

BEFORE THE METRO COUNCIL

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| FOR THE PURPOSE OF AMENDING THE |) | RESOLUTION NO. 10-4122 |
| NATURAL AREAS IMPLEMENTATION |) | |
| WORK PLAN TO AUTHORIZE THE CHIEF |) | Introduced by Chief Operating Officer Michael |
| OPERATING OFFICER TO MORE |) | J. Jordan, with the concurrence of Council |
| EFFICIENTLY ACQUIRE AND ASSIGN |) | President David Bragdon |
| TRAIL EASEMENTS. |) | |

WHEREAS, in November 2006 regional voters approved a \$227.4 million Natural Areas Bond Measure (“2006 Natural Areas Bond Measure”); and

WHEREAS, several of the target areas identified in the 2006 Natural Areas Bond Measure are regional trails in which the goal is to complete property acquisitions sufficient to allow for the construction of bicycle and pedestrian trails and, in most instances, the property interest needed to achieve such goal is the acquisition of a trail easement; and

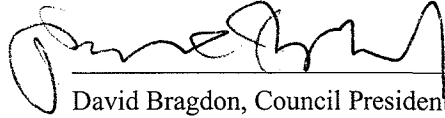
WHEREAS, in order to ensure that such trail projects will ultimately qualify for federal transportation funding for construction, such acquisitions must comply with federal property acquisition rules, administered by the Oregon Department of Transportation; and

WHEREAS, on March 1, 2007, the Metro Council adopted Resolution No. 07-3766A “Authorizing the Chief Operating Officer to Purchase property with Accepted Acquisition Guidelines as Outlined in the Natural Areas Implementation Work Plan” which included acquisition parameters for a pre-approved set of criteria under which the Chief Operating Officer and his/her designees are authorized to negotiate and complete land acquisition transactions (the “Natural Areas Implementation Work Plan”); and

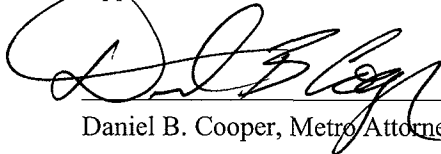
WHEREAS, in the process of executing the Work Plan in the trail target areas, staff have identified various circumstances in which the acquisition of trail easements, or in some instances fee title of trail properties, require different considerations than the standard acquisition practices as put forth in the Natural Areas Implementation Work Plan; now, therefore

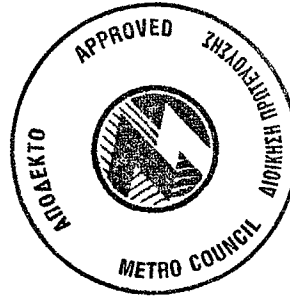
BE IT RESOLVED that the Metro Council hereby authorizes the Chief Operating Officer to acquire trail property interests subject to the Acquisition Parameters and Due Diligence Guidelines for Trail Easement Properties, attached hereto as "Exhibit A," and hereby incorporated by reference.

ADOPTED by the Metro Council this 4TH day of FEBRUARY 2008¹⁰.


David Bragdon, Council President

Approved as to Form:


Daniel B. Cooper, Metro Attorney



TRAIL EASEMENT ACQUISITION PARAMETERS

Definition:

"*Trail Easement Acquisition Parameters*" are the Metro Council-approved criteria and conditions under which the Chief Operating Officer and his/her designees are authorized to negotiate and complete Trail Easement Property acquisition transactions without further Council review and approval. The Chief Operating Officer and his/her designees may complete a trail easement acquisition transaction that does not meet all of the following acquisition parameters only with specific Council review and approval. A "*Trail Easement*" acquisition in this work plan refers also to acquisition of fee property interests when acquired for the main purpose of establishing a trail on the property.

Rationale:

The creation of pre-approved *Trail Easement Property Acquisition Parameters* will permit the agency to deal with willing sellers/grantors in an effective and efficient manner and allow the Metro Council to focus on policy level issues.

Intent:

Metro intends to pay no more than market value for property, it being acknowledged, however, that the Metro area real estate market is dynamic and the process of identifying market value is not exact. Metro's acquisition process should provide flexibility to achieve the goals of the Natural Area Bond Measure and to reflect the actual market conditions affecting the market value of properties targeted for natural areas acquisition. With respect to Trail Easement Property, market value does not always compensate landowners for certain impacts of trail development on their property that are difficult to quantify. These potential concerns are often related to security, privacy and costs related to owner attorney's review and advice. Their concerns provide barriers and objections to granting easements or selling suitable Trail Easement Property to Metro.

