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## LEGAL MEMORANDUM

TO: Kenny Asher, Community Development Director

FROM: Tim Ramis, City Attorney

CC: Marty Wine, Shelby Rihala, Angela Johnson

DATE: June 28, 2016

RE: **Answers Regarding Code Issues Related to High Capacity Transit**  
File No. 50014-74648

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### I. Summary

This memorandum addresses the question of whether amendments of the City's comprehensive plan or land use regulation would be needed to accommodate various possible alignments of a high capacity transit system. We conclude that the land use regulations would need to be amended to allow: 1) siting of a maintenance facility in certain industrial zones; and 2) crossing of significant wetlands by rail lines. Any of the alignments which directly serve Downtown Tigard cross regulated significant wetlands. The Code requires a comprehensive plan amendment to allow the alignment to cross a significant wetland. We therefore conclude that the project would require a comprehensive plan amendment or zoning text amendment.

The project includes a maintenance facility that qualifies as a Railroad Yard under the development code. Siting in some industrial zones will require amendment of the text of the zone.

### II. Analysis of Components of Light Rail Project

This memorandum summarizes our findings regarding the zoning status of each of the components of the proposed project. The specific question for each use is whether an amendment of the land use regulation is necessary to accommodate the proposed project.

Before determining if a use can be allowed in a city zoning district the use classification of the proposal must be determined. Any high capacity transit project would contain several different components which raise issues of proper use classification.

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## 1. Alignment Corridor

As an initial matter the alignments for any high capacity transit option appears to fall squarely within the characteristics of the category called Transportation/Utility Corridors:

. . . regional corridors in public or private ownership, including easements, dedicated to rail lines; multi-use trails; above-grade or underground power or communication lines; water, sewer and storm sewer lines; or similar services.

An issue that could be raised is found in the exceptions description which states that, "Transportation/Utility Corridors contained within motor vehicle rights of way are not included" in the category. If transportation corridors with rights of way are not within the use category, how are they treated under the code? The answer is that transportation improvements, like streets or utility lines located in street rights of way, are not regulated as a use requiring use approval by the zoning authority. For example, the City does not require a land use application approval before an electrical utility or a sewer district can place lines in a street right of way. These are not treated as separate land uses for zoning regulation purposes. The exclusion from the category, as interpreted in practice, allows certain necessary components of urban infrastructure to be constructed without a discretionary review of these components as a use. As is shown by the City's Sensitive Lands regulations, the construction impacts of the use are regulated, but the use is not.

The alternative interpretation would be that infrastructure falling within the exception language is not within a recognized use category and therefore not permitted. This would lead to absurd results. For example, on private lands, roads and associated water, sewer and power lines would be allowed, but in public rights of way they would not be allowed.

The better interpretation is that the exception makes clear that uses associated with Transportation/Utility Corridors, and located within public rights of way, are not a use category subject to separate use approval criteria.

### **Maintenance Yard.**

The envisioned maintenance facility would be used for overnight storage of trains or buses, cleaning and minor repairs. Major repairs will be done at another facility. The use falls under the definition of Railroad Yard:

. . . areas that contain multiple railroad tracks used for railcar switching, assembly of trains, **and** the transshipment of goods from other transportation modes to or from trains. (Emphasis added).

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This use is permitted in the I-H zone but not in the I-P and I-L zones. Location in those zones would require amendment of Table 18.530.1 which determines the uses allowed in those zones.

## **2. Transit Station.**

The code treats this use as Basic Utility. Basic Utilities are "infrastructure services that need to be located in or near where service is provided." The list of examples expressly includes "transit stations" and the description of characteristics states that the service provided may be public or private." The specific reference to "transit station" as a Basic Utility is persuasive. We therefore recommend that the use be processed under the conditional use procedures applicable to Basic Utilities.

The Basic Utility use is a permitted conditional use in all residential, commercial, park and industrial zones, except the I-H zone where it is outright permitted. The amendment of the Code is not necessary to accommodate siting of a transit station.

## **3. Park and Ride Facility.**

Associated with any high capacity transit project would be one or more park and ride locations. These facilities serve the transit project, providing parking for riders. They would not be constructed but for the transit projects and are typically constructed and funded along with that transit project.

Park and ride facilities are classified as "non-accessory parking" under Section 18.130.060k. This use is allowed as a permitted use or conditional use in most city zoning districts. It is prohibited only in the Park and Recreation zone, MUR zone and some residential zones (R-1, R-2, R-3.5, R-4.5, R-25 and R-40). No park and ride is proposed in those zones and therefore amendment of the Code is not necessary to accommodate this use.

## **4. Sensitive Lands Permit for Rail Lines**

If the location of the alignment triggers an application for a Sensitive Lands permit, there are situations where a rail line may not be permitted under the existing code.

Under Section 18.775.070.E.2 the alignment cannot be permitted if it is within a wetland area designated "significant" on the comprehensive plan floodplain and wetland map. Neither can it be permitted if it is within the vegetative corridor established by "Table 3.1 Vegetative Corridor Widths" and "Appendix C: Natural Resources Assessments" of the Clean Water Services "Design and Construction Standards" for such a wetland.

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Reviews of the alignment options by Tigard staff and TriMet staff have concluded that the alignments which serve Downtown Tigard are within mapped significant wetlands. A comprehensive plan amendment would therefore be required.

An amendment of the code or a Comprehensive Plan Amendment is required because of the location of at least five significant wetlands in the path of several of the proposed alignments. Three of the alignments pass close to or through five different significant wetlands. If an alignment requires any permanent or temporary impact to one of these wetlands (including the buffer), it will lead to a requirement for a Comprehensive Plan Amendment and Zone Change.

### **5. Housing Density**

No increase in housing density is proposed in order to construct or accommodate the light rail project.

### **III. Conclusion.**

The project cannot be constructed without comprehensive plan and code amendments. Because the alignments serving Downtown Tigard require crossing of significant wetlands, Section 18.775.070.E.2 requires amendment of the comprehensive plan. And, clarifying the use category for the maintenance yard will require a code amendment.