

**SEWER EASEMENT ENCROACHMENT AND DEVELOPMENT AGREEMENT  
RELATED TO STRUCTURES OVER TANNER CREEK SEWER IN THE  
BUTLER BLOCK**

This Agreement is made and entered into between the City of Portland (“the City”), by and through its Bureau of Environmental Services (“BES”), and the Tri-County Metropolitan Transportation District of Oregon (“TriMet”).

**Recitals**

A. In or about 1891, the Tanner Creek Sewer (“TCS”) was built in the creek bed of Tanner Creek. The TCS, which is 72” in diameter (inside dimension) and constructed of brick with a stone invert, is currently owned by BES, operated as a combined sewer line, and protected by a permanent sewer easement granted to the City on June 13, 1891 and recorded in Book 158, Page 227, in the official records of Multnomah County, Oregon (“the Easement”).

B. TriMet owns that certain parcel of real property located at 18<sup>th</sup> Avenue and Salmon Street in Portland, Oregon, commonly known as the Butler Block (the “Property”), and legally described as shown on Exhibit B attached hereto and incorporated by this reference herein. The Property is located immediately adjacent to TriMet’s Kings Hill/Salmon Street Light Rail Station.

C. Pursuant to an Intergovernmental Agreement between the City of Portland and TriMet dated November 3, 1994 (“Intergovernmental Agreement for the Management of Westside Light Rail Replacement Parking”), the City of Portland currently operates the Property as a surface parking lot.

D. A portion of the TCS runs approximately 40’ below the grade surface of the Property. The capacity of the TCS is 350 cfs. However, BES modeling projections indicate that, at the location of the Property, the TCS currently operates below capacity, with 100 cfs of storm runoff passing through the pipe during peak flows.

E. In 2003, BES conducted a videotape inspection of the portion of the TCS that runs below the Property. The videotape inspection establishes the current physical condition of this portion of the TCS as compromised, with longitudinal cracking on the crown of the pipe, as discussed in the attached Brown and Caldwell Tanner Creek Trunk Inspection Report dated July 28, 2015.

F. TriMet desires to sell the Property for redevelopment into a mixed-use Transit Oriented Development (“TOD”). Redevelopment of the Property into a TOD would be consistent with TriMet, Goose Hollow Neighborhood, City of Portland and regional Metro policies and goals which advocate for the redevelopment of surface parking lots adjacent to light rail stations into TODs. Such redevelopment would benefit TriMet in the form of increased light rail ridership and increased potential for additional transit-oriented development along TriMet’s light rail lines. It would benefit BES in the form of

increased revenue from new sewer ratepayers and improvements to the pipe by the developer. It would benefit the City of Portland in the form of increased revenue from new taxpayers, increased potential for revitalization of the community surrounding Providence Park, and increased potential to realize the City's goal of attracting new residents to live in the central city. It would benefit the Regional 2040 Vision by encouraging increased densities within the urban growth boundary and capitalizing on the region's investment in light rail.

G. BES generally does not allow construction of buildings over sewers but is willing to allow construction of a TOD over the TCS on the Property and allow associated encroachment upon the Easement for the purpose of constructing, occupying and maintaining the foundation and structures through, under and along the Property, in accordance with the terms of this agreement.

H. The parties entered into two separate but related intergovernmental agreements effective October 8, 2004 titled "Intergovernmental Agreement Between City of Portland and Tri-County Metropolitan Transportation District of Oregon for Indemnification Related to Structures Over Tanner Creek Sewer in the Butler Block" and "Intergovernmental Agreement Between City of Portland and Tri-County Metropolitan Transportation District of Oregon for Establishment of Structures Over Tanner Creek Sewer in the Butler Block" (collectively, "the Former IGAs"). The parties have agreed to terminate the Former IGAs and replace them with this Agreement and to replace the Easement with a new, permanent, sewer easement.