Acquisition of trail easements, in most cases will be governed by Federal Acquisition Guidelines as administered by the Oregon Department of Transportation. To address landowners' concerns about acquisition impacts related to security, privacy and costs related to owner attorney's review and advice, these guidelines provide the opportunity for offering greater compensation than the approved amount as determined by the property appraisal ("Administrative Settlements"). Following the Federal Acquisition Guidelines process assures that the governing body holding Trail Easement Property is eligible for future federal funding to assist or finance local or regional trail construction. For justified cases, Metro's Trail Easement Acquisition process may incorporate the option to offer Administrative Settlements in order to provide flexibility to achieve the goals of the Natural Areas Bond Measure.

Trail Easement Acquisition Parameters:

The Metro Council authorizes the Chief Operating Officer and his/her designees to negotiate and close Trail Easement Property transactions related to the 2006 Natural Areas Bond Measure provided all of the following criteria/conditions are met:

- The landowner is a willing seller/grantor.
- The tax lot is identified on a Council-adopted target area "confidential refinement map."
- The Real Estate Negotiator and a planning team representative have inspected the easement area, they and the Natural Areas Program Director have approved the purchase, and an acknowledgement of such visits and approvals has been completed.

- The negotiated purchase price for the easement is either:
 1. Equal to the fair market value as established by the appraisal and appraisal review processes described below (note that Metro will actively solicit donations and bargain sales); or
 2. Not more than 25% or \$20,000, whichever is greater, above such fair market value and the Natural Areas Program Director has authorized acquisition of the trail easement at such price after finding that acquisition of the easement above the initially offered purchase price is in the public interest. In order to conclude that such a purchase is in the public interest, the Program Director must conclude and document that:
 - The seller/grantor has rejected the fair market value as established by the appraisal and appraisal review processes described below and has provided a reasonable basis for the additional compensation;
 - The failure to acquire the easement will significantly compromise Metro's ability to achieve the goals described in the applicable adopted Refinement Plan for that target area. Staff will document the total compensation to the property owner including, but not limited to, future design and construction consideration such as landscaping, fencing, lighting or signage; and
 - The purchase will not reduce the amount of funds available to purchase other critical, high priority target properties nor will it compromise Metro's ability to achieve the goals described in the applicable adopted Refinement Plan for that target area.

- **Appraisal**

An independent certified appraiser has completed an appraisal of the easement area that states a conclusion of the fair market value of the property. The appraisal must generally comply with the Oregon Department of Transportation's appraisal guidelines. The appraiser shall state in the appraisal any assumptions that he/she relied upon to determine the easement's fair market value; however, the appraisal shall not be based upon any "extraordinary assumptions" made by the appraiser that materially affect the easement's fair market value.

- **Appraisal Review**

An independent certified appraiser has completed a review of the appraisal in accordance with the Uniform Standards of Professional Appraisal Practice ("USPAP") and general appraisal standards. If the review appraiser determines that the appraisal does not meet USPAP or other general appraisal standards, the review appraiser, after consultation with and at the direction of the Office of the Metro Attorney, may either (a) work with the appraiser to correct the deficiencies, (b) order a second appraisal to be reviewed in the manner set forth herein, or (c) make a final determination of the value for the property.

- *"Trail Easement Due Diligence"* has been completed in conformance with the *due diligence* section below and no unusual circumstances have been found to exist.

Notices and Reports to Council Regarding Completed Transactions

The Natural Areas Program Director or his/her designees shall notify the Council promptly following the closing of any real estate transaction. The Chief Operating Officer or his/her designees shall prepare and present to the Council quarterly updates summarizing acquisition activity distinguished by target area.

TRAIL EASEMENT DUE DILIGENCE GUIDELINES

Definition:

"*Trail Easement Due Diligence*" is the systematic inspection of the legal title and physical condition of an easement area before the easement is purchased to assure protection of public investment in trail properties. *Trail Easement Due Diligence* should be conducted in advance of closing so that resolvable problems can be adequately addressed prior to closing. A "*Trail Easement*" acquisition in this work plan refers also to acquisition of fee property when acquired for the main purpose of establishing a trail on the property.

