



DAN JOHNSON
DIRECTOR

DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
DEVELOPMENT SERVICES BUILDING
150 BEAVERCREEK ROAD OREGON CITY, OR 97045

February 24, 2022

Board of County Commissioners
Clackamas County

Members of the Board:

**Indemnity Agreement Related to Vacation of a
Portion of SE 79th Avenue**

Purpose/Outcomes	Acceptance of an agreement protecting the County and Water Environment Services from future claims or damages related to the vacation of a portion of SE 79 th Avenue and infrastructure existing in the affected area.
Dollar Amount and Fiscal Impact	N/A
Funding Source	N/A
Duration	Permanent
Previous Board Action	-Board of County Commissioners approved the vacation of a portion of SE 79 th Avenue on February 3, 2022. -Discussion item at issues February 22, 2022
Strategic Plan Alignment	Build public trust through good government.
Counsel Review	January 31, 2022 (NB)
Procurement Review	1. <i>Was the item processed through Procurement?</i> yes <input type="checkbox"/> no <input checked="" type="checkbox"/> 2. <i>If no, provide brief explanation:</i> The item is related to acceptance of an Indemnity Agreement and does not involve any procurement activities.
Contact Person	Nate Boderman, Assistant County Counsel; 503-655-8364
Contract No.	N/A

BACKGROUND:

Recently, the Board of County Commissioners approved the vacation of a portion of SE 79th Avenue. Within the portion of right of way that the County vacated is infrastructure owned, maintained and operated by Water Environment Services.

In the Vacation Order releasing the County's interest in the portion of SE 79th Avenue at issue, the County reserved a portion of vacated right of way as a perpetual easement for the benefit of public utilities and Water Environment Services, for the purpose of accessing, maintaining, installing, and replacing any of public utility facilities existing within the reserved easement area. As additional protection, the adjacent property owner has has agreed to indemnify and hold

harmless the County and Water Environment Services in the event a dispute were to arise related to the right of utilities or Water Environment Services to be able to own, maintain or operate utility facilities in the reserved easement area.

RECOMMENDATION:

Staff respectfully requests that the BCC accept and execute the attached Indemnity Agreement on behalf of the County.

Respectfully submitted,

Nate Boderman

Nate Boderman
Assistant County Counsel

Attachments:
Indemnity Agreement
Materials from 79th Ave. Vacation

After recording return to:
Schwabe, Williamson & Wyatt, PC
Joseph O. Gaon
1211 SW Fifth Avenue, Suite 1900
Portland, OR 97204

INDEMNITY AGREEMENT

This Indemnification Agreement (this "Agreement") is made this 21st day of January, 2022, by Eastbank Development, LLC, an Oregon limited liability company ("Indemnitor"), for the benefit and protection of Clackamas County, Oregon, a municipal corporation (the "County") and Water Environment Services, an intergovernmental entity formed pursuant to Oregon Revised Statutes Chapter 190 ("WES").

Recitals

A. Indemnitor owns certain real property located in Clackamas County at 7900 Southeast Luther Road, Portland Oregon 97206.

B. On August 29, 2019, a County Hearings Officer approved Indemnitor's application for design review for Clackamas County File # ZO-625-18 to build a 286 unit multi-family apartment complex (the "Project") on certain property located in the County of Clackamas, Oregon, as more particular described on Exhibit A attached hereto and incorporated herein by reference (the "Property").

C. To facilitate certain improvements related to the Project, Indemnitor seeks a vacation of a portion of SE 79th Avenue and has made an application for such vacation, and anticipates that the County will issue an order approving such vacation (the "Vacation Order").

D. In the Vacation Order, the County reserved a portion of vacated SE 79th Avenue as a perpetual easement for the benefit of WES, as further shown and described on Exhibit B (the "Reserved Easement Area"), for the purpose of accessing, maintaining, installing, and replacing any of its public utility facilities within the Reserved Easement Area, and has agreed to indemnify and hold harmless the County and WES in accordance with this Agreement.