### **Agreement**

NOW, THEREFORE, the parties agree as follows:

1. Termination of the Former IGAs. The Former IGAs are hereby terminated.
2. Binding Effect. This Agreement runs with the land and binds the parties and their heirs, administrators, representatives, successors, and assigns, and shall inure to the benefit of the parties and to their successors and assigns. All instances of the term "TriMet" in this Agreement apply equally to TriMet and to TriMet's heirs, administrators, representatives, successors, and assigns.
3. Rehabilitation, Relocation, or Replacement of the TCS. Prior to commencing pile support activities in connection with the construction of the TOD, and at no cost to BES, TriMet shall rehabilitate, relocate, or replace the TCS and access structures as directed by BES in writing. Installation of a composite structural liner system is an alternative that could meet this need. TriMet may not begin construction of the TOD until TriMet has, in the following sequence, (a) submitted for BES written approval the plans and specifications to rehabilitate, relocate, or replace the TCS; (b) obtained a public works permit from the City; and (c) obtained an approved City of Portland BES Public Sewer Improvement Permit. If the area over the TCS is redeveloped similar to current

conditions, with minor surface improvements such as shallow-rooted plantings, asphalt, surface vehicle parking, and pathways adding no significant load to the TCS, repair or replacement of the TCS may not be required. Such a proposal must be approved in writing by BES prior to the commencement of the work.

4. Use and Location of Pilings. TriMet shall pre-drill and install piles sufficient, in the determination of BES, to support all buildings located over the TCS. TriMet shall submit plans and specifications for pile pre-drilling and installation to BES and obtain BES's written approval before commencing such work. TriMet shall locate the TCS prior to commencing structural design of the pile supports using a cross-bore geophysical investigation or equivalent, as approved in writing by BES.

5. Review of Plans. TriMet shall submit for BES's written approval all building plans, geotech reports, structural calculations, cross-bore geophysical investigation results, and pile support layout documents. The City will not approve the plans until BES is satisfied that adequate care has been exercised in protecting the TCS from the building construction activities and permanent loads impacting the structural integrity of the TCS.

6. Inspections of the TCS.

- a. TriMet shall video-inspect the TCS, at no cost to BES, in accordance with the following schedule and provide copies of the resulting videos to BES:
  - i. Approximately ninety (90) days after completion of the work required by Paragraph 3 above;
  - ii. Within two (2) years after completion of the work required by Paragraph 3 above;
  - iii. Within thirty (30) days after substantial completion of the TOD; and
  - iv. Within seven (7) years after completion of the work required by Paragraph 3 above.
- b. If BES reasonably determines that the seven-year inspection reveals no cause for concern, BES will perform all future inspections of the TCS.
- c. If BES reasonably determines that the seven-year inspection reveals any cause for concern, TriMet will perform additional video or personnel-entry inspections as directed by BES at TriMet's cost.

7. Maintenance of the TCS. BES will maintain the TCS in accordance with its regular maintenance practices and procedures.

8. Damage to the TOD. TriMet assumes all risk of damage to the TOD resulting directly or indirectly from work on the TCS or failure of the TCS, to the extent such work or failure is caused by construction, operation, or maintenance of the TOD, or to the extent such work or failure is not the result of negligent or wrongful conduct by BES.

9. BES Right of Access. TriMet agrees that BES shall have the right to access the TCS from the Property for the purpose of maintaining, repairing, reconstructing, renewing, or replacing the TCS where it traverses the Property or adjacent parcels.

10. Damage to the TCS. TriMet shall reimburse BES for all costs incurred by the City resulting from damage to the TCS caused directly or indirectly by the existence, construction, operation, or maintenance of the TOD on the Property. TriMet shall be provided with an accounting of how the amount of reimbursement was calculated, and the Chief Engineer shall review the calculation with TriMet upon TriMet's request. If the amount of reimbursement is undisputed, TriMet shall make reimbursement to BES within thirty (30) days following receipt of a proper invoice from BES. In the event of a dispute as to the calculation of the reimbursement amount, the parties shall resolve such dispute in accordance with the procedure set forth in Paragraph 17.i. below, and TriMet shall not be required to pay any disputed amount pending resolution of the dispute.

