CITY OF

PORTLAND, OREGON

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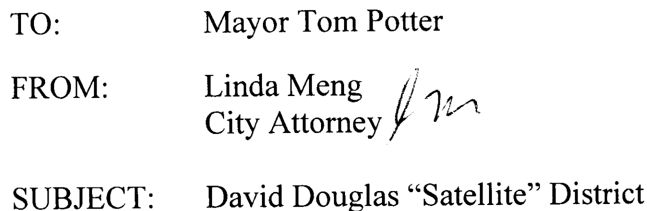
INTEROFFICE MEMORANDUM



TO: Mayor Tom Potter

FROM: Linda Meng
City Attorney

SUBJECT: David Douglas "Satellite" District

You have asked me to explain the issues that would be presented by going forward with the proposed addition of a satellite addition to the River District Urban Renewal Area without a statutory change.

It is my understanding that the project is to add to the River District Urban Renewal Area 5 to 8 acres of property owned by David Douglas School District, and only that site. The site was acquired by the School District to build a school, but the District does not have sufficient funds to undertake the construction. The property is not contaminated and could be developed if the District had the necessary funds. It is not desirable to include more than the actual school site in the urban renewal area because of the statutory cap on the total amount of land that may be included in urban renewal areas. Tax increment revenues would be used to fund or assist in funding construction of a school on the School District site. There is believed to be a connection between the overcrowding in the School District and River District development. The expectation is that the school will serve as a multi-functional community space, with additional recreational and community space included in the school facility. If those facts are incorrect, or if the project changes, some of the issues may be evaluated differently.

Let me preface discussion of the legal issues by noting that most of these issues do not have any definitive precedent. The primary tools for evaluating the proposal are the state constitution and ORS Chapter 457, the urban renewal statutes. There is little case law interpreting the statutes. The strength of the amended plan in the face of a challenge would depend to some extent on the strength of the findings made by PDC and the Council to support inclusion of the area in the River District Plan.

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Satellite Districts

"Urban renewal area" is defined as "a blighted area included in an urban renewal plan or an area in an urban renewal plan under ORS 457.160 [regarding disaster areas]." ORS 457. 010(14). There is nothing in the urban renewal statute that explicitly requires that an urban renewal area be contiguous. It is apparently a common practice to "cherry stem" areas together as part of one district. By that I understand the practice to be inclusion of a narrow strip, along a roadway, for instance, between areas of the urban renewal district.

There is some suggestion in the statutes that the areas included need not be contiguous. ORS 457.085 requires that an urban renewal plan include "[A] map and legal description of the urban renewal *areas* of the plan." In addition, the report that accompanies an urban renewal plan is required to contain "Reasons for selection of *each urban renewal area* in the plan." ORS 457.085(3)(b). These statutory provisions support the idea that there could be more than one "area" in an urban renewal plan. Moreover, there is nothing explicit that requires that those areas must be physically connected, by a "cherry stem" or otherwise.

Although we recommended a statutory amendment to take away any doubt on this issue, the fact that the area would be non-contiguous is not likely to be a serious impediment to proceeding.

Blight

More uncertainty exists with respect to whether the school site must be found to be blighted and, if so, whether it comes within the statutory definition. As noted above, "urban renewal area" means a "*blighted area* included in an urban renewal plan." "Blighted area" is broadly defined. It includes conditions that are generally understood as blight, such as buildings that are unfit or unsafe to occupy, as well as conditions such as susceptibility to flooding, deterioration or disuse of property due to faulty planning, and the existence of inadequate streets, open spaces and utilities. ORS 457.010(1).

We recommended that the definition of blight be amended to encompass the school site under the situation presented here because the school site – the only area to be added – does not fit easily within the statutory definition of blight. While it is probably true as a practical matter that not every square foot of an urban renewal area must individually be blighted, the addition to an existing plan of a single non-contiguous developable parcel of land presents a harder question. Although I do not have a great deal of information regarding the David Douglas School District, I assume that there are conditions within at least some parts of the District that would come

within the definition of blight. If the school site were part of a larger area to be added to the urban renewal plan and that larger area fell within the definition of blight, the inclusion of the school site would be unlikely to disqualify the area. However, if the intention is to add *only* the proposed school site, I have not been able to find anything in the definition of blight that would encompass a piece of bare land that is suitable for development except for the financial condition of its owner.

It has been suggested that if there is a sufficient nexus between the added area and the "parent" urban renewal area, there would be no necessity for a finding of blight for the new non-contiguous area. This might be a stronger argument if the non-contiguous area were included as a part of the original plan and a nexus were established. However, in the situation where a new area is being added to an existing district, I believe the argument is substantially weakened. Moreover, it is an argument that does not have an explicit foundation in the statute.

In addition, there was a suggestion that the school site could be found to be blighted because "inadequate or improper facilities" is one part of the definition of blight. I believe it would be difficult to argue that the school site, by itself, has "inadequate or improper facilities." In addition, that phrase is taken from the beginning of the definition, which states:

> "Blighted areas" means areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community."

The statute goes on to require that a blighted area is characterized by certain specified conditions. None of those conditions are applicable to the school site by itself. It may be that the David Douglas School District as a whole suffers from "inadequate or improper facilities," but it would be hard to say that description applies to the single site.

Again, there may be facts that I am unaware of that would support an argument that the site itself is blighted.

Use of Urban Renewal Revenues to Fund Public Facilities

In a memorandum written in conjunction with drafting the City's proposed legislation on this issue, Legislative Counsel suggested that the proposed amendments may be subject to legal challenge because "it is not beyond dispute whether school development projects or other public works projects qualify as urban renewal projects for which tax increment financing can be used." I do not believe there is any substantial basis for this suggestion.

