

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING)
THE EXECUTIVE OFFICER TO)
PURCHASE PROPERTY IN THE)
GRESHAM CIVIC NEIGHBORHOOD FOR)
A TRANSIT-ORIENTED DEVELOPMENT)
PROJECT)

RESOLUTION NO. 01-3086

Introduced by Mike Burton,
Executive Officer

WHEREAS, the Metro Council authorized start-up activities for the Transit-Oriented Development Implementation Program (TOD Program) by Resolution No. 98-2619 on April 9, 1998, including the adoption of a Work Plan that provided for acquisition of TOD sites; and

WHEREAS, the procedure for approving a TOD site for acquisition or site improvements is for the TOD Steering Committee to review the proposal and initiate action, followed by a Seven-Day Notice to the Metro Council providing the Council the opportunity to request review of the proposal in executive session; and

WHEREAS, Metro is undertaking value enhancing activities in the Gresham Civic Neighborhood area and it is in the public interest to capture the value of these activities through site control as soon as possible; and

WHEREAS, on April 23, 2001 a Seven-Day Notice was issued for the 4.36 acre parcel ("Civic SW") at the southwest corner of the Civic Drive and MAX intersection and for options to purchase up to 5.5 acres on the northwest corner and 12,500 square feet at the northeast corner from Gresham Station, LLC. The Metro Council toured these sites prior to the Council meeting on May 3, 2001; and

WHEREAS, acquisition and resale with TOD conditions of the vacant land surrounding the future Civic Neighborhood MAX station is an excellent opportunity for the TOD Program to facilitate the construction by the private sector of 4-5 story, mixed-use projects with housing above ground floor retail; and

WHEREAS, Gresham Station, LLC, will only sell the Civic SW Property to Metro on the condition that Metro accept the Property in "as is" condition, waive all claims against Gresham Station, LLC and release Gresham Station, LLC from any and all claims related to the transaction and/or the Property itself, including environmental conditions; and

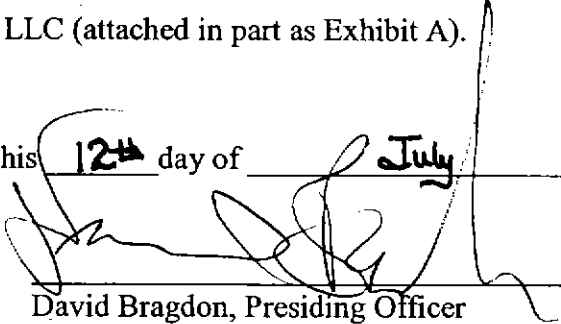
WHEREAS, Metro's Phase I Environmental Assessment did not reveal evidence of recognized environmental conditions in connection with the Property;

WHEREAS, the "as is," waiver, and release clauses required by Gresham Station LLC shift liability, requiring Metro to assume a larger share of the risk that the property suffers from some latent defect. It is therefore necessary that the Metro Council approve of Metro's acquisition of the property by Metro under said conditions; now, therefore,

BE IT RESOLVED,

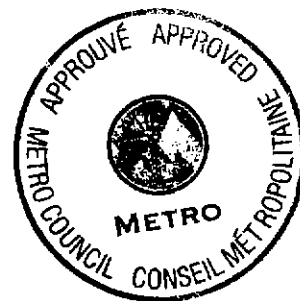
That the Metro Council approves the acquisition of the Civic SW Property subject to the "as is," waiver, and release provisions set forth in Section 11 of the Agreement of Purchase and Sale between Metro and Gresham Station, LLC (attached in part as Exhibit A).

ADOPTED by the Metro Council this 12th day of July, 2001.


David Bragdon, Presiding Officer

Approved as to Form:


Daniel B. Cooper, General Counsel



reasonable efforts and cooperate with FATCO to provide Metro with additional ALTA Extended Owner's title insurance coverage at Metro's cost as set forth below, in the full amount of the Purchase Price specified above, insuring fee simple title vested in Metro or its nominees, subject only to the Permitted Exceptions as established under Section 5 of this Agreement.