11. Payment of Extra Costs. TriMet shall reimburse BES for all Extra Costs BES pays for repair and maintenance of the TCS and access structures due to the existence of the TOD on the Property. The phrase "Extra Costs" means the difference between what repair and maintenance actually cost and what repair and maintenance would have cost had there been no TOD located on the Property. The Chief Engineer of BES shall determine the Extra Costs, which shall be the obligation of TriMet. TriMet shall be provided with an accounting of how the Extra Costs were calculated, and the Chief Engineer shall review the calculation with TriMet upon TriMet's request. If the Extra Costs are undisputed, TriMet shall pay them within thirty (30) days following receipt of a proper invoice. In the event of a dispute as to the imposition or calculation of Extra Costs, the parties shall resolve such dispute in accordance with the procedure set forth in Paragraph 17.i below, and TriMet shall not be required to pay any disputed Extra Costs pending resolution of the dispute.

12. Precautionary Measures. TriMet shall identify any precautionary measures that are reasonably necessary to protect the TOD during TCS maintenance, repair, reconstruction, renewal or replacement. If BES performs these measures, they will be included within the meaning of the phrase "Extra Costs," as that phrase is defined above. Restoration of the TOD to its original condition following such work is also regarded as an "Extra Cost" within the meaning of this phrase.

13. General Indemnity. To the extent permitted by the Oregon Constitution and within the limits of the Oregon Tort Claims Act, codified at ORS 30.260 through 30.300, TriMet shall hold the City of Portland, the City Engineer, and each and all of the officers, employees and agents of the City of Portland free and harmless from all claims for injury or damage to persons or property which may be occasioned by or arise from the presence

of sewerage facilities on the Property, including claims of third parties, except that TriMet shall not be responsible for, and this indemnity shall not cover, any claims for injury or damage to persons or property to the extent they arise from negligent or wrongful acts by the City, its officers, employees or agents.

To the extent permitted by the Oregon Constitution and within the limits of the Oregon Tort Claims Act, codified at ORS 30.260 through 30.300, the City of Portland shall hold TriMet and its directors, officers, employees and agents free and harmless from all claims for injury or damage to persons or property which may be occasioned by or arise from the presence of sewerage facilities on the Property, including claims of third parties, to the extent such claims for injury or damage to persons or property arise from negligent or wrongful acts by the City, its officers, employees or agents.

14. Hazardous Materials / Environmental Contamination. BES has investigated and has not discovered the presence of any hazardous materials (as that term is defined under Oregon law) on the Property, or any potential risks of environmental contamination associated with construction of the TOD over the TCS on the Property. If any hazardous materials are found to exist on the Property, TriMet agrees to assume all risks associated with construction of the TOD arising from the presence of such hazardous materials. TriMet shall not assert that the City's approval for construction of the TOD constitutes negligence. To the extent permitted by the Oregon Constitution and within the limits of the Oregon Tort Claims Act, codified at ORS 30.260 through 30.300, TriMet shall indemnify and defend the City from all claims for injury or damage to persons, property or the environment which may be occasioned by or arise from TriMet's activities on the Property, specifically including any environmental liabilities arising from activities of TriMet, its officers, employees, contractors and agents, except to the extent such claims for injury or damage to persons, property or the environment arise from negligent or wrongful acts by the City or its officers, employees or agents.

15. TriMet's Waiver of Direct and Consequential Damages. TriMet waives any claims for direct or consequential damages that may arise from damage to the TOD as a result of the City's sewer maintenance and repair operations, except for claims based on negligent or wrongful acts of the City or its officers, employees or agents.

16. Identification of Improvements, Automatic Termination. This Agreement is intended, in part, to allow for the construction of buildings on the Property. TriMet agrees that this Agreement shall be valid for the TOD only. If the TOD no longer exists, this Agreement will terminate, except that all obligations to indemnify and defend hereunder shall survive termination of this Agreement.

17. General Provisions.

a. Integration. This Agreement constitutes the entire agreement between the parties on the subject matter hereof, and supersedes all prior or contemporaneous written or oral understandings, representations or communications of every kind, including the

Former IGAs. No course of dealing between the parties and no usage of trade will be relevant to supplement any term used in this Agreement.

b. Term of Agreement. This Agreement is effective as of the last date of signature below and shall remain in effect until terminated or amended as provided herein.

c. Termination and Amendment. This Agreement may be terminated or amended by mutual written agreement of the parties.

d. Waiver and Amendment. No waiver of any portion of this Agreement and no amendment, modification or alteration of this Agreement shall be effective unless in writing and signed by the authorized representative of all parties. Acceptance or acquiescence in a course of performance rendered under this Agreement will not be relevant to determine the meaning of this Agreement and no waiver by a party of any right under this Agreement will prejudice the waiving party's exercise of the right in the future.

