

BEFORE THE BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

RESOLUTION NO. 2011-012

Approving an Intergovernmental Agreement with the City of Portland to Fund Construction of the Sellwood Bridge.

The Multnomah County Board of Commissioners Finds:

- a. Securing funding for the Sellwood Bridge Project ("Project") is a high priority for the City, the County and the region.
- b. The County has adopted a vehicle registration fee committed to the Project pursuant to ORS 801.041.
- c. The 2009 Oregon Legislature approved House Bill 2001 ("HB 2001"), "*Jobs and Transportation Act of 2009*" which is expected to provide increased revenues to the City and the County for transportation infrastructure. The City desires to allocate certain funds from its HB 2001 revenues for the design and construction of the Project.
- d. The County has assumed responsibility for providing or securing the additional funding necessary to construct the Project.
- e. The City and the County want to ensure that the Sellwood Bridge Project is a vital, well integrated part of our community's transportation system and ensure high quality access to pedestrians, bicycles, buses, streetcars, and motor vehicles.
- f. The City and the County have negotiated the terms of an Intergovernmental Agreement for Funding of the Sellwood Bridge Project, a copy of which is attached to this Resolution. It is in the best interests of the County to approve the terms of the attached intergovernmental agreement.

The Multnomah County Board of Commissioners Resolves:

1. The Board approves the attached Intergovernmental Agreement for Funding of the Sellwood Bridge Project.
2. The Chair is authorized to execute the agreement substantially in the form attached.

ADOPTED this 3rd day of February, 2011.



BOARD OF COUNTY COMMISSIONERS
FOR MULTNOMAH COUNTY, OREGON

Jeff Cogen, Chair

REVIEWED: HENRY H. LAZENBY, JR., COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

By _____
John S. Thomas, Deputy County Attorney

SUBMITTED BY: Jeff Cogen, County Chair

INTERGOVERNMENTAL AGREEMENT FOR FUNDING OF THE SELLWOOD BRIDGE PROJECT

This Agreement is between the City of Portland (“City”) and Multnomah County (“County”) hereinafter referred to as the “Agreement.” The County and the City may be collectively referred to as the “Parties.”

I. RECITALS

- A. Securing funding for the Sellwood Bridge Project is a high priority for the City, the County and the region. The Sellwood Bridge Project (the “Project”) includes the demolition of and replacement of the existing Sellwood Bridge largely on the existing alignment, a new west side interchange and improvements to SE Tacoma St. The new bridge will connect with OR 43 on the west side via a signalized intersection elevated above existing OR 43 with ramps from the signalized intersection that will provide direct access to OR 43. On the east side, the new bridge will connect with SE Tacoma Street. The intersection at SE 6th Avenue and SE Tacoma Street will be signalized with a bicyclist/pedestrian-activated signal to provide a safer crossing.
- B. The 2009 Oregon Legislature approved House Bill 2001 (“HB 2001”), “*Jobs and Transportation Act of 2009*” which is expected to provide increased revenues to the City and the County for transportation infrastructure.
- C. The City desires to allocate certain funds from its HB 2001 revenues for the design and construction of a new Sellwood Bridge Project.
- D. The County has adopted a vehicle registration fee committed to the Project pursuant to ORS 801.041 and has assumed responsibility for providing or securing the additional funding necessary to construct the Project.
- E. The City and the County want to ensure that the Sellwood Bridge Project is a vital, well integrated part of our community’s transportation system and ensure high quality access to pedestrians, bicycles, buses, streetcars, and motor vehicles.

II. AGREEMENT

- A. The City and County agree that a portion of the funds received by the City under HB 2001 shall be used by the City to finance a contribution to the Project. Subject to the limitation in Section II.G, the amount to be contributed to the Project by the City shall not exceed \$100 million, plus interest and issuance costs of bonds issued by the City for the Project.
- B. The City expects to fund its obligations under this Agreement through the issuance of one or more series of City limited tax revenue bonds.