9. **Costs.** Metro shall pay the cost of recording the deed from Seller to Metro and for the cost of its investigations of the Property. Seller shall pay all other recording charges, if any. Seller shall pay the premium for standard ALTA owner's title insurance coverage only. Metro shall pay the additional insurance premium required to obtain ALTA Extended Owner's title insurance coverage and any endorsements. Seller shall pay all conveyance, excise, and/or transfer taxes payable by reason of the purchase and sale of the Property. Metro and Seller shall each pay one-half of all other escrow fees and costs. Metro and the Seller shall each pay its own legal and professional fees of other consultants incurred by Metro and the Seller, respectively. All other costs and expenses shall be allocated between Metro and the Seller in accordance with the customary practice in Multnomah County, Oregon.
10. **Seller's Representations and Warranties.** Seller hereby warrants and represents to Metro the following matters, and acknowledges that they are material inducements to Metro to enter into this Agreement. Seller agrees to indemnify, defend, and hold Metro harmless from all expense, loss, liability, damages and claims, including attorneys fees, arising out of the material breach or falsity of any of Seller's representations, warranties, and covenants. Seller warrants and represents to Metro that the following matters are true and correct, and shall remain true and correct through Closing:
 - a) **Authority.** Seller represents that Winmar has agreed to convey the Property to the Seller under the agreement referenced in Exhibit B. Under its agreement with Winmar, Seller has the immediate, unconditional right to close its acquisition of the Property from Winmar, and Seller will not amend or terminate its agreement with Winmar in any material way without first obtaining Metro's consent, such consent not to be unreasonably withheld, conditioned or delayed. Seller has full power and authority to enter into this Agreement (and the persons signing this Agreement for Seller, if Seller is not an individual, have full power and authority to sign for Seller and to bind it to this Agreement) and to sell, transfer and convey all right, title, and interest in and to the Property in accordance with this Agreement. No further consent of any partner, shareholder, creditor, investor, judicial or administrative body, governmental authority, or other party is required.
 - b) **Hazardous Substances.** For purposes of this Agreement, the phrase "Hazardous Substances" shall include but not be limited to the substances defined in ORS 465.200. Seller has consulted with the Current Title Holder and warrants, represents, and covenants as follows:
 - i) To Seller's actual knowledge, there are no Hazardous Substances in, upon, or buried on or beneath the Property and no Hazardous Substances have

- been emitted or released from the Property in violation of any environmental laws of the federal or state government;
- ii) Seller has not brought onto, stored on, buried, used on, emitted or released from or on the Property, any Hazardous Substances in violation of any environmental laws of the federal or state government;
 - iii) Except as set forth in any environmental study or analyses delivered to Metro by Seller, to Seller's actual knowledge, no underground storage tanks are located on the Property, including (without limitation) any storage tanks that contain, or previously contained, any Hazardous Substances, and Seller agrees not to cause or permit any such tanks to be installed in the Property before Closing;
 - iv) To Seller's actual knowledge, the Property is materially in compliance with applicable state and federal environmental standards and requirements affecting it;
 - v) The Seller has not received any notices of violation or advisory action by regulatory agencies regarding environmental control matters or permit compliance with respect to the Property;
 - vi) The Seller has not transferred Hazardous Substances from the Property to another location that is not in compliance with applicable environmental laws, regulations, or permit requirements; and
 - vii) To Seller's actual knowledge, there are no proceedings, administrative actions, or judicial proceedings pending or, to the best of Seller's knowledge, contemplated under any federal, state, or local laws regulating the discharge of hazardous or toxic materials or substances into the environment.
- c) Contracts, Leases, Rights Affecting Property. Seller has not entered into, and will not enter into, any other contracts for the sale of the Property. Except as shown on FATCO Supplemental Title Report #918495, dated April 3, 2001 there are no rights of first refusal, options to purchase the Property, leases, mortgages, licenses, easements, prescriptive rights, permits, or other rights or agreement, written or oral, express or implied, which in any way affect or encumber the Property or any portion thereof. The Seller has not sold, transferred, conveyed, or entered into any agreement regarding timber rights, mineral rights, water rights, "air rights," or any other development or other rights or restrictions, relating to the Property, and except as shown on FATCO Supplemental Title Report #918495, dated April 3, 2001, to Seller's actual knowledge no such rights encumber the Property, and will not through Closing.

