APPROVED USES AND TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES AS DEFINED IN ORS 30.930.

The true consideration for this conveyance is \$0.00 and is a donation.

IN WITNESS WHEREOF, this Statutory Bargain and Sale Deed has been executed and delivered as of the date first set forth above.

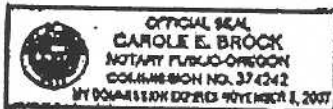
SCHNITZER INVESTMENT CORP., an Oregon corporation

By: [Signature]  
Its: President

STATE OF OREGON }

COUNTY OF Multnomah }

This instrument was acknowledged before me by Kenneth W. Hreck the President of Schnitzer Investment Corp., an Oregon corporation, on behalf of and as the act and deed of said corporation, on this the 29<sup>th</sup> day of June, 2004.



[Signature]  
NOTARY PUBLIC, STATE OF OREGON  
Printed Name: Carole E. Brock  
My Commission Expires 11/8/2007

179009

Order No. 21224

EXHIBIT A

LEGAL DESCRIPTION

PARCEL I:

A parcel of land in the Finice Caruthers D.L.C. and in the southeast quarter of the southwest quarter of Section 3, Township 1 South, Range 1 East of the Willamette Meridian, in the City of Portland, County of Multnomah and State of Oregon, described as follows:

Beginning at a point that is on the North line of Southwest Lincoln Street as laid out on the plat of City of Portland, produced Easterly in said City of Portland, that is South 87°49'24" East 547.57 feet from the East line of Southwest Water Avenue; thence South 3°08'06" West 427.66 feet to a monument; thence South 87°50'54" East 605.01 feet to a monument; thence South 100.0 feet to a monument; thence East a distance of 41.10 feet to the true point of beginning, said point being on the southeasterly line of the property taken in that Condemnation Suit No. 289802 in State Circuit Court; thence Northerly 88°12'04" East a distance of 219.31 feet, to the U.S. Harbor line; thence North 20°18'44" West along the U.S. Harbor line a distance of 223 feet, more or less, to a point on the southeasterly line of that property taken in above mentioned condemnation suit; thence Southwesterly along said southeasterly line a distance of 300 feet, more or less, to the true point of beginning.

TOGETHER WITH that certain 20 foot easement granted in Suit No. 289802 in the State Circuit Court for Multnomah County and the portion of the 20 foot easement granted by instrument recorded November 13, 1957 in Book 1871, Page 405, Deed Records lying Southerly of said premises.

EXCEPTING THEREFROM that portion lying below the line of ordinary high water as set forth in Deed to the State of Oregon, acting by and through the Division of State Lands, dated September 10, 1930, Recorded September 29, 1930, in Book 2345, Page 457.

PARCEL II:

A parcel of land situated in the Finice Caruthers D.L.C. in Township 1 South, Range 1 East of the Willamette Meridian, in the City of Portland, County of Multnomah and State of Oregon, described as follows:

Beginning at a point on the North line of Southwest Lincoln Street, produced Easterly in said City of Portland, that is South 89°17' East 547.57 feet distant from the East line of Southwest Water Avenue, measured along said North line of said Southwest Lincoln Street, produced Easterly; thence South 0°40'18" West a distance of 427.66 feet to a monument; thence South 89°29'30" East a distance of 605.0 feet to a monument; thence South a distance of 220.0 feet to the North line of the property conveyed to Miller Products Company, an Oregon corporation, by Deed recorded May 4, 1950 in Deed Book 1401, Page 471; thence Easterly along said line to the southeasterly boundary of that parcel acquired by the State of Oregon, by and through its State Highway Commission, by decree entered October 16, 1961 in Suits No. 289801, said point being the true point of beginning of the parcel to be described; thence Southwesterly along the State of Oregon Tract 234 feet, more or less, to its intersection with the West line of the Miller Products Company property; thence Southerly along the West line of said Miller property 33 feet, more or less, to the North line of that parcel conveyed to the State of Oregon, by and through its State Highway Commission, by Deed recorded July 14, 1959 in Deed Book 1964, Page 487; thence North 86°34'04" East along the North line of the State of Oregon property 196.77 feet; thence North 78°30' East along said North line 390 feet, more or less, to the Easterly line of the Miller Products Company Tract; thence North 22°30' West along said Easterly line 164.73 feet

(Continued)

179009

Order No: 282254

LEGAL DESCRIPTION

to the North line of the Miller property; thence West along said North line to the true point of beginning.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation recorded March 29, 1949 in Book 1326, Pages 511 and 520, Records of Multnomah County.

PARCEL III:

A parcel of land lying in the Finice Caruthers D.L.C., in Township 1 South, Range 1 East of the Willamette Meridian, in the City of Portland, County of Multnomah and State of Oregon, and being a portion of that property described in that certain Deed to Miller Products Company, recorded in Book 1401, Page 471 through 474 of Multnomah County Record of Deeds, the said parcel being described as follows:

Beginning at a point on the North line of Southwest Lincoln Street produced Easterly in the City of Portland, that is South 89°17' East 547.57 feet from the East line of Southwest Water Avenue, measured along said North line of Southwest Lincoln Street produced Easterly; thence South 0°40'30" West 417.64 feet to a monument; thence South 89°19'30" East 605 feet to a monument; thence South 228 feet to a monument; thence West 134 feet; thence South 0°52' West 318.85 feet to the true point of beginning, said point also being the Southwest corner of said property; thence South 89°17' East along the South line of said property 451.81 feet to the Southeast corner of said property; thence North 32°30' West along the Easterly line of said property 177.80 feet; thence South 78°30' West 180 feet; thence South 86°34'04" West 196.77 feet to the Westerly line of said property; thence South 0°52' West along the Westerly line of said property 109 feet to the true point of beginning.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation recorded March 29, 1949 in Book 1326, Pages 511 and 520, Records of Multnomah County.

PARCEL IV:

A parcel of land in the Finice Caruthers D.L.C., in the southwest quarter of Section 3, Township 1 South, Range 1 East of the Willamette Meridian, in the City of Portland, County of Multnomah and State of Oregon, described as follows:

Beginning at a point on the North line of Southwest Lincoln Street produced Easterly in said City of Portland that is South 89°17' East 547.57 feet from the East line of Southwest Water Avenue; thence on a calculated bearing and distance of South 26°54'45" East 1021.11 feet to an iron pipe which is the Southwest corner of the property conveyed to Miller Products Company, an Oregon corporation; by Deed recorded May 4, 1958 in PE Deed Book 1401, Page 471, and the true point of beginning; thence North 89°17' West 152 feet, more or less, to the Southeasterly line of that tract of land conveyed to the State of Oregon, by and through its State Highway Commission, by Deed recorded June 21, 1963 in Book 2173, Page 492, Deed Records; thence Northeasterly along the Southeasterly line of said State of Oregon Tract 203 feet, more or less, to the West line of said Miller Products Company Tract; thence South along said West line 133 feet, more or less, to the true point of beginning.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation, recorded March 29, 1949 in Book 1326, Pages 511 and 520, Records of Multnomah County.

(Continued)

179009

Order No. 202284

LEGAL DESCRIPTION

PARCEL V:

A tract of land in the Finice Caruthers D.L.C. in the Southwest quarter of Section 3, Township 1 South, Range 1 East of the Willamette Meridian, described as follows:

Beginning at a point on the North line of Southwest Lincoln Street produced Easterly in said City of Portland, that is South 89°17' East 547.57 feet from the East line of Southwest Water Avenue; thence South 0°40'30" West, 417.64 feet to a monument; thence South 89°19'30" East, 605.0 feet to a monument; thence South 200.0 feet to a monument; thence East 174.02 feet; thence South 22°30' East 144.14 feet to the southeast corner of the tract conveyed to Miller Products Company, by Deed recorded May 4, 1950 in PS Deed Book 1401, Page 471 and being the true point of beginning of this description; thence continuing South 22°30' East 124.31 feet to the South line of the tract conveyed to A.M. Barde and Harold Barde by Deed recorded March 29, 1949 in PS Deed Book 1226, Page 320; thence North 89°17' West 254.40 feet to the Northeastly line of the tract dedicated for street purposes by instrument recorded April 8, 1955 in PS Deed Book 1716, Page 138; thence North 23°51' West 78.82 feet to a point in the North line of Southwest Sheridan Street projected Easterly; thence North 89°17' West, along said projected line 16.49 feet to the Easterly line of a 50 foot easement for roadway as reserved in said Deed recorded in PS Deed Book 1326, Page 520; thence North 23°51' West, along said easement line, 77.33 feet; thence South 89°17' East 175.10 feet to the true point of beginning, in the City of Portland, County of Multnomah and State of Oregon.