Components:

The primary areas of *Trail Easement Due Diligence* are described below. A more detailed list of items examined may be found in the Appendix under "Due Diligence and Closing Checklist." The Metro Attorney may amend the checklist as determined necessary and appropriate at his/her discretion.

The Due Diligence Team is comprised of the Real Estate Negotiator, Metro Attorney staff, and assigned planner for each property.

- **Meeting Federal Guidelines:** Each Trail Easement acquisition shall be evaluated to determine if future federal funding for design and construction is potentially possible. If federal funding is possible, in order to safeguard eligibility for this funding, Metro staff will adhere to the trail acquisition guidelines as required by the Oregon Department of Transportation, and updated from time to time to ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Act of 1970 (the "Uniform Act") and with Oregon law (ORS 35.510).
- **Appraisal:** An appraisal of the easement area must be completed to determine the easement's market value and provide other useful information about the property. The appraisal shall be in the format described in the previous section regarding *trail easement acquisition parameters* and shall be reviewed in the manner set forth therein.
- **Examination of Title:**
 1. Metro must satisfy itself that the seller/grantor has authority to sell the easement, that Metro understands what rights will be conveyed, that all parties necessary for the grant are involved, and that any rights that are not a part of the transaction will not defeat the purpose of the acquisition.
 2. *Trail Easement Due Diligence* requires the review and inspection of the title report and related documents, including the deed to the current owner, recorded easements and other encumbrances, water rights, access rights, taxes, liens, etc.
 3. Other documents that need to be inspected include unrecorded leases with existing tenants or farmers, management agreements, records pertaining to personal property included in the sale, surveys, and agreements the seller may have entered into that may not be of record.
- **Inspection of the Property:**
 1. Location of Boundaries. *Trail easement due diligence* requires the review of any existing survey of the property. Metro should also identify the boundaries of the easement area. If such boundary identification is not possible, a survey of the easement area will be conducted unless deemed unnecessary or uneconomical by the Due Diligence Team. Additionally, Metro must identify that both legal and physical access to the easement area exist and are usable. Legal and physical access by the public will be secured unless the nature of the property is such that access restrictions are acceptable for that property.
 2. Physical Inspection. Metro or its contractors and agents must physically inspect the easement area

for general environmental assessment purposes and to identify possible hazards, unrecorded easements and trespassers, and to make a preliminary evaluation of the condition of the property for future development of a trail. If there are any structures and improvements (roads, fences, utilities, etc.), that are part of the Trail Easement acquisition, these shall be further evaluated. Any encroachments, potential property boundary disputes, or unrecorded use of the easement area identified either during property inspection or in title search will be resolved prior to closure unless deemed impractical by the Due Diligence Team and the Natural Areas Program Director has authorized closing notwithstanding such circumstances(s).

3. Environmental Inspection. A Phase I ESA is not necessary on all potential easement acquisitions unless (a) the Metro Attorney determines that a Phase I is advisable based on information learned in the course of its due diligence, (b) the Trail Easement is purchased in fee title, or (c) such assessment is required by the local jurisdiction to which Metro will assign its interest in the Trail Easement at closing. The Office of the Metro Attorney has determined that, while potential liability is not zero, the chances of an easement holder being held liable for environmental contamination on a property are extremely low, and that provisions within the Purchase Agreement will provide sufficient protection from such liability (unless, of course, the contamination was directly caused by or exacerbated by the actions of the easement holder). To the extent any Phase I ESA reports exist on the subject Trail Easement property, acquisition staff will make every effort to obtain copies to help inform the decision of whether to proceed with the easement acquisition.
- Unusual Circumstances. If, in the course of *Trail Easement Due Diligence*, the Due Diligence Team discovers any unusual deed or title restrictions, encumbrances, or other conditions that may prohibit or unduly restrict Metro's ability to use the property as a trail or that may create a liability to Metro, such restrictions, encumbrances, or conditions shall be considered "unusual circumstances." As provided in the section of this Work Plan regarding *trail easement acquisition parameters*, the Chief Operating Officer and his/her designees may not complete the purchase of an easement with such unusual circumstances without obtaining the Metro Council's specific approval prior to such acquisition.
 - Ownership: When agreed to by the local jurisdiction in which the trail will be located, built, and maintained, Metro may assign its interest in the Trail Easement at closing to such local jurisdiction.
 - Document Retention. Documents related to acquisitions shall be retained as determined appropriate by the Metro Attorney and in accordance with the Uniform Act when required.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 10-4122, FOR PURPOSES OF AMENDING THE NATURAL AREAS IMPLEMENTATION WORK PLAN TO AUTHORIZE THE CHIEF OPERATING OFFICER TO MORE EFFICIENTLY ACQUIRE AND ASSIGN TRAIL EASEMENTS.