- d) No Legal Proceedings. To Seller's actual knowledge, there is no suit, action, arbitration, judgment, legal, administrative, or other proceeding, claim, lien, or inquiry pending or threatened against the Property, or any portion thereof, or pending or threatened against Seller which could affect Seller's right or title to the Property, or any portion thereof, affect the value of the Property or any portion thereof, or subject an owner of the Property, or any portion thereof, to liability.
- e) Mechanic's and Other Liens. No work on the Property has been done or will be done, or materials provided, giving rise to actual or impending mechanic's liens, private liens, or any other liens, against the Property or any portion thereof.
- f) Public Improvements or Governmental Notices. To Seller's actual knowledge, there are no intended public improvements which will result in the creation of any liens upon the Property or any portion thereof, nor have any notices or other information been served upon Seller from any governmental agency notifying Seller of any violations of law, ordinance, rule or regulation which would affect the Property or any portion thereof.
- g) Breach of Agreements. The execution of this Agreement will not constitute a breach or default under any agreement to which Seller is bound or to which the Property is subject.
- h) Possession. Seller will be able to deliver immediate and exclusive possession of the entire Property to Metro at the close of escrow, and no one other than Seller will be in possession of any portion of the Property immediately prior to close of escrow.
- i) Bankruptcy Proceedings. No attachments, execution proceedings, assignments for the benefit of creditors, insolvency, bankruptcy, reorganization, or other proceedings are pending or, to Seller's actual knowledge, threatened against the Seller, nor are any such proceedings contemplated by Seller.
- j) Recitals. The statements and information applicable to Seller set forth in the Recitals are true and correct.
- k) Changed Conditions. If Seller discovers any information or facts that would materially adversely change the foregoing warranties and representations, Seller shall promptly give notice to Metro of those facts and information. If any of the foregoing warranties and representations cease to be true before the close of escrow, Seller may elect to either terminate this Agreement or use its commercially reasonable efforts to remedy the problem before the close of escrow. If the problem is not remedied 10 days before Closing, Metro may elect to either (a) terminate this Agreement, in which case Metro shall have no obligation to purchase the Property and all escrow payments shall be refunded to Metro, and Seller shall have no further obligation or liability to Metro, or (b) defer the Closing Date for a period not to exceed thirty (30) days or until such problem

has been remedied, whichever occurs first. If the problem is not remedied in that time frame, Metro may elect to terminate the Agreement as set forth above.

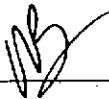
- l) Seller's Actual Knowledge. Whenever a representation is made to "Seller's actual knowledge" or terms of similar import, the accuracy of such representation shall be based solely on the actual knowledge of Fred Bruning and Jean Paul Wardy on the date of this Agreement, excluding constructive or imputed knowledge or the duty of investigation or inquiry.