SAVE AND EXCEPT that portion thereof appropriated for public purposes in that certain proceeding No. 287 863 entitled/State of Oregon, by and through its State Highway Commission composed of Glenn L. Jackson, Kenneth M. Fridley and David S. Simpson vs. Schnitzer Realty Company, et al, in the Circuit Court of the State of Oregon for the County of Multnomah, wherein judgment was entered on the 30th day of March, 1966 in Book 1707, Page 781 of the Journal of said Court.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation recorded March 29, 1949 in Book 1226, Pages 511 and 520, Records of Multnomah County.

PARCEL VI:

A parcel of land lying in the Finice Caruthers Donation Land Claim, in Section 3, Township 1 South, Range 1 East of the Willamette Meridian, in the City of Portland, County of Multnomah and State of Oregon, described as follows:

Commencing at a point on the North line of S.W. Lincoln Street produced Easterly in the City of Portland, that is South 89°17' East 547.57 feet from the East line of SW Water Avenue; thence South 0°40'30" West 417.64 feet to an iron pipe; thence South 89°19'30" East, 474.37 feet to the Northwest corner of a tract described in a Deed to Knappton Towboat Company recorded March 23, 1955 in PS Deed Book 2713, Page 73; thence tracing the West line of said tract South 0°52' West, 201.56 feet to the southwest corner of said tract; thence East along the South line of said tract, 177.15 feet to the true point of beginning of the tract to be described; thence continuing East 130.57 feet; thence South 22°30' East 21.65 feet; thence West 157.47 feet; thence North 42°25' East, 27.08 feet to the point of beginning.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation recorded

(Continued)

Order No. 26224

LEGAL DESCRIPTION

March 29, 1949 in Book 1326, Page 511, Records of Multnomah County and in Deed from Union Pacific Railroad Company recorded March 29, 1949 in Book 1326, Page 320.

PARCEL VII:

A parcel of land situated in the Finice Caruthers Donation Land Claim in Township 1 South, Range 1 East of the Willametta Meridian, described as follows:

Commencing at a point in the North line of Southwest Sheridan Street extended Easterly that is South 89°17' East 498.43 feet from the East line of Southwest Water Avenue, measured along said North line and the extension thereof; thence South 23°51' East a distance of 78.62 feet to the true point of beginning of this description; thence continuing South 23°51' East a distance of 814.19 feet; thence South 88°12' East a distance of 640.50 feet; thence North 1°18' East a distance of 350.60 feet; thence North 21°34'30" West a distance of 439.34 feet; thence North 89°17' West a distance of 825.34 feet to the true point of beginning, in the City of Portland, County of Multnomah and State of Oregon; save and except the portion thereof appropriated for public purposes in that certain proceeding No. 387, 865 entitled State of Oregon by and through its State Highway Commission composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson vs. Schnitzer Realty Company, et al, in the Circuit Court of the State of Oregon, for the County of Multnomah, wherein judgment was entered on the 30th day of March, 1966 in Book 1767, Page 789 of the Journal of said Court.

EXCEPTING THEREFROM all minerals and mineral rights as reserved in the Deed from Oregon-Washington Railroad and Navigation Company, an Oregon corporation recorded April 22, 1955 in Book 1718, page 152, Records of Multnomah County.

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**EXHIBIT D**  
**Restrictive Covenants**

1. Part of the Deed. The following restrictive covenants (the "Restrictive Covenants") are incorporated into the attached Statutory Bargain and Sale Deed dated June 30, 2004 from Schnitzer Investment Corp. ("SIC") in favor of Oregon Health and Science University Foundation (the "Foundation"), which is a tax-exempt, publicly supported, public benefit corporation within the meaning of IRC §§ 501(c)(3) and 170(b)(1)(A)(iv).

2. Binding Effect. These Restrictive Covenants burden and encumber the real property described in Exhibit A, attached to the above-described Statutory Bargain and Sale Deed (the "Property"). The Property may only be used and transferred in accordance with these Restrictive Covenants. These Restrictive Covenants run with the Property and are binding upon any grantee, vendee, assignee or lessee of all or any portion of the Property.

3. Term. These Restrictive Covenants have a term until June 30, 2054, and after that date, these Restrictive Covenants shall automatically terminate and have no further effect.

4. Benefited Party. These Restrictive Covenants are solely for the benefit of SIC (and any entity created by merger with SIC where after the merger SIC's owners own the majority of ownership of the resultant entity) and its Land Use Approval Committee (the "Committee") (or if that Committee is terminated pursuant to Section VI of its Charter, then the Oregon Community Foundation), and may only be enforced by those respective entities. The Charter of the Committee dated June 30, 2004 is incorporated by reference and no amendments to that Charter are binding on OHSU, unless consented to in writing by OHSU. The current Committee consists of Kenneth M. Novack, James C. Eddy and Paul Bragdon.

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5. Transfer to OHSU. The Foundation is free to transfer the Property in whole or in part, and from time to time, without consideration to Oregon Health and Science University ("OHSU").

6. OHSU's Mission. The following is the Mission Statement of OHSU (the "Mission Statement"). The missions of OHSU are set forth in ORS 353.030(3) which follows:

(3) The university is designated to carry out the following public purposes and missions on behalf of the State of Oregon:

(a) Provide high quality educational programs appropriate for a health and science university;

(b) Conduct research in health care, engineering, biomedical sciences and general sciences;

(c) Engage in the provision of inpatient and outpatient clinical care and health care delivery systems throughout the state;

(d) Provide outreach programs in education, research and health care;

(e) Serve as a local, regional and state-wide resource for health care providers; and

(f) Continue a commitment to provide health care to the underserved patient population of Oregon.

7. Allowed Uses. The Property may only be developed and used for the following permitted uses:

7.1 The Property may be developed and used for any use which is in furtherance of the OHSU Mission Statement. The uses set forth in Section 7.2 are examples of what is presently understood to be in furtherance of the OHSU Mission Statement. Before commencing construction of a building upon the Property, the owner of that portion of the Property which will be the site of such building shall first submit to the Committee a description of the uses that will occupy the building upon its completion. The Committee will, in its

179009

reasonable judgment, determine if those uses are in furtherance of the OHSU Mission Statement, within sixty (60) days of the owner's submission. If the Committee fails to respond in writing to the submission within that period of time, the proposed uses will be deemed to be in furtherance of OHSU's Mission Statement. After a building has been built on the Property, when uses within that building are changed, then: (i) if the changed use is clearly in furtherance of the OHSU Mission Statement or consists of less than 20,000 square feet of gross floor space (not including common areas), then no action of the Committee shall be required; and (ii) if the building area to be occupied by a new use is 20,000 square feet or more of gross floor space (not including common areas) and if there is reasonable doubt as to whether a changed use is or is not in furtherance of the OHSU Mission Statement, then the owner of that building must submit a description of the changed use to the Committee as though the changed use constituted a new building, for the Committee's approval or deemed approval as provided above and in the Charter.

7.2 The following is a list of uses that in 2004 are in furtherance of the OHSU Mission Statement. The Foundation, OHSU and SIC acknowledge that uses that are in furtherance of the OHSU Mission Statement will change over the 50-year term of these Restrictive Covenants. Accordingly, the following list of permitted uses is illustrative only.

