

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING)
THE EXECUTIVE OFFICER TO)
PURCHASE WITH "AS-IS, WHERE-IS")
CONDITIONS PROPERTY IN THE)
GRESHAM CIVIC NEIGHBORHOOD FOR)
A TRANSIT-ORIENTED DEVELOPMENT)
PROJECT.)

RESOLUTION NO. 01-3124

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, on April 23, 2001, a Seven-Day Notice was issued for acquisition of the parcel at the Southwest corner and an option for the parcel at the Northwest corner ("Civic NW") of the Civic Drive and MAX intersection from Gresham Station, LLC. The Metro Council toured these sites prior to the Council meeting on May 3, 2001; and

WHEREAS, the TOD Program is now prepared to exercise the option on the "Civic NW" parcel; 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 revealed no evidence of recognized environmental conditions in connection with the Property except for two small piles of household debris; and

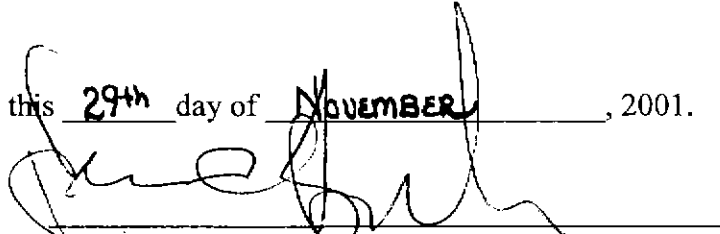
WHEREAS, the ground under the debris piles was tested after the debris was transferred to the Hillsboro landfill and the tests revealed no evidence of recognized environmental conditions; and

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 if 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,

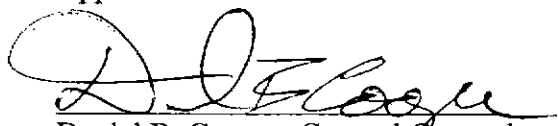
BE IT RESOLVED,

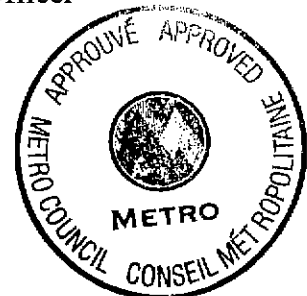
That the Metro Council approves the acquisition of the Civic NW Property subject to the "as is" waiver and release provisions set forth in Section 29 of the Option Agreement Metro and Gresham Station, LLC (attached in part as Attachment A).

ADOPTED by the Metro Council this 29th day of NOVEMBER, 2001.


David Bragdon, Presiding Officer

Approved as Form:


Daniel B. Cooper, General Counsel



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COMMUNITY PLANNING COMMITTEE REPORT

CONSIDERATION OF RESOLUTION NO. 01-3124, FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO PURCHASE WITH "AS-IS, WHERE-IS" CONDITIONS PROPERTY IN THE GRESHAM CIVIC NEIGHBORHOOD FOR A TRANSIT-ORIENTED DEVELOPMENT PROJECT

Date: November 26, 2001

Presented by: Councilor McLain

Committee Action: At its November 20 meeting, the Community Planning Committee voted 6-0 to recommend Council adoption of Resolution 01-3124. Voting in favor: Councilors Bragdon, Burkholder, Hosticka, McLain, Monroe and Park.

Background: The staff report was presented by Phil Whitmore, of the Community Planning Department. This Transit Oriented Development project is in the Gresham Civic Neighborhood area. A future light rail stop for the area is planned, and Metro has purchased and optioned nearby sites. The site in question, the "Civic NW" parcel, is a 5.29 acre site representing the second phase of this project. It is the last remaining parcel Metro will be involved with in the Civic Neighborhood. It will be directly connected to the transit station, and include 4-5 story mixed use development. .5 acre of the site is being donated to the project for a plaza.

The acquisition of this parcel resembles the acquisition of a previous parcel, in that it includes an "as-is" waiver. The parcel is being purchase from Gresham Station, LLC. Gresham Station LLC, however will hold title only briefly, and does not with to provide assurances as to its environmental condition, beyond what will be negotiated into the contract. A phase 1 environmental site assessment has been performed, and no significant issues have been found.

Upon purchase of this site, Metro will issue an RFP for development of the property, possibly as soon as March 2002.

- Existing Law: Metro authorized involvement in the TOD program via resolution in 1998. A TOD steering committee, authorized by the Federal Transit Administration, reviews TOD proposals.
- Budget Impact: The purchase price for the property is \$2.2 million. The funding is in the adopted budget, in the TOD Implementation Program.

Committee Issues/Discussion: Brief committee discussion focused on aspects of the environmental condition of the site, and were otherwise favorable to this program and the resolution itself.