11. **"AS IS" Transaction; General Release.**

- a) EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF SELLER SET FORTH IN THE DEED AND SECTION 10, THE SALE OF THE PROPERTY HEREUNDER IS AND WILL BE MADE ON A STRICTLY "AS IS, WHERE IS, WITH ALL FAULTS" BASIS WITHOUT REPRESENTATIONS OR WARRANTIES OF ANY KIND OR NATURE, EXPRESS OR IMPLIED, BY SELLER OR ANY OF SELLER'S AGENTS, EMPLOYEES OR CONTRACTORS, INCLUDING BUT NOT LIMITED TO ANY REPRESENTATION OR WARRANTY CONCERNING TITLE TO, OR PHYSICAL, SEISMIC, STRUCTURAL, LEGAL, ENVIRONMENTAL OR FINANCIAL CONDITION OF THE PROPERTY, OR CONCERNING ANY LEASES, CONTRACTS, AGREEMENTS, LEGAL REQUIREMENTS, UTILITIES, SOILS, GROUNDWATER, TAXES, INCOME, EXPENSES, CHARGES, LIENS, ENCUMBRANCES, RIGHTS OR CLAIMS AGAINST OR AFFECTING OR PERTAINING TO THE PROPERTY OR ANY PART THEREOF. METRO REPRESENTS AND WARRANTS THAT, ON OR BEFORE TEN DAYS PRIOR TO THE CLOSING DATE, IT SHALL HAVE CONDUCTED AND COMPLETED ALL NECESSARY "INVESTIGATIONS" (AS DEFINED ABOVE) AND EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF SELLER SET FORTH IN THE DEED AND SECTION 10, WILL ACQUIRE THE PROPERTY SOLELY ON THE BASIS OF THE INVESTIGATIONS AND THE TITLE INSURANCE PROTECTIONS AFFORDED BY THE TITLE POLICY. METRO ACKNOWLEDGES THAT, EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF SELLER SET FORTH IN THE DEED AND SECTION 10, NEITHER SELLER NOR ANY OF ITS AGENTS, REPRESENTATIVES, ATTORNEYS OR EMPLOYEES HAVE MADE REPRESENTATIONS OR WARRANTIES OF ANY KIND, VERBAL OR WRITTEN, WITH RESPECT TO THE PROPERTY, INCLUDING BUT NOT LIMITED TO ITS FITNESS FOR ANY PARTICULAR PURPOSE, QUALITY OF CONSTRUCTION, WORKMANSHIP, CONDITION, ENVIRONMENTAL CONDITIONS, STATE OF REPAIR, SAFETY, MERCHANTABILITY, ACCURACY OF DIMENSIONS, STRUCTURAL SOUNDNESS, COMPLIANCE WITH LEGAL AND INSURANCE REQUIREMENTS, FINANCIAL VIABILITY OR COMPLETENESS OR ACCURACY OF THE REVIEW ITEMS. ACCORDINGLY, EXCEPT FOR THE REPRESENTATIONS AND

WARRANTIES OF SELLER SET FORTH IN THE DEED AND SECTION 10, METRO HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY AND ALL ACTUAL OR POTENTIAL RIGHTS METRO MIGHT HAVE AGAINST SELLER, ITS AFFILIATES, AND ANY OF THEIR RESPECTIVE PARTNERS, OFFICERS, DIRECTORS, SHAREHOLDERS, MEMBERS, MANAGERS, EMPLOYEES, AGENTS OR REPRESENTATIVES AND THEIR RESPECTIVE SUCCESSORS AND ASSIGNS, REGARDING ANY FORM OF WARRANTY, EXPRESS OR IMPLIED, RELATING TO THE PROPERTY, AND COMPLETELY RELEASES AND FOREVER DISCHARGES SUCH PARTIES OF AND FROM ANY AND ALL CLAIMS AND DEMANDS WHATSOEVER, IN LAW OR IN EQUITY, WHETHER SUCH CLAIMS ARE KNOWN OR UNKNOWN, DIRECT OR INDIRECT, FIXED OR CONTINGENT, WHICH METRO NOW HAS, HAS HAD OR MAY CLAIM TO HAVE AGAINST SELLER CAUSED BY OR ARISING OUT OF THE FOREGOING MATTERS, INCLUDING, BUT NOT LIMITED TO, THE ENVIRONMENTAL CONDITION OF THE PROPERTY. METRO WAIVES THE BENEFIT OF ANY STATUTE, LAW OR CASE DECISION WHICH WOULD IN ANY WAY LIMIT OR RESTRICT THE PROVISIONS OF THIS SECTION 11.

Metro's Initials: _____



- b) With the exception of claims based on the representations and warranties of Seller set forth in Section 10, Metro and anyone claiming by, through or under Metro hereby waives its right to recover from and fully and irrevocably releases Seller, its affiliates and their respective employees, officers, directors, representatives, agents, servants, attorneys, affiliates, parent, subsidiaries, successors and assigns, and all persons, firms, corporations and organizations in its behalf, but specifically excepting predecessors in title, ("Released Parties") from any and all claims, responsibility and/or liability that it may now have or hereafter acquire against any of the Released Parties for any costs, loss, liability, damage, expenses, demand, action or cause of action arising from or related to (i) the condition (including any errors, omissions or other conditions, latent or otherwise, and the presence in the soil, air, structures and surface and subsurface waters of materials or substances that have been or may in the future be determined to be Hazardous Substances or otherwise toxic, hazardous, undesirable or subject to regulation and that may need to be specially treated, handled and/or removed from the Property under current or future federal, state and local laws regulations or guidelines), valuation, salability or utility of the Property, or its suitability for any purpose whatsoever, and (ii) with the exception of Seller's representations and warranties provided in Section 10 herein, any information furnished by the Released Parties under or in connection with this Agreement. This release includes claims of which Metro and Seller are presently unaware or which Metro does not presently suspect to exist which, if known by Metro, would materially affect Metro's release to Seller. In this connection and to the extent permitted by law, Metro hereby agrees, represents and warrants that Metro realizes and acknowledges that factual