- 7.2.1 Patient care;
- 7.2.2 Clinical research;
- 7.2.3 Basic research in the areas referred to in ORS 353.030(3)(b);
- 7.2.4 Biomedical research and development;
- 7.2.5 Pharmaceutical research and development;



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7.2.6 Manufacturing of: pharmaceuticals, biomedical devices, diagnostic equipment, software incidental to and in furtherance of OHSU's Mission Statement;

7.2.7 Nanotechnology research and development;

7.2.8 Behavioral research, psychiatry research, psychology research, epidemiology;

7.2.9 Libraries;

7.2.10 Medical School;

7.2.11 Dental School;

7.2.12 School of Nursing;

7.2.13 School of Science and Engineering;

7.2.14 Student housing for students of the above schools;

7.2.15 Use by an institution which is an accredited institution of higher learning for its primary or research missions or an ancillary use integral thereto; and

7.2.16 Outreach programs in education, research, and health care.

7.3 Uses which are lawfully required by the City of Portland.

7.4 Uses which are not described in Sections 7.1 through 7.3, but which are ancillary and supportive to the uses described in Section 7.1 through 7.3 such as: parking and uses which provide goods and services for the occupants, patients and visitors which will use buildings to be constructed on the Property. However, such supportive services do not include uses which primarily serve customers that are not OHSU employees, building occupants, patients and visitors of buildings to be constructed on the Property.

179009

7.5 The for-profit or not-for-profit status of an owner or user shall not affect the permissibility of the use or the Disposition under the terms of these Restrictive Covenants.

8. Limitations on Disposition. A "Disposition" of a parcel of or all of the Property consists of any of the following by OHSU: (i) the conveyance of an ownership interest in any unimproved portion of the Property, except for a conveyance to the City of Portland (the "City") of land for a public park, the conveyance to the City of land for a Willamette River greenway, the conveyance to the City of a public right-of-way for a street or other public transportation system, or the grant of a public utility easement; (ii) the conveyance of a leasehold interest in any unimproved portion of the Property; or (iii) the formation by OHSU of a general partnership, joint venture, or a legal entity with another party which is other than an OHSU-controlled entity or an accredited institution of higher education and the conveyance to such general partnership, joint venture, or legal entity of an ownership interest in any unimproved portion of the Property. In the case of a proposed Disposition, OHSU shall submit to the Committee the legal documentation proposed to be used to effect the Disposition which reasonably demonstrates that these Restrictive Covenants will be binding upon the party acquiring an ownership interest in the Property and on subsequent transferees. In the event OHSU receives cash as a result of a Disposition, the parties intend that the portion of the cash generated by such Disposition which is reasonably allocated to the land value and not improvement value be utilized for OHSU activities and programs to be conducted on The Schnitzer Campus (as defined below). Any Disposition shall, as a condition precedent to the Disposition, require the prior approval of the Committee based on the determination that the Disposition is in furtherance of the OHSU Mission Statement and that the other requirements of these Restrictive Covenants that apply to the Disposition will be met.

9. Identification of the Property.

9.1 The Schnitzer Campus

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The Foundation and OHSU agree that the Property, in its entirety and forever, shall be identified by the name "The Schnitzer Campus" or such other name which includes the word "Schnitzer" as may be agreed upon by SIC and OHSU, each in their sole discretion, preceded or followed by a reference to OHSU (e.g. The Schnitzer Campus of OHSU). The above-described name shall be physically represented in monument form at the primary entrance to the Property when and as the Property is being developed and thereafter, during the term of these Restrictive Covenants. In the event that naming rights are allowed with respect to buildings to be built on the Property, those naming rights shall not be implemented in such a manner as to become a name associated generally with the entirety of the Property and its developments. OHSU and the Committee, each in their respective sole discretion, may agree in the future to a change in the name or a different name.

9.2 Depiction of the Property's History

The Property has been owned by founders of the Schnitzer Family and by SIC for decades. The Property has played a significant role in the success of the Schnitzer Family and SIC. OHSU recognizes and appreciates this close association between the Schnitzer Family and the Property and desires to design, construct, install and maintain a visual depiction of the activities of the Schnitzer Family and SIC at the Property (the "Visual History Presentation"). Accordingly, OHSU and SIC will work together to develop an appropriate, attractive and educational Visual History Presentation that will inform the public of the history of the Schnitzer Family and the Property. OHSU will provide an appropriate location on the Property, either in an outdoor plaza or public space, or in a ground floor open area of a building, within which to construct, install and maintain the Visual History Presentation.

10. Remedies. In the event of a claimed breach of these Restrictive Covenants, SIC (for itself, the Oregon Community Foundation and their respective successors in interest) irrevocably waives any claim for monetary damages, rescission or reversion (or similar claims)

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and agrees not to assert such claims, but shall be free to assert claims for declaratory relief, specific enforcement or similar equitable claims.

11. Exempt Disposition

A Disposition pursuant to Section 5.2 of that Agreement to Make a Gift among SIC, OHSU and the Oregon Health and Science University Foundation dated June 15, 2004, is exempt from this Exhibit B.

12. No Third-Party Beneficiaries

There are no intended third-party beneficiaries of this deed, whether by expression or by implication.

**179009**  
FILED: June 9, 2004

IN THE COURT OF APPEALS OF THE STATE OF OREGON

ROBIN JAQUA  
and JOHN JAQUA,

Petitioners - Cross-Respondents,

1000 FRIENDS OF OREGON,

Cross-Respondent,

LANE COUNTY,

Intervenor below,

v.

CITY OF SPRINGFIELD  
and PEACEHEALTH,

Respondents - Cross-Petitioners.

COALITION FOR HEALTH OPTIONS IN CENTRAL EUGENE-SPRINGFIELD,  
ANNE S. HEINSOO, LINDA MAUREEN CHENEY,  
FRED FELTER, and 1000 FRIENDS OF OREGON,

Cross-Respondents,

LANE COUNTY,

Intervenor below,

v.

CITY OF SPRINGFIELD  
and PEACEHEALTH,

Cross-Petitioners.

2003-072, 2003-073, 2003-077, 2003-078; A123624

Judicial Review from Land Use Board of Appeals.

Argued and submitted March 16, 2004.

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Allen L. Johnson argued the cause for petitioners - cross-respondents. With him on the opening brief were Corinne C. Sherton and Johnson & Sherton, P. C., and William G. Wheatley, and Jaqua & Wheatley, P. C., and William G. Wheatley and Jaqua & Wheatley, P.C. On the reply and post-oral argument briefs were Allen L. Johnson and Johnson & Sherton, P.C.

Meg E. Kieran argued the cause for respondent - cross-petitioner City of Springfield. With her on the answering brief and the cross-petition, response brief, and rebuttal/reply brief were Joseph J. Leahy and Harold, Leahy & Kieran.

Stephen L. Pfeiffer argued the cause for respondent - cross-petitioner PeaceHealth. With him on the response brief and brief on cross-petition and response brief were Michael C. Robinson, Steven P. Hultberg, Roger A. Alfred, and Perkins Coie LLP. With him on the supplemental brief were Steven L. Pfeiffer, Steven P. Hultberg, and Perkins Coie LLP.

William H. Sherlock filed the briefs for cross-respondents Coalition for Health Options in Central Eugene-Springfield, Anne S. Heinsoo, Linda Maureen Cheney, and Fred Felter. With him on the briefs was Hutchinson, Cox, Coons, Dupriest, Orr & Sherlock, P. C.

Michael K. Collmeyer argued the cause for cross-respondent 1000 Friends of Oregon. With him on the briefs was Mary Kyle McCurdy.

Glenn Klein, and Harrang Long Gary & Rudnick P.C. filed the brief *amicus curiae* for League of Oregon Cities.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

EDMONDS, P. J.

Reversed and remanded on Jaquas' petition; otherwise affirmed.

EDMONDS, P. J.