Date: February 4, 2010

Prepared by: Kathleen Brennan-Hunter
503-797-1948

BACKGROUND

The 2006 Natural Areas Bond Implementation Work Plan (“Work Plan”) describes a comprehensive contractual, due diligence and closing process for the acquisition of property under the 2006 Natural Areas Bond.

Metro’s Natural Areas Program Work Plan is designed to create an effective process for purchasing and protecting natural areas and trails at the regional, local and neighborhood levels. Metro’s acquisition efforts include the purchase of fee interests or right-of-way easements for trails in order to assemble corridors for future trail projects.

The acquisition of right-of-way easements for trails is the most efficient and common method of obtaining the desired property interests necessary for future trails. A trail right-of-way easement is a non-possessory interest acquired for the stated purpose of building and maintaining trails. With right-of-way easements, a property owner retains the ownership of the entire property, is responsible for the property taxes, and continues to assume liability for damages and claims on the property. The easement holder secures the rights required for the desired use.

Fee title ownership acquisitions are a lesser used method of obtaining the property interests necessary for future trails. Fee title transactions entitle Metro to ownership of the entire property where the future trail will be located. In the case of a fee title acquisition, the property owner relinquishes ownership rights in the entire property.

Once Metro acquires the necessary property interests to accommodate the proposed trail or trail segment, future federal transportation funding will likely finance trail design and construction. Metro must follow federal and Oregon Department of Transportation (ODOT) right-of-way acquisition guidelines because federal funds may be used to purchase, design or construct some part of the future trail.

In the process of implementing acquisition in various target areas, guided by refinement plan priorities, staff have identified various circumstances in which the acquisition of trail easements, or fee title property for which trails are the primary basis for a purchase (“Trail Easement Property”), require different consideration than the standard acquisition practices as put forth in the Work Plan Sections on Acquisition Parameters and Due Diligence Guidelines.

Metro staff has prepared supplemental Work Plan Acquisition Parameters and Due Diligence Guidelines to the Work Plan in order to permit staff to more effectively and efficiently execute Trail Easement Property transactions with willing sellers/grantors in a timely, effective, and consistent manner.

Metro staff is recommending the following additions to the Work Plan to more efficiently and effectively facilitate trail easement acquisitions.

1. As previously set forth in Amended Exhibit A to Resolution No. 07-3766A, Metro intends to pay no more than market value for property, it being acknowledged, however, that the Metro area real estate market is dynamic and the process of identifying fair market value is not exact. Metro's Acquisition process should provide flexibility to achieve the goals of the Natural Area Bond Measure and to reflect the actual market conditions affecting the market value of properties targeted for natural areas acquisition. With respect to Trail Easement Property, market value does not always compensate landowners for certain impacts of trail development on their property that are difficult to quantify. These potential concerns are often related to security, privacy and costs related to owner attorney's review and advice. Their concerns provide barriers and objections to granting easements or selling suitable Trail Easement Property to Metro.

It is proposed that the purchase price for the Trail Easement Property may be negotiated by Metro staff within the following parameters:

- a. Equal to market value as established by the prescribed appraisal and appraisal review process (note that Metro will actively solicit Trail Easement Property donations and bargain sales); or
 - b. Not more than 25% or up to \$20,000 above such market value and the Natural Areas Program Director has authorized acquisition of the property at such price after finding that acquisition of the property at the negotiated purchase price is in the public interest. In order to conclude that such a purchase is in the public interest, the Natural Areas Program Director must conclude that:
 - The seller/grantor has rejected the fair market value as established by the appraisal and appraisal review processes described below and has provided a reasonable basis for the additional compensation;
 - The failure to acquire the property will significantly compromise Metro's ability to achieve the goals described in the applicable adopted Refinement Plan for that target area; and
 - The purchase will not reduce the amount of funds available to purchase other critical, high priority target properties in a manner that will significantly compromise Metro's ability to achieve the goals described in the applicable adopted Refinement Plan for that target area.
2. Acquisition of trail easements, in most cases will be governed by Federal Acquisition Guidelines as administered by the Oregon Department of Transportation. To address landowners concerns of acquisition impacts related to security, privacy and costs related to owner attorney's review and advice, these guidelines provide the opportunity for offering greater compensation than the approved amount as determined by the property appraisal ("Administrative Settlements"). Following the Federal Acquisition Guidelines process assures that the governing body holding Trail Easement Property is eligible for future federal funding to assist or finance local or regional trail construction. For justified cases, Metro's Trail Easement Acquisition process should incorporate the option to offer Administrative Settlements in order to provide flexibility to achieve the goals of the Natural Areas Bond Measure.
 3. In most cases, Metro will not be the long term developer or operator of the regional trails. The Metro Council at its discretion may assign its interest in acquired Trail Easement Property to