e. Interpretation of Agreement. This Agreement shall not be construed for or against any party by reason of the authorship or alleged authorship of any provision. The paragraph headings contained in this Agreement are for ease of reference only and shall not be used in constructing or interpreting this Agreement.

f. Sale or Assignment. The parties anticipate that TriMet will sell or otherwise transfer the Property to another party for development of the TOD. Before the consummation of such sale or transfer of the Property, TriMet will grant the City a new, 20-foot-wide, permanent, sewer easement as described in Exhibit B and the City will quitclaim its interest in the Easement. Also, in the event of such sale or transfer of the Property, TriMet may assign its rights and obligations under this Agreement to such party, except TriMet's obligation to grant the City a new easement, and all such rights and obligations shall become the rights and obligations of such party and not of TriMet. The City hereby consents to such assignment. In the event TriMet fails to assign any obligations of this Agreement to another party, the City may enforce such obligations against both TriMet and TriMet's successors-in-interest. However, the City may not enforce against TriMet any obligation that TriMet has assigned to another party.

g. Severability/Survivability. If any of the provisions contained in this Agreement are held by a court of law or arbitrator to be illegal, invalid or unenforceable, the enforceability of the remaining provisions shall not be impaired. All provisions concerning indemnity survive the termination of this Agreement for any cause.

h. Laws and Regulations. The parties agree to abide by all applicable laws and regulations in carrying out this Agreement.

i. Dispute Resolution. BES and TriMet shall negotiate in good faith to resolve any dispute arising out of this Agreement. If the parties are not able to resolve

the dispute within ninety (90) days after it has arisen, they shall submit the matter to mediation, and TriMet and BES shall each pay their own costs and share equally in mediation fees and costs. In the event the dispute is not resolved in mediation, TriMet and BES shall submit the matter to binding arbitration. The decision of the arbitrator shall be final, binding and conclusive upon TriMet and BES and subject to appeal only as provided by Oregon law. TriMet and BES shall each pay their own costs, but will share equally in fees and costs of the arbitration and/or arbitrator service

j. Notice. Routine correspondence and communication regarding the Project shall be given as follows:

TriMet:  
Real Property Director  
TriMet  
1800 SW First Ave, Ste. 300  
Portland, OR 97201

BES:  
Chief Engineer  
1120 SW 4<sup>th</sup> Avenue  
Room 1000  
Portland, OR 97204

Either party may designate a different representative for notice purposes by giving written notification to the other party as provided in this paragraph.

k. Choice of Law; Venue. This Agreement, and all rights, obligations and disputes arising out of this Agreement shall be governed by Oregon law. Venue for all mediation and arbitration shall be in Multnomah County, Oregon.

l. No Third-Party Beneficiary. Except as set forth herein, this Agreement is between the Parties and creates no third-party beneficiaries.

*The remainder of this page is intentionally blank.*

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year hereinafter written.

CITY OF PORTLAND BUREAU OF ENVIRONMENTAL SERVICES


Approved as to Form:

By: \_\_\_\_\_  
Title: \_\_\_\_\_

\_\_\_\_\_  
City Attorney

TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON

Approved as to Form:

By:   
Title: Exec. Dir. Cap. Proj.


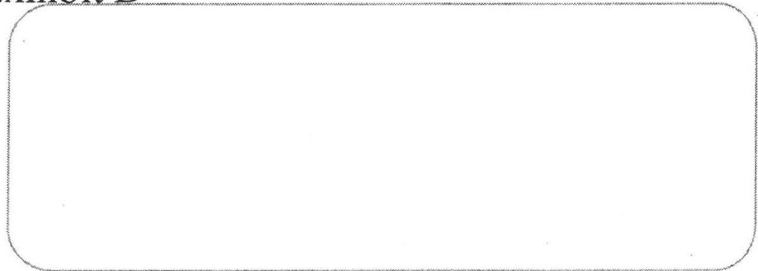
  
Deputy General Counsel, TriMet



Exhibit B

Grantor's Name & Address:

Tri-County Metropolitan Transportation  
District of Oregon (TriMet)  
1800 SW 1<sup>st</sup> Ave, Suite 300  
Portland, OR 97204