Robin and John Jaqua, owners of nearby affected land, petition for judicial review of a Land Use Board of Appeals (LUBA) decision regarding two City of Springfield ordinances. In addition, the City of Springfield (city) and PeaceHealth, the developer of a proposed regional hospital complex on the subject lands, cross-petition for judicial review of LUBA's decision. <sup>(1)</sup> The challenged ordinances amend a regional land use plan and a refinement of that plan, and they facilitate the future rezoning of 99 acres within the city for purposes of PeaceHealth's development. We reverse on the Jaquas' petition and affirm on the city's and PeaceHealth's cross-petitions for review.

We take the facts from LUBA's opinion *Jaqua v. City of Springfield*, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 2003-072, 2003-075, 2003-077, 2003-078, January 5, 2004):

"Intervenor-respondent PeaceHealth (hereafter PeaceHealth) wishes to construct a hospital on approximately 66 acres of land and construct related commercial development on 33 acres of land. The area where this disputed construction would take place is located within the acknowledged regional urban growth boundary (UGB). The property that is at the center of [the]

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dispute is subject to (1) a regional plan (the Eugene/Springfield Metro Area General Plan (Metro Plan)); (2) a refinement of the Metro Plan (the Gateway Refinement Plan (GRP)); and (3) city land use regulations that have been adopted to implement those plans (the City of Springfield Development Code (SDC)).

"The GRP area is an approximately 1,000-acre area in the northwestern part of the City of Springfield lying east of Interstate Highway 5 and south of the McKenzie River. Approximately 180 acres of the GRP area is designated Medium Density Residential (MDR) by both the Metro Plan and the GRP.

"The challenged decisions adopt the Metro Plan and GRP map designations for up to 33 acres to Community Commercial (CC). The challenged decisions authorizes a change in city zoning for those 33 acres from MDR to Mixed Use Commercial (MUC). Finally, the challenged decisions authorize application of the city's Medical Service (MS) zone to the 66 acres where the hospital is proposed. The existing Metro Plan and GRP maps for the 66 acres are not changed, and those 66 acres retain their MDR Metro Plan and GRP map designations.

"To summarize, the plan map and zoning map changes adopted by the challenged decisions apply to a portion of the 180-acre MDR-designated portion of the GRP area. The decisions (1) change the Metro Plan map, and GRP Plan map designations for 33 acres to CC; (2) authorize future rezoning of those 33 acres to [MUC]; and (3) authorize future rezoning of 66 acres to MS.

"In addition to the above-described map changes, one of the ordinances also adopts a number of changes to the GRP text. Among other things, those changes *require* development of a large hospital on the MS-zoned area and require a master plan review process to consider any application to develop the hospital and related commercial and residential development on the 99 acres. Both ordinances adopt a number of conditions that, among other things, are intended to limit traffic impacts and to ensure provisions of needed supporting public facilities to the development proposed for those 99 acres."

(Emphasis in original; footnotes omitted.)

After the city adopted its ordinances, the Jaquas, CHOICES, Lane County and 1000 Friends of Oregon appealed its decisions to LUBA. LUBA remanded the matter for findings of compliance with Statewide Land Use Planning Goals 9 (Economic Development) and 12 (Transportation) but otherwise affirmed the city's planning decisions. Thereafter, the Jaquas sought review by this court of LUBA's decision, and the city and PeaceHealth filed cross-petitions for review. The Jaquas make three assignments of error: They assert that (1) LUBA erred by ruling that the ordinances do not violate the Eugene/Springfield Metro Area General Plan's (Metro Plan) limited authorization for "auxiliary" uses on land designated for residential use; (2) LUBA erred when it ruled that the proposed hospital complex and related non-residential uses do not violate statewide planning goals and statutes; and (3) LUBA erroneously interpreted the Metro Plan not to require the participation of Lane County and the City of Eugene, the other participants in

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the plan.

The city and PeaceHealth make two assignments of error on cross-appeal. First, they argue that LUBA erred when it concluded that the city's findings did not demonstrate that the ordinances were consistent with the Springfield Commercial Lands Study (SCLS) and with Goal 9. Under those rules, local jurisdictions are required to demonstrate compliance with local Goal 9-related components of local comprehensive plans. Second, they contend that LUBA erred when it concluded that the city incorrectly interpreted the Transportation Planning Rules (TPRs) in OAR chapter 660, division 12, by construing it not to require the resolution of transportation issues until the end of the planning period in 2018.

We turn first to the Jaquas' third assignment of error, which raises the issue of whether the city could unilaterally amend the Metro Plan and the GRP without the consent of Lane County and the City of Eugene. A decision on that issue adverse to the city could operate to nullify both ordinances. The parties do not appear to dispute the basic requirements for amendments to the Metro Plan and the GRP. All three jurisdictions--the city, the City of Eugene, and Lane County--adopted the Metro Plan and the GRP, but unilateral amendments by a single jurisdiction are contemplated by the plans if certain conditions are present. Under the plan, any "Type I" amendment generally requires the participation of all jurisdictions. Springfield Development Code (SDC) 7.070(1). A Type I amendment is defined as

"[a]ny change to the Metro Plan which (1) changes the urban growth boundary or the jurisdictional boundary of the Plan; (2) requires a goal exception not related to a UGB expansion to be taken under statewide planning goal 2; or, (3) is a non-site specific amendment of the Plan text."

SDC 7.030; *see also* Metro Plan, Plan Amendments and Refinements, Policies 3. On the other hand, Type II amendments regarding an area inside city limits may be made unilaterally by a member of the plan. SDC 7.070(2). A Type II amendment is

"[a]n amendment to the Metro Plan which is not otherwise a Type I plan amendment and which: (1) changes the Plan diagram; or, (2) is a site-specific Plan text amendment."

SDC 7.030.

The parties disagree as to whether the city's amendments to the Metro Plan in the ordinances are Type I or Type II amendments. Their disagreement turns on the meaning of the words "site specific" in the plan. Those words are not defined in the plan and should therefore be given their plain, natural, and ordinary meaning within the text and the context of the plan itself. *See, e.g., Department of Land Conservation v. Lincoln County*, 144 Or App 9, 14-15, 925 P2d 135 (1996), *rev den*, 324 Or 560 (1997). The city held that the amendments apply only to property wholly within the city after annexation occurs and entirely within the GRP area. <sup>(2)</sup> It reasons that the amendments therefore were "site specific" within the meaning of the plan. The city also points out that the Metro Plan applies to the entire Eugene metropolitan area and that some of the objectives of the plan are applicable to the entire geographic area. In contrast, it says that the identification of the McKenzie/Gateway MDR site in the plan and the GPR is sufficiently



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definite to be considered "site specific" with the meaning of those words as used in the plan. The Jaquas, on the other hand, argue for a more restrictive interpretation of the term. They contend that the "site-specific" requirement requires the designation of a specific site and not of a general area such as "up to 33 acres" or "up to 66 acres" as challenged in the ordinances.

LUBA concluded, and we agree, that the Metro Plan operates as a general plan and that it contemplates that it will be supplemented, as the plan states, "by more detailed refinement plans, programs and policies." The GRP is one such plan that operates to refine the Metro Plan. For instance, the GRP maps are more detailed than the Metro Plan maps and show particular lots and parcels. Also, the GRP explains that its purpose with regard to residential lands "is to provide *site-specific* application of adopted Metro Plan residential land use designations, to resolve plan/zone conflicts, and to resolve land use conflicts as they relate to the livability of residential neighborhoods." (Emphasis added.) Thus, it appears from the text of the Metro Plan that the amendments to the GRP are the kind of actions affecting particular properties that the Metro Plan contemplates as "site-specific" implementing measures; in other words, the amendments are an example of the site-specific measures that the Metro Plan authorizes individual jurisdictions to take without the participation of other plan participants. Accordingly, we conclude that the city's ordinances are site-specific amendments within the meaning of a Type II amendment to the Metro Plan.