matters now unknown to Metro and Seller may have given or may hereafter give rise to causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses which are presently unknown, unanticipated and unsuspected, and Metro further agrees, represents and warrants that the waivers and releases herein have been negotiated and agreed upon in light of that realization and that Metro nevertheless hereby intends to release, discharge and acquit Seller from any such unknown causes of action, claims, demands, debts, controversies, damages, costs, losses and expenses.

- c) Metro acknowledges that, as of the date of Closing, Metro will have inspected the Property and observed its physical characteristics and existing conditions and will have had the opportunity to conduct such investigations and studies on and of said Property and adjacent areas as it deems necessary, and with the exception of claims based on the representations and warranties of Seller set forth in the deed and Section 10, hereby waives any and all objections to or complaints regarding the Property and its condition, including, but not limited to, federal, state or common law based actions and any private right of action under state and federal law to which the Property is or may be subject, including, but not limited to, physical characteristics and existing conditions, including, without limitation, structural and geologic conditions, subsurface soil and water conditions and solid and hazardous waste and Hazardous Substances on, under, adjacent to or otherwise affecting the Property. Metro further hereby assumes the risk of changes in applicable laws and regulations relating to past, present and future environmental conditions on the Property and the risk that adverse physical characteristics and conditions, including, without limitation, the presence of Hazardous Substances or other contaminants, may not have been revealed by its investigation

Seller and Metro have each initialed this Section 11 to further indicate their awareness and acceptance of each and every provision hereof.


Metro's Initials


Seller's Initials

12. Seller's Representations, Warranties and Covenants Regarding the Property Through the Close of Escrow. The Seller further represents, warrants, and covenants that, until this transaction is closed or escrow is terminated, whichever occurs first, it shall:

- a) Maintain the Property in its present state, with no material alteration of the Property in any way;
- b) Keep all existing insurance policies affecting the Property in full force and effect;
- c) Make all regular payments of interest and principal on any existing financing; and

STAFF REPORT

RESOLUTION 01-3086; FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO PURCHASE PROPERTY IN THE GRESHAM CIVIC NEIGHBORHOOD FOR A TRANSIT-ORIENTED DEVELOPMENT PROJECT.

Date: June 21, 2001

Presented by:

Andy Cotugno
Phil Whitmore

DESCRIPTION

This Resolution requests authorization for the Executive Officer to acquire property from Gresham Station, LLC, Fred Bruning, President.

EXISTING LAW

The Metro Council authorized start-up activities for the TOD Implementation Program by Resolution No. 98-2619 on April 9, 1998. This included the adoption of the Work Plan, which provided for acquisition of TOD sites. The procedure for approving a TOD project for site acquisition or site improvements is for the TOD Steering Committee to review the proposal and initiate action. The Steering Committee was a requirement of the Federal Transit Administration for grant approval to broaden the representation of the program and is comprised of representatives of the Governor's Office (Chair), five state agencies, Portland Development Commission, Tri-Met, and Metro. Metro's representative is Councilor Susan McLain. As soon as practical after the Steering Committee action, the Executive Officer is to provide a Seven-Day Notice to the Metro Council during which the Council may request to review a proposal in executive session.

BACKGROUND

The Federal Transit Administration approved Metro's grant request for the TOD Program in the amount of \$2.99M and provided environmental approval for the Program in March 1998. The Program is the first of its kind in the United States to use federal transit funds for TOD site acquisitions. The Council authorized initiation of the Program the next month and to date 10 projects have been undertaken at transit stations along the east side and west side MAX light rail, ranging from those in the conceptual design stage to completed projects.