STAFF REPORT

FOR THE PURPOSE OF AUTHORIZING THE EXECUTIVE OFFICER TO PURCHASE WITH "AS-IS, WHERE-IS" CONDITIONS PROPERTY IN THE GRESHAM CIVIC NEIGHBORHOOD FOR A TRANSIT-ORIENTED DEVELOPMENT PROJECT.

Date: November 7, 2001

Presented by:

Andy Cotugno
Phil Whitmore

DESCRIPTION

This Resolution requests authorization for the Executive Officer to acquire property with "as-is, where-is" conditions 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 three 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 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 parcel at the southwest corner (the "Civic SW Property" or "Property") and an option for the parcel at the northwest corner of Civic Drive and MAX.

During negotiations to acquire the Civic NW 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. The property at the SW corner was purchased from Center Oak with these same conditions.

A Phase I environmental site assessment has been completed on the site. The consultant found no "recognized environmental conditions" on the site except two small ash piles in the southeastern perimeter of the site. Burnt debris including common household materials such as sheetrock, ceramic tile, light fixtures, aerosol cans and oil filters were noted in or around the ash stock piles. Laboratory tests found that the ash included some oil and grease, and small amounts of heavy metals. The ash and other debris, amounting to two small truck loads, was transferred to the Hillsboro landfill. To ensure the site poses no environmental risks, the ground under the piles is being tested. Results of these tests will be known by the time this resolution is under Planning Committee review. [Mr. Jeff Stone gave permission for this staff report to be filed prior to the ground test results being returned to Metro]

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.

The Executive Officer recommends passage of Resolution No. 01-3124.

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Council \Agendas\2001\Community Planning\Nov 20\01-3124 SR.doc

- (e) Seller agrees that should any dispute arise out of the exchange transaction with regard to the condition of the Property or title thereto or any other terms or conditions of the purchase and sale agreement or any escrow instructions or any other documents relating thereto, such dispute shall be resolved as if Seller had directly transferred the Property to Metro;
- (f) Metro is not obligated to hold title to any additional property;
- (g) Seller agrees to indemnify, hold harmless and defend Metro from and against any and all claims, damages, costs, liabilities, losses, and expenses (including reasonable attorney's fees) arising out of or related to the exchange transaction or its qualification under any tax, law, code, rule or regulation. Metro understands that Seller may assign its rights under this Agreement to an intermediary for the purpose of accomplishing this transaction and that the intermediary will have no continuing obligations to Metro other than to complete the transfer of title to the Property under the terms hereof. Metro will at all times look to Seller for performance of all continuing obligations under this Agreement.

28. **Statutory Disclaimer.** 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 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.

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

- (a) EXCEPT FOR THE REPRESENTATIONS AND WARRANTIES OF SELLER SET FORTH IN THE DEED AND SECTION 12(a), 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 THE DATE IT EXERCISES THE OPTION, 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 12(a), 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 12(a), 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 12(a), 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 29.

Metro's Initials: 

- (b) With the exception of claims based on the representations and warranties of Seller set forth in Section 12(a), 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 excluding herefrom Seller's predecessors-in-interest) ("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 12(a) 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 it exercises the Option, 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 Section 12(a) and the Deed, 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 29 to further indicate their awareness and acceptance of each and every provision hereof.



Metro's Initials



Seller's Initials

30. **Exculpation.** None of the officers, directors, members, managers, shareholders, partners, employees, agents or consultants of Seller shall have any personal liability, directly or indirectly, under this Agreement, and Metro hereby waives all right to proceed directly against such persons or entities under or in connection with this Agreement.
31. **Business Days.** Whenever action must be taken under this Agreement during a period of time that ends on a Saturday, Sunday or federal or state holiday, then such period shall be extended until the next day which is not a Saturday, Sunday or such a holiday. Subject to the foregoing, time is of the essence of this Agreement.
32. **Third Party Benefits.** Nothing in this Agreement, expressed or implied, is intended to confer any rights or remedies upon any person, other than the parties hereto and, subject to the restrictions on assignment herein contained, their respective successors and assigns.
33. **Assignment.** Neither party shall assign any of its rights or delegate any of its obligations under this Agreement without the prior written consent of the other party, such consent not to be unreasonably withheld, conditioned or delayed. No assignment made without such prior written consent shall be valid or enforceable or confer any rights upon any third party. No assignment of a party's rights or delegation of a party's obligations under this Agreement or any instrument or agreement delivered pursuant hereto shall release the assignor from its obligations under this Agreement. Subject to the foregoing, this Agreement shall inure to the benefit of, and shall be enforceable by and binding upon, the parties hereto and their respective heirs, administrators, executors, representatives, successors and assigns.

This offer to enter into an Option Agreement shall automatically expire on July 13, 2001, at 5:00 p.m., if not accepted by Seller by returning a fully executed Agreement to Metro within that time.