We return to the Jaquas' first assignment of error. At issue is the meaning of the following language in the Metro Plan regarding the designation of land use as "residential":<sup>(3)</sup>

"This category is expressed in gross acre density ranges. Using gross acres, approximately 32 percent of the area is available for auxiliary uses, such as streets, elementary and junior high schools, neighborhood parks, other public facilities, neighborhood commercial services, and churches not actually shown on the diagram. Such auxiliary uses shall be allowed within residential designations if compatible with refinement plans, zoning ordinances, and other local controls for allowed uses in residential neighborhoods."

Before LUBA, the Jaquas argued that the above language authorizing 32 percent of the area to be available for auxiliary uses has the effect of limiting auxiliary uses to neighborhood commercial uses and public facilities scaled to serve neighborhoods and that it does not authorize a large regional hospital facility with supporting commercial development, which is what the city's challenged ordinances contemplate. The city argued in turn that the "auxiliary uses" language expressly recognizes that nonresidential public facilities can occupy residential land and that refinement plans, such as the GRP, are available to implement such a policy.

Apparently, LUBA was concerned about the breadth of the city's argument. It commented that, if the question

"were whether the above-described Metro Plan provisions, viewed alone, can be interpreted to permit locating a regional hospital and supporting uses on 66 acres of a 180-acre MDR-designated area as an 'auxiliary' use to the

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residential uses that the MDR designation envisions, we would have little trouble agreeing with petitioners that the Metro Plan would not permit such a hospital development on MDR-designated land. The concept of 'auxiliary uses' viewed in the context of those Metro Plan provisions is simply not that broad."

LUBA, however, also concluded that, consistently with its language, the quoted Metro Plan provision delegated to individual participants in the plan "authority to further elaborate on the kinds of auxiliary uses that may be allowed on lands that the Metro Plan designates for residential use." (Footnote omitted.) According to LUBA, the city exercised its discretion under its delegated authority when it adopted a Medical Services District (MSD) <sup>(4)</sup> in 1989 because of the Metro Plan's provision that "auxiliary uses shall be allowed within residential designations if compatible with refinement plans, zoning ordinances, and other local controls for allowed uses in residential neighborhoods." LUBA also concluded that "the individual cities and county [have the] authority to further elaborate on the kinds of auxiliary uses that may be allowed on lands that the Metro Plan designates for residential use."

LUBA determined that such an authorized delegation under the Metro Plan occurred in 1989, when the city adopted the MSD. The district has been in effect since that time as one of the city's acknowledged land use regulations. One of the challenged ordinances, Ordinance 6051, authorizes the future application of the MSD to up to 66 acres of MDR-designated land for primary medical and medically-related uses. The 1989 enactment of the MSD furnishes the basis for the assertion by the city and PeaceHealth that "[no] analysis of the 'auxiliary use' language of the Metro Plan is necessary to allow the city to rely upon its own zoning regulations to rezone property."

Under SDC 22.010(3), an MSD may be created in Medium Density Residential as well in as other designated areas. According to the city and PeaceHealth, the adoption of the MSD by the city in 1989 was an authorized action under the Metro Plan because the SDC is an authorized interpretation of the Metro Plan, and the proposed application of the district to the lands subject to the ordinances is similarly authorized. The city and PeaceHealth also stress that the MSD, as adopted and acknowledged, has a three-acre minimum lot size and no maximum lot size. That is, the district may be applied only to properties larger than three acres. That fact, they argue, is further authority for the action in the challenged ordinance authorizing application of the district to 66 acres.

Preliminarily, LUBA observed that it "would have been a relatively simple matter for the city to include language in the MS zone to limit the hospitals and hospital expansions authorized in the MS zone to sub-regional or limited, community-oriented facilities. However, there is no such limiting language." It then concluded that the enactment of the MSD and the fact that it is acknowledged as being in compliance with the Statewide Land Use Planning Goals were controlling, and it therefore held that the challenged ordinances were not inconsistent with and were authorized by the Metro Plan because of the city's earlier adoption of an MSD. <sup>(5)</sup>

On review, the Jaquas argue that

"[t]he plain meaning of the complete text of the delegating language is that only uses similar in type, scale, and relationship to the principal uses may be

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allowed through subsequent planning processes. It does not prescribe the conditions under which uses outside that range can be added to the class. The Metro Plan authorizes Eugene, Springfield, and Lane County to decide unilaterally later only (a) whether a proposed use is a use 'such as' the auxiliary uses and (b) \* \* \* whether, and under what conditions to allow auxiliary uses such as parks, schools, streets and churches on residential lands within the jointly adopted Eugene-Springfield Metro Plan urban growth boundary."

As to the city's authority to exercise its discretion with regard to the creation of an MSD, the Jaquas contend that

"there was no such discretion to exercise. The Metro Plan only delegates discretion to authorize and allocate those 'auxiliary uses' that fall within the range of 'such uses' as defined and limited by the Metro Plan."

The city and PeaceHealth counter that the Jaquas' challenge is precluded by the adoption of the MSD in 1989 and the fact that it is an acknowledged land use plan. They argue that the Jaquas should have challenged the provisions of the MSD at that time and that a challenge to the ordinances at issue in this appeal comes too late because it is an acknowledged zone. Thus, they conclude that we should reject the Jaquas' challenge as an impermissible collateral attack on the 1989 ordinance creating the MSD.

In the alternative, PeaceHealth argues that the Jaquas' challenge to the city's two ordinances is premature. As we understand its argument, PeaceHealth asserts that, because the ordinances on review do not approve a master plan authorizing specific developments in the subject area by applying the MSD to property within the Gateway District, any challenge by the Jaquas must await that future action by the city. PeaceHealth also argues that the city did not rely on the auxiliary use provision in the Metro Plan when it promulgated the ordinances. It points to the city's findings rejecting any "explicit or implied" action to "correlate medical uses with the auxiliary use definition in the Metro Plan." Instead, PeaceHealth echos the city's alternative contention that the city simply authorized future application of the MSD to 66 acres of MDR-designated land as it understood the Metro Plan and the 1989 ordinance to permit it to do.

Finally, the city and PeaceHealth assert that the list of auxiliary uses stated for designated residential areas in the Metro Plan is not exclusive. They point to the use of the words "such as." In their view, those words, when read with the remainder of the phrase indicate

"that the Metro Plan did not intend the list of auxiliary uses to be exclusive. Had the City intended the list to be exclusive, it would have used a phrase like 'only the following non-residential uses shall be allowed' or a similar phrase."

We consider first whether the Jaquas' challenge to the two ordinances at issue constitutes a collateral attack on the 1989 creation of an MSD. It is significant to their argument that the 1989 ordinance is general in nature and does not expressly apply to the area that is the subject of the challenged ordinances. The Jaquas therefore direct their argument at the city's exercise of its authority to amend the GRP to authorize application of the MSD to a particular area initially designated for MDR use and their auxiliary uses for

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nonresidential uses. As we understand their argument, it is the city's amendment of the GRP authorizing the use of the MSD to justify the change in use designation on the property in question that violates the Metro Plan policy regarding residential use, not the creation of the MSD itself. Consequently, in their view, there would have been nothing for them to challenge in 1989. So far as they are concerned, a controversy arose only after the city paved the way for the application of the Medical Services classification to particular lands that affect them by the enactment of the ordinances that are the subject of this litigation.

We agree with the Jaquas' position. There is no question that the ordinances that LUBA reviewed are final land use decisions as defined in ORS 197.015(10) and are subject to review under ORS 197.825. The ordinances do not "rezone" the subject area by applying the MSD; rather, they eliminate the legal barriers to future application of the district, and they authorize future development consistent with the terms of the ordinances creating the MSD (Ordinance 6051) and the Mixed Use Commercial zone (Ordinance 6050). In effect, the ordinances on review determine what future actions are consistent with the GRP and the Metro Plan. The Jaquas' challenge is therefore not premature, nor is it precluded by the 1989 creation of an MSD; it comes at the proper time to challenge the authority of the city under the Metro Plan to amend its land use regulations regarding an area designated by the plan for residential use.