another park-providing entity. This new Work Plan will allow Metro's Chief Operating Officer to assign all of Metro's interest in Trail Easement Property to the local jurisdiction in which the future, proposed trail is to be located, constructed and maintained in perpetuity, without requiring further Metro Council approval. In the event a regional trail is located in an area where no local operator exists, Metro will hold the easement.

4. It is proposed that the original Environmental Review requirement for property acquisition as referenced in Amended Exhibit A to Resolution No. 07-3766A, be optional and at the discretion of the Metro Attorney within the process of trail easement acquisition. Unless required by the local jurisdiction to which Metro will assign its interest in the Trail Easement Property at Closing, the Office of the Metro Attorney ("Metro Attorney") has advised that Phase I Environmental Site Assessments ("Phase I ESA") are not necessary on potential easement only acquisitions. Further, the Metro Attorney has determined that, while potential liability is not zero, the chances of an Easement holder being held liable for environmental contamination on a property are extremely low, and that provisions within the Purchase Agreement and the recorded Easement will provide sufficient protection from such liability (unless, of course, the contamination was directly caused by or exacerbated by the actions of the Easement holder). To the extent any Phase 1 ESA reports exist on the subject Easement property, acquisition staff will make every effort to obtain copies to help inform the decision of whether to proceed with the trail easement acquisition. The option of Phase I ESA step in the easement acquisition process will also alleviate a common owner/grantor concern that a Phase I ESA could create expensive liabilities and burden the owner with the knowledge of potential environmental contamination on their property, and create a significant impediment to successful acquisition. Trail Easement Property purchased in fee title will require a Phase 1 ESA, like all other fee purchases and the due diligence guidelines as defined in Resolution No. 07-3766A will apply.

This resolution is recommended in order to permit staff to more effectively and efficiently execute trail easement transactions with willing sellers.

ANALYSIS/INFORMATION

1. Known Opposition

None.

2. Legal Antecedents

Resolution No. 06-3672B, "For the Purpose of Submitting to the Voters of the Metro Area a General Obligation Bond Indebtedness in the Amount of \$227.4 Million to Fund Natural Area Acquisitions and Water Quality Protection," was adopted on March 9, 2006.

The voters' approved Metro's 2006 Natural Areas Bond Measure at the general election held on November 7, 2006.

Resolution No. 07-3766A "Authorizing the Chief Operating Officer to Purchase Property With Accepted Acquisition Guidelines as Outlined in the Natural Areas Implementation Work Plan," was adopted by the Metro Council on March 1, 2007, and established the Acquisition Parameters and Due Diligence Guidelines for the purchase of properties as part of the 2006 Natural Areas Bond Program.

Resolution No. 08-3963 "Amending the Natural Areas Implementation Work Plan to Authorize the Chief Operating Officer to Acquire Certain Properties when the Purchase Price is equal to or less than \$5,000," was adopted by the Metro Council on July 24, 2008, and established the Acquisition

Parameters and Due Diligence Guidelines for the purchase of properties as part of the 2006 Natural Areas Bond Program.

3. Anticipated Effects

Assuming that no unusual circumstances arise, Metro will close on the Acquisition of Trail Easement Property that meet the above-referenced criteria. In the rare case that Metro acquires Fee Title to Trail Easement Property for a future Trail site, the Due Diligence Guidelines as provided within Resolution No. 07-3766A, requiring completion of a Phase 1 Environmental Assessment, will be followed.

4. Budget Impacts

Expenditures for purchases and related due diligence are budgeted in the Natural Areas Bond Fund.

RECOMMENDED ACTION

The Chief Operating Officer recommends passage of Resolution No. 10-4122.