- C. The City and County agree that the estimated cost of the Project is \$330 million and that subject to the cost-saving provisions of Section II.G, the City shall contribute \$100 million toward the estimated \$330 million cost. The County agrees to construct the Project and to be responsible for providing or otherwise securing all other funding for construction of the Project. Project savings shall not reduce the County's obligation to fund any Project shortfalls. The City funds shall be paid as follows:
1. Unless a later date is subsequently agreed to by the Parties, \$70 million shall be deposited to the escrow account described in Section II.D on or before December 31, 2012.
 2. The Parties agree to confer on or about July 1, 2014, and use best efforts to agree whether total Project costs are expected to be less than \$330 million (taking into account projected cost savings and projected cost increases). If the parties agree that the projected total Project costs will be less than \$330 million dollars and that therefore a sum less than \$30 million is required to be deposited in escrow, then unless a later date is agreed to by the Parties, the sum agreed to by the parties shall be deposited to the escrow account described in Section II.D on or before September 1, 2014. Any acceptance by the County pursuant to this Subsection II.C.2. of a deposit of less than \$30 million shall not relieve the City from its obligation to pay the amounts owed by the City to the County under the terms of this Agreement if it is later determined that the amount paid under this Section II.C was insufficient to meet the City's obligation. If the parties cannot agree on the amount to be deposited under this Section by July 15, 2014, then, unless a later date is agreed to by the Parties, the City shall deposit \$30 million to the escrow account on September 1, 2014 subject to the City's right to receive a refund pursuant to Section II.G. if there are cost savings.

The County shall maintain detailed accounting records of all amounts received from the City and the expenditure of such amounts on Project expenses. The County agrees to work in good faith with the City to allow the City to comply with all applicable arbitrage rebate requirements related to the City's bonds.

- D. Proceeds from the City's issuance of bonds for the Project in the amounts described in Section II.C shall be deposited into an escrow account established and held by a third-party escrow agent to be selected by the City. Costs of escrow shall be borne by the City. The City shall apply amounts in the escrow account only to pay the City's contribution to the Project that is described above in Section II.C, until that contribution is paid in full. Unless the parties agree to a different funding schedule, funds shall be disbursed from the escrow account based upon reimbursement requests provided to the City by the County or its agents. The reimbursement requests shall be submitted on the attached reimbursement form. Payments shall be made within 10 calendar days of receipt of the reimbursement request. Amounts in the escrow account shall be invested at the direction of the City. Interest earnings on the escrow account may be used by the City to reduce Project contributions or to pay debt service on bonds issued by the City to fund its Project contributions.

- E. As of the date of this Agreement, the expected funding sources for the Project are as follows:

Multnomah County	\$127,000,000
City of Portland	\$100,000,000
Federal	\$40,000,000
State of Oregon	\$30,000,000
Clackamas County	\$22,000,000
EIS Phase Carryforward	<u>\$11,000,000</u>
Total	<u>\$330,000,000</u>

- The County agrees that the City shall not be obligated to provide its contribution for the Project until the County has authorized bonds or other obligations to be issued based on revenue from the County's vehicle registration fee in an amount sufficient to fund the County's contribution to the Project. In addition, to the extent that any of the funding sources shown above are not legally committed at the time the City is to provide its initial contribution to the Project, the County shall provide the City with a funding plan showing how the County expects to fund any uncommitted amounts in the event those amounts are not realized.
- F. Both the City and the County are committing significant resources to the Project and both parties desire that the Project be designed and constructed in a cost-effective manner. The parties agree that the Senior Agency Staff (which includes staff representatives from the City, County and other jurisdictions) shall continue to meet to discuss Project design with a focus on cost savings. If there is a disagreement between the parties as to Project design or determination of cost savings, other than as to those matters in Sections II. H, I, J and K (unless the result is dictated by funding agreements with the federal government or the State of Oregon – in which case such agreements shall govern), the decision of the Public Stakeholder Committee on the issue shall be final and binding as between the parties.
- G. The City and County agree that the Project, including accommodation of a streetcar as provided in Sections II.H, II.I, and II.J is projected to cost \$330 million. If the final cost of the Project is less than \$330 million, the City and County agree that one half of the first \$40 million in Project cost savings shall accrue to the City in the form of a reduced contribution to the cost of the Project as provided in Section II.C.2. or as a refund to the City as provided in Section II.G.2. Cost savings beyond \$40 million shall be credited or refunded to the City pro rata based on its maximum \$100 million commitment to the Project budget of \$330 million. Upon completion of the Project and acceptance by the County and ODOT and City (for improvements that the City will own, operate and maintain) and after all costs associated with property acquisition, design, construction and management of the Project have been paid and all claims and other contract disputes have been resolved, County shall provide an accounting of all Project costs to the City. When the parties agree that the Project costs have been accurately accounted for:

1. If the City has contributed to the Project less than the amount the City is required by this agreement to contribute, the City shall pay the difference including interest to the County not later than two months after the County makes written demand on the City for that amount.
 2. If the City has contributed to the Project more than the amount the City is required by this agreement to contribute, the County shall refund the difference including interest to the City not later than two months after the City makes written demand on the County for that amount.
- H. The County shall provide as part of the Project, a preliminary trackwork design (vertical and horizontal profiles) sufficient to show that the Project can accommodate the future installation of streetcar improvements connecting the Portland to Lake Oswego line to Tacoma Street. The preliminary design shall include an overhead catenary system layout across the Sellwood Bridge. The design shall be sufficient to show the locations of the items in Sections II. I. below. The City shall provide written approval of the design which shall not be unreasonably withheld.
- I. The County shall as part of the Project construct and install the following:
1. Concrete blockouts on the bridge, approach structures, and interchange in sufficient width and depths to allow ease in construction of the future streetcar and trackway;
 2. Communications and systems conduits and junction boxes for the entire length of the bridge and approach structures; and,
 3. Street light pole foundations on the bridge and interchange structures sufficient to accommodate and support the future installation of streetcar overhead wires.
- J. The County shall design and construct the new Sellwood Bridge with 12-foot sidewalks and 6.5-foot bike lanes on each side, and shall ensure that the bridge is constructed in a manner that is structurally able to support its use by Tri-Met busses and streetcars.
- K. The County agrees that it will make no change to the design that would materially impact the requirements set forth in Sections II.H, I and J without the prior written consent of the City which shall not be unreasonably withheld. If the parties cannot agree whether changes proposed by the County would materially impact that requirements set forth in Sections II.H, I and J, the dispute shall be resolved in accordance with the dispute resolution provisions in Section III.J.
- L. If the City issues bonds pursuant to this agreement and pays all or part of the proceeds of such bonds to the County, and the County determines to terminate construction of the Project before it is completed, for a reason other than an act of God or nature, the County will refund all sums paid by the City to the County pursuant to this agreement with interest at the then current investment pool rate, or at such rate of interest that

fully reimburses the City for interest costs incurred and paid by the City on bonds it has issued for the Project, and shall further pay to the City all of the City's cost of issuing its bonds and actual and necessary costs related to defeasance of such bonds. For purposes of this agreement, "an act of God or nature" is defined as a natural phenomenon such as an earthquake or flood of such catastrophic proportions or intensity as would reasonably cause the County to terminate construction of the Project.

- M. The obligation of the County to make all payments to the City under this Agreement is a special obligation of the County that is payable solely from the County's gas tax revenues, motor vehicle license fees to the extent use of such fees is permitted by law to fund the County's obligation herein, proceeds of obligations issued by the County to finance the Project to the extent that the revenue which is pledged to repay such obligations is permitted by law to fund the County's obligations herein, unexpended transfers of amounts made by the City to the County under this Agreement, and any other lawfully available funds as agreed to by the parties. This Agreement shall not be construed as a debt or liability of the County that violates Article XI, Section 10 of the Oregon Constitution. The County's commitment of gas tax revenues to this obligation shall be subordinate to all existing contractual commitments of such revenues. The County's use of gas tax revenues shall not be in any manner restricted by the terms of this agreement until such time as the County terminated the construction of the Project before it is completed for a reason other than an act of God or nature. The County's payment obligations shall survive the termination of this Agreement.

III. GENERAL TERMS AND CONDITIONS

A. TERM

The effective date is the last date at which every party has signed this Agreement. The Agreement shall terminate upon completion of construction of the Project and satisfaction of the payment obligations of the parties under this agreement.