We also reject for related reasons the city's and PeaceHealth's argument that no analysis of the "auxiliary use" language in the Metro Plan is necessary because the city's creation of an MSD in 1989 authorized the district's location "[o]n arterial streets where Community Commercial, Major Retail Commercial, Medium Density Residential or High Density Residential Metro Plan designations exist." The city and PeaceHealth's argument puts in issue the scope of the authority delegated by the Metro Plan to the city to make amendments to the use of lands designated for a particular use by the plan. Under the city's view, the enactment of an MSD, an enactment permitted by the Metro Plan, authorizes it to locate an MSD wherever it desires. But that view is at odds with the terms of the Metro Plan itself. Rather, the Metro Plan permits the location of an MSD in a residential area only when it will constitute an "auxiliary" use to the residential area. Because the authority to create an MSD on lands designated for residential use by the Metro Plan is derived from the provisions of the plan itself, it necessarily follows that any restrictions or limitations imposed by the plan on the auxiliary uses of designated residential lands also attach to the location of such a district. Otherwise, the city's exercise of authority in creating an MSD would swallow up the provisions of the Metro Plan, thereby eviscerating the land use controls agreed to and put in place by all the participants of the plan. While the plan authorizes a participant to implement a Type II amendment unilaterally, it must do so within the constraints of the plan itself. Those constraints are at least two-fold: the amendment must be site-specific, and it must conform to the plan's requirement for areas designated for residential use. One of those requirements is that a nonresidential use be auxiliary in nature. That observation leads us to conclude that the city's ordinances creating an MSD in an area designated by the Metro Plan as residential must demonstrate that the uses permitted under the MSD qualify as "auxiliary" uses. Otherwise, the city through its ordinances has undertaken a *de facto* change in the text of the Metro Plan without complying with the applicable procedures for such a change.

We turn to the issue of whether the uses the challenged ordinances authorize on MDR land are permissible auxiliary uses under the Metro Plan for an MDR area. As discussed

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earlier, LUBA relied on the fact that the text of the MSD establishes a minimum acreage for application, but does not provide a maximum acreage limitation. Also, the GRP recognizes that the Metro Plan establishes general land use policies to guide all land use decision making in Springfield, Eugene, and Lane County. Refinement plans are used to implement specific application of Metro Plan policies, including site-specific determination of Metro Plan land use designations. While both of those considerations provide context for determining the meaning of the plan, the more pertinent inquiry is in regard to the meaning of the word "auxiliary," for it circumscribes what nonresidential uses are available in an area designated for residential use.

An "auxiliary use" is not defined in the city's land use regulations, at least as the board understood the record before it. We are left to use a dictionary definition of "auxiliary." In this context, "auxiliary" means "functioning in a subsidiary capacity" or "supplementary." *Webster's Third New Int'l Dictionary* 149 (unabridged ed 1993). See also *State ex rel Jackson Creek Sand Co. v. Jackson County*, 147 Or App 577, 938 P2d 773, rev den, 326 Or 57 (1997). Norman Williams, Jr. and John M. Taylor, 4 *American Land Planning Law* sect; 79:8 (2003) (listing elements of ordinance definitions of "accessory use" as requiring that the use be related to the principal use, be "subordinate and clearly incidental to the principal use," be customarily incidental to the principal use, be located on the same lot as the principal use and not "alter the character of the area or be detrimental thereto \* \* \*"); *id.* at sect; 79:12 through 79:15 (addressing "principal use" and reviewing cases concerning accessory uses as related to the principal use, as subordinate and incidental to the principal use and as "customarily incidental" to the principal use). That understanding of the meaning of "auxiliary" leads us to examine the text of relevant provision of the Metro Plan and its description of the principal use of areas designated as MDR. Under the Metro Plan's Plan Diagram, the Metro Plan sets out standards "intended to provide minimum guidelines to local jurisdictions in determining appropriate new and expanded sites and locations for such uses in urban areas."<sup>(6)</sup> As noted above, the Metro Plan contains a definition of the "Residential" designation (Residential Policy):

"This category is expressed in gross acre density ranges. Using gross acres, approximately 32 percent of the area is available for auxiliary uses, such as streets, elementary and junior high schools, neighborhood parks, other public facilities, neighborhood commercial services, and churches not actually shown on the diagram. Such auxiliary uses shall be allowed within residential designations if compatible with refinement plans, zoning ordinances, and other local controls for allowed uses in residential neighborhoods. The division into low, medium, and high densities is consistent with that depicted on the *1990 Plan* diagram. In other words:

"Low-Density Residential#8211; Through ten units per gross acre  
Medium-Density Residential#8211; Over 10 through 20 units per gross acre  
High-Density Residential#8211; Over 20 units per gross acre

"These ranges do not prescribe particular structure types, such as single-family detached, single-family attached, manufactured dwellings in parks, or multiple-family. That distinction, if necessary, is left to local plans and zoning ordinances.

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"While all medium- and high-density allocations shown on the diagram may not be needed during the planning period, their protection for these uses is important because available sites meeting pertinent location standards are limited."

The policy goes on to discuss the history of residential development density, stating that in 1994 it was 5.81 dwelling units per acre and then "calls for an overall average of about six dwelling units per gross acre for new construction through 2015."

There is further support for understanding the meaning of the word "auxiliary" as connoting something that functions or serves in a supplementary capacity in the examples of auxiliary uses contained within the plan itself. The Metro Plan grants authority to devote 32 percent of a residential district to "such" auxiliary uses as "streets, elementary and junior high schools, neighborhood parks, other public facilities, neighborhood commercial services, and churches." The use of residential lands for streets, elementary and junior high schools, *neighborhood* parks, *neighborhood* commercial services and churches are the kinds of land use that ordinarily function or serve in a supplementary capacity to a residential neighborhood. For example, streets and other public facilities exist in any residential area to facilitate the residential use of the land, but they hardly constitute the primary use of land designated as residential. The same can be said of schools, neighborhood parks, neighborhood commercial services, and churches.

By comparison, the city's actions in this case change the universe of primary use of the area from residential to nonresidential. The proposed regional hospital project and adjoining medical and commercial services authorized by the ordinances are not mere adjuncts or supplements to residential use. They will become, in fact and in effect, the primary uses of the land; and they will, by their intrinsic nature, change the overall use of the land in the area from residential to commercial. We therefore conclude, based on our understanding of the meaning of the word "auxiliary" as used in the context of the Metro Plan, that the kinds of uses contemplated by the challenged ordinances are not permitted uses in an area designated for residential use. If the city wishes to use the area in question for the commercially-related uses authorized by the ordinances, it will have to undertake a zone change or other change authorized by the plan.

Our conclusion should not be understood to subscribe to the notion apparently asserted by the Jaquas that the Residential policy operates to prohibit every hospital or commercial use in MDR designated areas. The "such auxiliary uses" language refers to a wide range of permitted uses including "neighborhood commercial services." It is certainly conceivable that a hospital could be a neighborhood commercial use within the meaning of the plan, at least to the same extent that other neighborhood commercial uses are similarly auxiliary and supportive. The text and context of the policy, however, require that such uses do not become the primary use in a MDR designated area, such as occurs under the ordinances. Thus, it is the extent and the pervasiveness of the proposed change in use that renders it legally incapable, within the meaning of the plan, of being characterized as auxiliary uses. In summary, our disagreement with LUBA's treatment of the city's ordinances under the Residential policy, a disagreement dictated by the plain meaning of the word "auxiliary," requires that we remand its decision.