The Gresham Civic Neighborhood is an excellent opportunity to acquire and option sites adjacent to a future light rail station and for the TOD Program to facilitate the construction by the private sector of a 4-5 story, mixed-use project with housing above ground floor retail. This TOD will directly connect the transit station to the newly completed first phase of the development project known as Gresham Station, being developed by Gresham Station, LLC.

Gresham Station's president, Fred Bruning, has stated that his company would be "honored" to work with Metro for the mixed-use portion of the project, which Bruning's company does not develop.

Metro has committed to completing the station in the IGA with Tri-Met executed November 18, 1999, and approved by Resolution No. 99-2858, in exchange for Tri-Met's providing local funds

to expand and provide more flexible funding for the TOD Program. The Congestion Mitigation/Air Quality (CMAQ) funds that were initially reserved for the station were conditioned upon 260 housing units above retail directly adjacent to the station. Acquiring and optioning the four corners at Civic Drive and the MAX tracks next to the station will provide for this opportunity.

On January 3, 2001, the Seven-Day Notice was issued by the Executive Officer for the 2.1 acre parcel at the southeast corner of Civic Drive and MAX and that acquisition was completed. On April 23, 2001 the Seven-Day Notice was issued for the 4.36-acre parcel at the southwest corner (the "Civic SW Property" or "Property") and options to purchase up 5.5 acres on the northwest corner and 12,500 square feet at the northeast corner. The Metro Council toured the site prior to the Council meeting on May 3, 2001.

During negotiations to acquire the Civic SW Property, Bruning has indicated that his company will only hold title to the property for a brief period of time. Because of the brief holding period, Gresham Station, LLC will the only sell the Property to Metro in "as is, where is," condition, disclaiming all representations and warranties about the Property and requiring Metro to waive all claims against Gresham Station, LLC relating thereto, except for those representations and warranties specifically negotiated into the agreement with Metro, and qualified as to knowledge. Bruning also requires that Metro release Gresham Station, LLC from any and all future claims related to the transaction or the Property itself, including its environmental condition, except for those representations and warranties specifically negotiated into the agreement with Metro, and qualified as to knowledge. Gresham Station, LLC has the entire Gresham Station Property under acquisition agreement from multiple parties to be taken down in parcels. Because Bruning will not have owned those parcels, he does not want to provide additional assurances as to their environmental condition. However, the release set forth above does not apply to predecessors in interest to Gresham Station, LLC, and therefore does not limit Metro's ability to hold prior owners responsible for claims related to the property and its environmental condition.

The "as is," waiver and release clauses required by Gresham Station LLC shift liability, requiring Metro to assume a larger share of the risk that the property suffers from some latent defect. It is therefore necessary that the Metro Council approve of Metro's acquisition of the property under these conditions.

During Metro's acquisition of the neighboring 2.1-acre parcel in January, Metro conducted extensive environmental investigations, including groundwater testing. Metro's consultant reported that the 2.1 acre property posed no environmental risks. This finding, combined with the fact that the other surrounding property has heretofore been forested, planted in cabbages, or used for nursery stock, suggests that the Civic SW Property does not suffer from the migration of any off-site environmental contaminants. The Civic SW Property itself is predominately forested now, but was last used as agricultural land. Nevertheless, a Phase I environmental assessment has been conducted on the Civic SW Property. The site was field inspected by an environmental consulting firm on June 21st. The consultant reports that no specific evidence of environmental contamination was evident. A full Phase I report will be completed and available for Metro Council review prior to Council action.

BUDGET IMPACT

There is no budget impact from this action. The approval for the acquisitions and options were already authorized and funding will come from the TOD Implementation Program.

EXECUTIVE OFFICER'S RECOMMENDATION

It is recommended that the Metro Council approve the acquisition from Gresham Station, LLC, subject to the "as is," waiver and release provisions attached hereto, providing the Phase I environmental site assessment indicates that the site does not represent an environmental risk.

The Executive Officer recommends adoption of Resolution No. 01-3086.

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