B. NOTICES AND COMMUNICATIONS

All communications between the parties regarding this Agreement shall be directed to the party's respective contact persons as indicated below:

County

Multnomah County Chair
501 SE Hawthorne Blvd.
Portland, OR 97214
(503) 988-3308

With a copy to:

Multnomah County Attorney
501 SE Hawthorne Blvd, Suite 500

City

Mayor City of Portland
1221 SW 4th Avenue, Suite 340
Portland, OR 97204
(503) 823-4120

Office of City Attorney
1221 SW 4th Ave., Rm 430

Portland, OR 97214
P: 503-988-3138
F: 503-988-3377

Portland, OR 97204
P: 503.823.4047
F: 503.823.3089

Official communications regarding this Agreement shall be in writing and delivered by mail or hand delivery to the above-named persons or their successors in office or designated representatives. Notice of appointment of a designated representative shall be made in writing. Designated representatives may be changed only upon written notice to the other party.

C. COUNTY CONTRACTS FOR THE PROJECT

1. County shall secure in all construction contracts for the Project the following agreements:
 - a. An agreement to name the City as a third party beneficiary.
 - b. An agreement to indemnify the City on the same terms the contractor agrees to indemnify the County.
 - c. An agreement to name the City as an additional insured on the contractor's insurance on the same terms the contractor agrees to name the County as additional insured. County shall furnish City with evidence of said insurance.

D. INDEMNIFICATION

1. Subject to the limitations of the Oregon Tort Claims Act and the Oregon Constitution, City agrees to indemnify, hold harmless and defend County, its officers, employees and agents from and against all claims, suits, actions, of whatsoever nature, damages or losses, and all expenses and costs incidental to the investigation and defense thereof including reasonable attorneys fees, resulting from or arising out of the acts of City, its officers, employees or agents under this Agreement.
2. Subject to the limitations of the Oregon Tort Claims Act and the Oregon Constitution, County agrees to indemnify, hold harmless and defend City, its officers, employees and agents from and against all claims, suits, actions, of whatsoever nature, damages or losses, and all expenses and costs incidental to the investigation and defense thereof including reasonable attorneys fees, resulting from or arising out of the acts of County, its officers, employees or agents under this Agreement.
3. The City and County indemnification obligations under this Section shall survive the termination of this Agreement.

E. ADHERENCE TO LAW

Each party shall comply with all federal, state and local laws and ordinances applicable to this agreement.

F. NON-DISCRIMINATION

Each party shall comply with all requirements of federal and state civil rights and rehabilitation statutes and local non-discrimination ordinances.

G. ACCESS TO RECORDS

Each party shall have access to the books, documents, and other records of the other which are related to this agreement for the purpose of examination, copying, and audit, unless otherwise limited by law.

H. ENTIRE AGREEMENT, WAIVER AND AMENDMENT

This Agreement constitutes the entire Agreement between the parties. There are no understandings, agreements or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, amendment or change of terms of this Agreement shall bind either party unless in writing and signed by all parties and unless all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of either party to enforce any provision of this Agreement shall not constitute a waiver by either party of that or any other provision.

I. EARLY TERMINATION

1. The Parties may mutually agree in writing to terminate this Agreement upon terms and conditions that they will prescribe at such time.
2. The City may terminate this Agreement if construction has not commenced within 10 years of the date of this Agreement.

J. DISPUTE RESOLUTION

1. To the extent permitted by law, with respect to any disagreement between the Parties, any dispute, or any instance where mutual agreement is not reached (a "Dispute"), shall be resolved through dispute resolution pursuant to this Section III. J. ("Dispute Resolution"). Dispute Resolution does not apply where a decision or approval is subject to the Party's sole discretion; however to the extent that such a decision is subject to a Party's "reasonable discretion," the reasonableness of the decision shall be subject to Dispute Resolution. The parties agree that time is of the essence in this Agreement and both parties agree to expedite to the greatest extent possible resolution of all Disputes.