SEWER EASEMENT

KNOW ALL PERSONS BY THESE PRESENTS, that TriMet (Grantor), in consideration of the sum of One and no/100 Dollars (\$1.00), and other good and valuable consideration, to it paid by the City of Portland, a municipal corporation of the State of Oregon (Grantee), does hereby grant unto said City of Portland a perpetual easement for the purpose of laying down, constructing, reconstructing, operating, inspecting, monitoring and maintaining a sewer or sewers, and appurtenances, through, under, over and along the following described parcel (Easement Area):

A strip of land over and across a portion of Lots 3 and 6, Fractional Block 329, CITY OF PORTLAND, City of Portland, County of Multnomah and State of Oregon as depicted on Exhibit A attached hereto and by this reference made a part hereof.

Contains \* square feet, more or less.

IT IS UNDERSTOOD and agreed that:

- A. No other utilities, buildings, facilities, easements, material storage, grade change or tree planting will be allowed within the easement boundaries without prior written consent of the Director of the Bureau of Environmental Services. Landscaping which by its nature is shallow rooted and may be easily removed to permit access to the sewer lines and facilities authorized by this easement shall not require consent.
- B. This easement includes the right of access for construction, inspection, maintenance or other sewerage system activities.

R/W #\*

BES #\*

\* TL \*

After Recording Return to: \_\_\_\_\_

\*, City of Portland \_\_\_\_\_

1120 SW 5th Avenue, Suite 800 \_\_\_\_\_

Portland, OR 97204 \_\_\_\_\_

Tax Statement shall be sent to: No Change \_\_\_\_\_

- C. This easement does not grant or convey to Grantee any right or title to the surface of the soil along the route of said sewer except for the purpose of laying down, constructing, reconstructing, operating, inspecting and maintaining the same.
- D. Grantor reserves all other rights not conveyed herein, but will not exercise said rights in any manner that would be inconsistent or interfere with or materially affect rights herein granted.
- E. This easement shall bind the heirs and assigns of Grantor and shall inure to the benefit of the successors in title of Grantee.
- F. Grantor represents and warrants that they have the authority to grant this easement, that the Easement Area is free from all liens and encumbrances that would materially affect the easement grant, and that they will defend the same to Grantee against the lawful claims and demands of all persons whomsoever.
- G. Grantor agrees that the consideration paid by Grantee is accepted as just compensation for the property or property rights conveyed, which includes damage to the property remainder, if any, resulting from the acquisition or use of said property or property rights.
- H. Grantor represents that to the best of their knowledge, after appropriate inquiry under the circumstances, the subject property is in compliance with all local, State and Federal environmental laws and regulations.
- I. Grantor represents that they have disclosed all knowledge of any release of hazardous substances onto or from the property, and disclosed any known report, investigation, survey or environmental assessment regarding the Easement Area. "Release" and "hazardous substance" shall have the meaning as defined under Oregon law.
- J. Grantor warrants that there are no underground storage tanks, as defined under Oregon law, presently on or under the Easement Area.
- K. Grantee, by accepting this easement, is not accepting liability for any preexisting release of hazardous substances onto or from the Easement Area, and Grantor\* is not attempting to convey any such liability.

TO HAVE AND TO HOLD, the above described and granted premises unto said City of Portland for the uses and purposes aforesaid forever.

IN WITNESS WHEREOF, Tri-County Metropolitan District of Oregon has caused these presents to be signed by its Director of Real Property, this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

TRI-COUNTY METROPOLITAN TRANSPORTATION  
DISTRICT OF OREGON

By: \_\_\_\_\_  
Lance Erz, Director of Real Property

State of OREGON

County of MULTNOMAH

This instrument was acknowledged before me on \_\_\_\_\_, 20\_\_\_\_, by Lance Erz, as Director of Real Property of the Tri-County Metropolitan Transportation District of Oregon, a mass transit district organized under the laws of the State of Oregon.

\_\_\_\_\_  
Notary Public for OREGON  
My Commission expires \_\_\_\_\_

APPROVED AS TO FORM:

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City Attorney

APPROVED:

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Bureau of Environmental Services Director  
or designee

SEWER EASEMENT