Additionally, we agree with LUBA's rejection of the Jaquas' contention that the challenged ordinances violate Statewide Land Use Planning Goal 10 (Housing), and we affirm that ruling without further comment. Our decision today concludes only that

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LUBA erred in ruling that the city's challenged ordinances do not violate the Residential policy addressing auxiliary uses in MDR designated areas, and our holding should not be understood to mean that the city's application of the MSD to MDR-designated land will, in all possible applications, amount to a violation of the Metro Plan.<sup>(7)</sup>

We turn to the cross-petitions filed by the city and PeaceHealth challenging LUBA's conclusion that the ordinances at issue were inconsistent with OAR 660-012-0060, a portion of the "Transportation Planning Rule" (TPR).<sup>(8)</sup> In relevant part, OAR 660-012-0060(1) provides:

"Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and performance standards (e.g. level of service, volume to capacity ratio, etc.) of the facility. This shall be accomplished by either:

"(a) Limiting allowed land uses to be consistent with the planned function, capacity, and performance standards of the transportation facility;

"(b) Amending the TSP<sup>[(9)]</sup> to provide transportation facilities adequate to reduce demand for automobile travel and meet travel needs through other modes; or

"(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes; or

"(d) Amending the TSP to modify the planned function, capacity and performance standards, as needed, to accept greater motor vehicle congestion to promote mixed use, pedestrian friendly development where multimodal travel choices are provided."

OAR 660-012-0060(2) defines when a land use amendment "significantly affects a transportation facility":

"A plan or land use regulation amendment significantly affects a transportation facility if it:

"(a) Changes the functional classification of an existing or planned transportation facility;

"(b) Changes standards implementing a functional classification system;

"(c) Allows types or levels of land uses which would result in levels of travel or access which are inconsistent with the functional classification of a transportation facility; or

"(d) Would reduce the performance standards of the facility below the minimum acceptable level identified in the TSP."

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At issue before LUBA was whether city transportation facilities were significantly affected under the two challenged ordinances and under the Oregon Highway Plan (OHP) Action 1F.6. <sup>(10)</sup> The OHP, among other standards, establishes levels of service on volume-to-capacity ratio for a traffic facility. The OHP Action statement establishes a trigger for a finding that a land use action "significantly affects" a transportation facility, and it further establishes a standard of performance should there be such a circumstance.

In this case, PeaceHealth identified over 50 state and local transportation facilities that would be impacted by the traffic generated by the development contemplated under the two ordinances. The analysis of the impacts was included in a "transportation impact analysis" (TIA). The TIA assumed that certain transportation improvements would be constructed before the end of the 2018 planning period. Under that assumption, there would be no violation of established performance standards, with one exception. To address the one anticipated failure, the city imposed a condition that PeaceHealth immediately provide funding needed to improve the facility likely to fail. Thus, with the assumption that all other improvements would be made before 2018, the city concluded there would be no "significant" effect on a transportation facility.

The Jaquas argued to LUBA that the city must consider under OAR 660-012-0060 whether the proposed changes would cause or accelerate failure of a transportation facility *within* the planning period. They contended that the rule did not permit PeaceHealth to wait until 2018 to make all the needed improvements. According to the Jaquas, if a transportation failure occurs even temporarily during the planning period, the city is obliged to apply one or more of the mitigating measures set out in OAR 660-012-0060(1) until the failure is corrected by construction of improvements. LUBA agreed with petitioners' argument, relying on our opinion in *ODOT v. City of Klamath Falls*, 177 Or App 1, 8, 34 P3d 667 (2001), in which we opined that there was nothing in the text or the context of the TPR that can be read to require that "the effects of a proposed action may be measured only at the end of the planning period." For that reason, LUBA remanded the issue back to the city for further findings.

In *Klamath Falls*, we examined the text and the context of the rule and thereafter rejected the petitioner's argument that a determination of whether an amendment to a land use regulation significantly affects a transportation facility should be determined at the end of the planning period. We observed that, if compliance could await the end of the planning period, the provisions of the rule providing interim, alternative means of ensuring compliance would be rendered meaningless. *Id.* at 8. Rather, the rule requires local governments to address whether a temporary failure of a transportation facility will occur if approval is given and, if failure will occur, to implement mitigating measures until the failure is corrected. Here, LUBA reasoned correctly that OAR 660-012-0060 serves to *prevent* local governments from engaging in land use decision-making without considering whether transportation systems can accommodate the proposed use. In addition, LUBA correctly refused to treat the rule as not being concerned with temporary facility failures because to do so would ignore the fact that a temporary failure might extend well beyond the planning period.

Nonetheless, PeaceHealth and the city disagree with LUBA's analysis and assert, among other arguments, that LUBA's opinion will require that transportation facilities be constructed concurrently with new developments rather than be completed at the end of the planning period. *Amicus* League of Oregon Cities agrees with that argument,



asserting:

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"[LUBA'S] majority [ ] interpretation will require cities and other governmental entities to engage in piece-meal and ad hoc decision making with respect to the timing of transportation system improvements. Such ad hoc, piece-meal decision-making will result in the construction of projects that provide fewer benefits to the transportation system as a whole prior to more beneficial projects, thereby preventing the governmental entities from carrying out those transportation improvements in the most cost effective and efficient manner."

In construing an administrative rule, we apply the same analytical framework applicable to the construction of statutes. *Alanis v. Barrett Business Services*, 179 Or App 79, 82, 39 P3d 880 (2002). We look first to the text and context of the rule, giving effect to the words in the rule in accordance with their ordinary meaning. First, we do not understand LUBA's opinion to do more than conclude that an interim failure of an affected facility is a significant "effect" on a transportation facility under OAR 660-012-0060(2) and that, consequently, the mitigation measures set out in the rule at subsection (1) must be considered. Our understanding (and LUBA's) does not mean that the rule necessarily requires that, before an approved change in land use occurs, road improvements must occur. The rule offers alternatives to the local land use planning body. However, importantly, the rule does not authorize any delay in implementing the mitigating factors in subsection (1) until the end of the planning period once it is determined that a land use regulation significantly affects a transportation facility. The rule means what it says. Subsection (2) of the rule identifies certain criteria for determining whether a land use regulation "significantly affects a transportation facility," and, if one of those criteria exists, subsection (1) is explicit about what must occur. If we were to write the qualification into the rule that the city, PeaceHealth and *amicus* propose, we would be undertaking a legislative function to add terms to the rule that, simply, are not expressed in it.<sup>(11)</sup> Accordingly, their complaints must be addressed elsewhere, and we agree with LUBA's decision remanding the matter back to the city for further findings.

The parties' other arguments do not warrant discussion.

Reversed and remanded on Jaquas' petition; otherwise affirmed.

1. The Coalition for Heath Options in Central Eugene-Springfield (CHOICES), Anne S. Heinsoo, Linda Maureen Cheney, and Fred C. Felter also filed a petition for judicial review. We dismissed the petition because it was filed on the twenty-second day following LUBA's decision on review, one day later than the 21-day limit specified in ORS 197.830 (3) (a) and ORS 197.850(3) (a). The petitioners ask that we vacate our order and, in substance, treat their petition as a cross-petition. See ORAP 4.68(1). We decline to do so. CHOICES's citation to *State ex rel Dodd v. Joseph*, 313 Or 333, 833 P2d 1273 (1992), is unavailing because its conduct in this proceeding is unlike that of the successful cross-petitioner in *Dodd*. In *Dodd*, the relators did not challenge this court's dismissal of their untimely petition for judicial review but instead, and after another party properly filed a petition for judicial review, timely filed a cross-petition. CHOICES did not file a cross-petition to transform its petition into a cross-petition under ORAP

4.68. To accept its argument would have the effect of waiving the time limit on filing petitions for judicial review set out in ORS 197.830(3) (a) and ORS 197.850(3) (a).

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Return to previous location.

2. Apparently, there are approximately 10 acres of MDR property that are not presently within the city.

Return to previous location.

3. We are mindful of the city and PeaceHealth's view that LUBA, and we, are obliged to defer to the city's understanding of the terms of its own land use regulations. That obligation, and the construction of local ordinances, is mandated by ORS 197.829 and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). However, it does not extend to affirming a local interpretation that alters the common definition of the operative words in the code. In short, we are not obliged to affirm an interpretation that is "inconsistent with the express language of the comprehensive plan or land use regulation [.]" ORS 197.829(1). Moreover, we observe that the city is only one of three participants in the plan. We question whether ORS 197.829 requires deference to an interpretation by only one participant when land use regulations are promulgated by multiple land use planning bodies. However, we need not decide that question in this case because of the clear import of the language used in the provisions of the Metro Plan in issue.