2. In the event either Party believes a Dispute exists, it shall give notice to the other specifying in reasonable detail the nature of such Dispute. The Parties shall seek in good faith to negotiate a settlement of the Dispute, including, without limitation, by agreeing to reasonable requests of the other to hold a meeting to discuss such Dispute
3. If the Parties are unable to resolve their Dispute in accordance with Section III. J. 1., it is agreed that such dispute will be submitted to a mediator prior to any arbitration, and the parties hereby expressly agree that no claim or Dispute arising under the terms of this Agreement shall be resolved other than first through good faith negotiation, then through mediation and, only in the event said mediation efforts fail, through arbitration. Costs of mediation and arbitration shall be shared equally except that each party shall be responsible for payment of its own costs and expense, including without limitation, attorney fees.
4. **Mediation.** The parties shall exercise good faith efforts to select a mediator who shall be compensated equally by both parties. Mediation will be conducted in Portland, Oregon, unless both parties agree in writing otherwise. Both parties agree to exercise good faith efforts to resolve disputes covered by this Article through this mediation process. If a party requests mediation and the other party fails to respond within ten (10) days, or if the parties fail to agree on a mediator within ten (10) days, a mediator shall be appointed by the presiding judge of the Multnomah County Circuit Court upon the request of either party. The parties shall have any rights at law or in equity with respect to any dispute not covered by this Article.
5. **Arbitration.** Any Dispute not resolved through mediation shall be resolved through arbitration as provided herein. After mediation, either party may request arbitration and recommend an arbitrator to decide the matter. If party requests arbitration and the other party fails to respond within ten (10) days, or if the parties fail to agree on an arbitrator within ten (10) days, either party may apply to the presiding judge of the Multnomah County Circuit Court for appointment of an arbitrator. The arbitration shall proceed according to ORS 36.450 to 36.558, and the decision of the arbitrator shall have the effect therein provided. The arbitration shall take place in Portland, Oregon. Costs of the arbitration shall be shared equally by the parties, but each party shall pay its own attorney fees and other costs incurred in connection with the arbitration.
6. Unless otherwise agreed in writing, during the period that any mediation or arbitration is pending under this Agreement, the Parties shall continue to comply with all terms and provisions of this Agreement, which are not subject to the Dispute.

K. VENUE AND CHOICE OF LAW

This Agreement shall be governed by the laws of the State of Oregon. Venue shall be in Multnomah County, Oregon.

L. 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 Section headings contained in this Agreement are for ease of reference only and shall not be used in construing or interpreting this Agreement.

M. CAPTIONS

The titles to the sections of this Agreement are descriptive only and are not intended to change or influence the meaning of any section or to be part of this Agreement.

N. NONWAIVER

Failure by a Party to promptly enforce any regulation, remedy, or right of any kind under this Agreement shall not constitute a waiver of the same and such right or remedy may be asserted at any time after the Party becomes entitled to the benefit thereof notwithstanding delay in enforcement.

APPROVALS:

IN WITNESS WHEREOF, the duly authorized representatives of the parties have executed this Agreement as of the day and year first written above.

MULTNOMAH COUNTY, OREGON

By 
Jeff Cogen
Chair

Date: 02/03/11

Reviewed:
HENRY H. LAZENBY, COUNTY
ATTORNEY FOR MULTNOMAH COUNTY

By 

CITY OF PORTLAND

By _____
Sam Adams
Mayor

Date: _____

Approved as to form:

City Attorney

**SELLWOOD BRIDGE
REQUEST FOR REIMBURSEMENT FROM CITY BOND PROCEEDS**

1. Date of Reimbursement Request: _____
2. Name: _____
3. Phone: _____
4. Fax: _____
5. Email: _____
6. Amount of Reimbursement Requested: _____

County Certification

The undersigned certifies the following:

- The County has previously incurred project expenses for the Sellwood Bridge Project, for which it now requests reimbursement from bond proceeds held in escrow for the Project.
- This request is made in accordance with the provisions of the intergovernmental agreement between the City and the County relating to the funding of the Sellwood Bridge Project.
- Attached is a list of expenses incurred for which reimbursement is requested.

Signature: _____

Name: _____

Title: _____