Article IX, Section 1c provides:

> The Legislative Assembly may provide that the ad valorem taxes levied by any taxing unit, in which is located all or part of an area included in a redevelopment or urban renewal project, may be divided so that the taxes levied against any increase in the assessed value, as defined by law, of property in such area obtaining after the effective date of the ordinance or resolution approving the redevelopment or urban renewal plan for such area, shall be used to pay any indebtedness incurred for the redevelopment or urban renewal project. The legislature may enact such laws as may be necessary to carry out the purposes of this section.

This constitutional provision gives the Legislature broad authority to define urban renewal. It specifically delegates to the Legislature the authority to provide for dividing the taxes to support urban renewal activities and allows the Legislature to "enact such laws as may be necessary to carry out the purposes of this section." The history of urban renewal shows that the types of projects that have been authorized have changed over time. See Tashman History of Urban Renewal. http://www.orurbanrenewal.org/Resources/tabid/4074/Default.aspx. The Legislature has provided in the current statute for development of public facilities. ORS 457.085(2)(j) requires that an urban renewal project "which includes a public building [include] an explanation of how the building serves or benefits the urban renewal area."

Even if urban renewal had been static, it is clear that urban renewal funds have been used for public works projects from the beginning of urban renewal in Oregon. Article IX, Section 1c was adopted by voters in November of 1960. The Keller Fountain as well as parks, streets, sidewalks and pedestrian ways were included in 1960 in the City of Portland's South Auditorium urban renewal area – the first urban renewal area created by the Portland Development Commission and the City of Portland. Throughout its history, urban renewal development has included public facilities.

Public facilities have been included in urban renewal plans all over the state. These include parks, infrastructure, transportation facilities and numerous other public buildings such as the Canby Fire Station, a Lincoln City Community Center and Fitness Center, Wilsonville's City Hall and High School improvements, White City's Family Center, Library and Fire District Training Facility and the Clackamas Fire Station improvements, and the Clackamas Town Center District's funding of Oregon Institute of Technology/Clackamas Community College Facilities, two fire stations, a Regional Swim Center and a Law Enforcement Training Facility. See Evaluation of Seven Urban Renewal Plans by AORA, April, 2007. http://www.orurbanrenewal.org/Resources/tabid/4074/Default.aspx.

Charter Authority to Build Schools

In addition to the issues arising under the urban renewal statute, it is not without question that the City can spend its funds to construct schools. We recommended an addition to the urban renewal statute that specifically authorized spending tax increment funds on schools because the City Charter gives the City authority to exercise any power granted by the Charter *or by statute*. Sections 2-104; 2-105. Although the City has broad powers, it is not clear that those powers include funding core public school functions. Section 1-102 of the Charter gives the City, within its corporate limits, "authority to perform all public and private services, including those of an educational or recreational character as well as others, with all governmental powers *except such as are expressly conferred by law upon other public corporations within such limits* . . . ."

Our Office has been asked many times whether the City can fund public schools. Our opinion has been, and remains, that there is some doubt whether our Charter allows funding of core school functions. Our agreements with all of the school districts have required that the districts spend the funds provided by the City on things the City is authorized to do. The early agreements contained a list of activities that could be funded. The later agreements are more general, but continue to require that moneys received from the City pay for activities the City is authorized to fund. Core school functions such as teachers, books and classrooms have been considered to be at most risk.

Although there is no question that the City can fund construction of parks and recreation facilities and community centers, there remains a question whether it can fund construction of school classrooms. Depending on what the actual plan is for the David Douglas School District, this could present a greater or lesser concern. We proposed the statutory amendment to remove any doubt about the City's authority.

Measure 5 Categorization

Article XI, Section 11b of the Oregon Constitution (Measure 5) requires that property taxes be categorized according to the use for which they are imposed. There is a limit of $5 per thousand of real market value for taxes imposed to fund schools, and a limit of $10 per thousand of real market value for taxes imposed to fund government functions other than schools. Depending on how it is done, use of urban renewal funds to construct a school may raise an issue of categorization of funds under Measure 5. The issue is complex and would be difficult to analyze until the particulars of the transaction are known.

Urban renewal funds include the incremental taxes from all of the overlapping jurisdictions. Those include taxes that would otherwise go to the city, the county, the Port and the school districts. A challenge brought to the categorization of urban renewal funds in the

Shilo Inn case resulted in a statute that now requires that all urban renewal funds are categorized as general (non-school) government. If urban renewal funds were specifically raised in order to fund school construction, it is possible that the Constitution would require that those funds be categorized as school funds, rather than general government funds, under Measure 5.

The result of that categorization, if it happened, is unclear. Measure 5 categorization is done on a property-by-property basis. That is, the assessor looks at the taxes that are assessed on each property to determine whether the $5 or $10 limits are exceeded. If the taxes on a property exceed the cap, taxes are compressed to come within the limit. If the satellite area were added to the River District Urban Renewal Area, the main part of the District would be within the Portland Public School District and the school site to be funded would be within the David Douglas School District. I do not know if either School District is close to its Measure 5 limit and, therefore, whether compression would be an issue. In addition, the statutory school funding formula makes the impact of such a categorization further complicated. It is possible, however, that Portland Public Schools would be concerned that tax revenues raised from properties within its district – and counted against the $5 cap on those properties – would go to fund school construction in another school district. I cannot tell at this time what the level of risk would be.

These are the issues I am aware of at this time. As noted above, if my understanding of the facts is incorrect or if the particulars of the project were to change, the legal analysis might require revision.

Please let know if you have further questions regarding this matter.

LM:ks