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4. We note that in LUBA's opinion and in the record the MSD is referred to as both a "medical services zone" and a "medical services district." Because the Metro Plan uses the term "Medical Services District," we also use that term.

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5. LUBA explained, "We do not mean to suggest that the city has absolute discretion to develop its own list of auxiliary uses that are allowed in MDR-designated areas. However, the Metro Plan is somewhat ambiguous in how it views hospitals and expressly states that they present complex siting questions. \* \* \* Other than disagreeing with the city's interpretation of the scope of the MS zone, petitioners offer no basis for us to conclude that the city's interpretation of the acknowledged MS zone, or the manner in which it harmonizes that zone with the Metro Plan, is beyond the city's interpretive discretion under ORS 197.829(1)."

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Return to previous location.

6. The diagram is "a generalized map and graphic expression of the goals, objectives, and recommendations found elsewhere in the *Plan*."

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7. We are mindful of the city and PeaceHealth's complaint that, if the Jaquas' argument is accepted, then the matter of exactly what size of development would fit within the term "auxiliary use" becomes uncertain. But it seems to us that that is a more appropriate matter for the local planning body to determine so long as its decision remains faithful to the language of the Metro Plan.

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8. We do not address cross-petitioners' assertion that LUBA erred in concluding the amendments were not consistent with the SCLS. LUBA's conclusion rested on what it saw as a failure to provide an adequate explanation of compliance with the study. In general, we agree with LUBA's assessment. On remand, assuming that the city's decision is consistent with the SCLS, a condition precedent that we do not address here, the city should be able to provide a revised or more complete explanation.

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9. A transportation systems plan (TSP), is a local planning jurisdiction document required under the TPR. The TSP, among other things, sets the minimum acceptable level of service of a transportation facility. OAR 660-012-0020. "Transportation facilities" are "any physical facility that moves or assists in the movement of people or goods, including facilities identified in OAR 660-012-0020 but excluding electricity, sewage and water systems." OAR 660-012-0050 (24).

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10. The parties do not explain the legal status of the Oregon Highway Plan. We note that the plan is not an administrative rule and is not codified in statute, although it is referred to as establishing certain highway standards. *See, e.g.*, OAR 734-051-0190 (addressing standards for highway access control).

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11. See ORS 174.010 (the office of the judge is not to add words to a statute or to delete words therefrom but to declare what is contained therein).

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12/15/04

WITH  
C. REIVE  
TESTIMONY

**SOUTH WATERFRONT CENTRAL DISTRICT PROJECT  
DEVELOPMENT AGREEMENT**

Among:

**The Portland Development Commission  
Oregon Health & Science University  
River Campus Investors, LLC  
North Macadam Investors, LLC  
Block 39, LLC**

Copy of Title pg  
only.  
Complete document  
available w  
Auditor's offer

August 22, 2003

Andrew -  
This doc. is 2" thick.  
you are welcomed to come  
to our office + copy it  
if you need it.

*[Signature]*  
131/140

PORTLAND OFFICE OF TRANSPORTATION

COUNCIL CALENDAR ITEM

Council Calendar No. \_\_\_\_\_

179009  
12-22-04

Submitted for Council Consideration on: December 15, 2004 Regular Agenda

**DESCRIPTION:**

An ordinance to amend the Portland Aerial Tram LID Formation Ordinance.

**BACKGROUND:**

Council approved the Portland Aerial Tram LID Formation Ordinance on August 18th. This ordinance was a substitute ordinance that resulted in two of the four remonstrances against LID formation being withdrawn. This "housekeeping" ordinance is being brought forward for Council consideration on the advice of the City Attorney in response to subsequent litigation filed by ZRZ Realty against the City of Portland. As noted in the ordinance title, these changes do not result in any changes to allocation of funding amounts or to estimates of assessments.

First, this ordinance strikes the reference in the Formation Ordinance to LID assessments being an incurred charge. Second, this ordinance replaces the LID map to restore Zone D, which was inadvertently excluded, so that all five internal assessment zones are identified and referenced within the Formation Ordinance. Third, we are reiterating that property owners' project costs exclusive of Auditor's costs are fixed at \$19 million. This was included on the petitions and in the Resolution of Intent approved by Council, and will now also include this language in the Formation Ordinance for an additional degree of reassurance to property owners.

We notified all property owners of the housekeeping changes by mail on November 24th, and contact has been received from only one property owner in response to the mailing prior to this hearing, and that property owner did not indicate any opposition to these changes.

**ISSUES:**

ZRZ Realty may use this agenda item as a forum to revisit policy issues already decided by Council. It is suggested that Council reinforce to the audience present that the scope of this ordinance is limited, and that any testimony and/or evidence submitted be directed to the changes being considered under this Ordinance.

**POTENTIAL PROBLEMS:** None

**RECOMMENDATION:** Pass Ordinance

Can be delayed  week(s), if necessary

Fiscal Review by KK

Should be filed this week.

No impact at fund level

Must be filed this week.

Impact on Fund

Contact Person Andrew Aebi will attend Council session.

Contact Person Matt Brown will not attend Council session.

Phone No. 503-823-5648 (Andrew Aebi) or 503-823-7027 (Matt Brown)

City of Portland  
**BUDGET/FINANCIAL COUNCIL ACTION IMPACT STATEMENT**

INITIATOR'S SUMMARY OF COUNCIL ACTION (Deliver original to Financial Planning Division. Retain copy).

1. Name of Initiator Andrew Aebi	2. Interoffice Mail Address 106/800	3. Telephone No. 503-823-5648	4. Bureau/Office/Dept. PDOT/BTE&D/PMD
5a. To Be Filed (date) December 15, 2004	5b. Calendar (Check One ) <b>REGULAR</b> Consent    4/5ths <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	5. Date Submitted to OMF Budget Analyst: December 8, 2004	6. Fund Name & Number Transportation Fund #

Please check appropriate box and list dollar amount.  
 If using electronic MS Word Version, underline appropriate category and type and list dollar amount after. (Opt.)

**Category 1** No financial Impact [ X ]

**Category 2** Routine and Budgeted Items [ ]

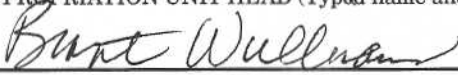
- |  |   |
|--|---|
| <input type="checkbox"/> Contracts   | <input type="checkbox"/> Annual Supply Contract                   |
| <input type="checkbox"/> Grants  | <input type="checkbox"/> Claims payment under \$15,000            |
| <input type="checkbox"/> Call for bids on purchasing contracts               | <input type="checkbox"/> Creation of a Local Improvement District |
| <input type="checkbox"/> Reports to Council regarding completion of projects | <input type="checkbox"/> Other                                    |

**Category 3** Non-Routine or Unbudgeted Item [ ]

**SUMMARY OF ACTION:** In concise terms, describe what is to take place through the enactment of this council action. Where applicable, narrative should include answers to the following questions. Add space as necessary below each question. Multiple page responses are acceptable if necessary to answer all relevant questions.

- A. What action(s) is proposed?
- B. Who will be affected by the proposed action? (List other City bureaus? Citizens? The business community?)
- C. What will the action cost? In this fiscal year? Subsequent year(s)? How much revenue will it generate? In this fiscal year? In subsequent year(s)? If there are indirect costs or future commitments implied as a necessary accompaniment or result of this action, include an estimate of these costs even if the action does not formally authorize any expenditure.
- D. Is the cost included in the current year's budget? If so, which Fund or AU? If not, identify funding sources and amounts -i.e., interagency, contingency/unforeseen, grants, administrative transfer, etc.
- E. What alternatives to this action have been explored?

APPROPRIATION UNIT HEAD (Typed name and signature)



Brant Williams, Director, Office of Transportation