Agreement

In consideration of the foregoing recitals, which are incorporated herein by reference, and for other good and valuable consideration, Indemnitor, the County and WES agree as follows:

1. Indemnity.

a Subject to the terms and conditions of Section 2 below, Indemnitor shall fully protect, indemnify, and defend the County and WES, and their elected officials, officers, employees, volunteers and agents (each, a “**County Indemnified Party**”) and hold the County, WES, and any County Indemnified Party harmless from and against all claims for injury or damage and all loss, liability, cost or expense, including court costs and reasonable attorneys’ fees, arising out of or resulting directly or indirectly from any work performed within the Reserved Easement Area, including but not limited to construction by the County or WES, their contractor, their subcontractors, agents, or employees related to public facilities and utility placement within the Reserved Easement Area (a “**Claim**”). However, neither Indemnitor nor any attorney engaged by Indemnitor shall defend the claim in the name of County or any department of County, or WES, nor purport to act as legal representative of County, or any of its departments, or WES, without first receiving authority from the Clackamas County Counsel’s Office, nor shall Indemnitor settle any claim on behalf of County or WES without the approval of the Clackamas County Counsel’s Office. County or WES may, at their election and expense, assume their own defense and settlement.

b The Indemnitor shall be responsible for the County’s and WES’ reasonable costs associated with a challenge to the Vacation Order, and the County’s and WES’ right to participate in the defense of such order. In the event a court of competent jurisdiction determines that the County did not have the authority to reserve a perpetual public easement in the Reserved Easement Area in the Vacation Order, the reasonable costs in the preceding sentence shall include the County’s and WES’ reasonable costs associated with establishing a perpetual public easement in accordance with the requirements in Recital D of this Agreement.

c The County acknowledges and agrees that this Agreement and the indemnification herein are solely related to the Project.

2. Procedure for Indemnification.

a The County and WES shall provide Indemnitor with written notice of any Claim which the County, WES, or a County Indemnified Party intends to base a claim for indemnification under this Agreement (the “**Claim Notice**”) reasonably promptly after assertion of the Claim against the County, WES, or a County Indemnified Party.

b Indemnitor shall have the right, upon written notice given to the County, WES, or County Indemnified Party within thirty (30) days after its receipt of the Claim Notice, to assume the defense or handling of such Claim, at Indemnitor’s sole expense. If Indemnitor elects to defend the Claim, it shall select counsel reasonably acceptable to the County, WES, or the County Indemnified Party in connection with conducting the defense or handling of such Claim, and Indemnitor shall keep the County and, if applicable, the County Indemnified Party or WES, timely apprised of the status of such Claim. The County, WES, and any County Indemnified Party shall provide Indemnitor with access to its records and personnel relating to any such Claim during normal business hours and shall otherwise cooperate with Indemnitor in the defense or settlement of any Claim.

c. If Indemnitor does not give written notice to the County or WES within 30 days after its receipt of the Claim Notice of Indemnitor's election to assume the defense or handling of such Claim, then the County or WES may, at Indemnitor's expense, select counsel in connection with conducting the defense or handling of such Claim and defend or handle such Claim in such manner as it may deem appropriate in its reasonable discretion. Neither the County nor WES shall settle any Claim without the prior written consent of Indemnitor, which consent shall not be unreasonably withheld. If the County or WES defends or handles such Claim, Indemnitor shall cooperate with the County or WES and shall be entitled to participate in the defense or handling of such Claim with its own counsel and at its own expense.

3. **Modification and Waiver.** This Agreement may not be amended or modified in any manner, except by an instrument in writing signed by each of the parties hereto. The failure of any party to enforce at any time any of the provisions of this Agreement shall in no way be construed to be a waiver of any such provision, or in any way affect the right of such party thereafter to enforce each and every such provision. No waiver of any breach of this Agreement shall be deemed to be a waiver of any other or subsequent breach.

4. **Headings.** The headings preceding the text of sections of this Agreement are for convenience only and shall not be deemed parts thereof.

5. **Applicable Law; Jurisdiction.** This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of Oregon, as applied to contracts executed and to be fully performed in such state. Jurisdiction and venue of any proceeding relating to this Agreement will be at Clackamas County, Oregon.

6. **Runs with the Land; Parties in Interest.** The terms and provisions of this Agreement shall run with the land and be binding upon and inure to the benefit of the then- present owner of the Property. Upon sale, transfer, or other disposition of the Property, any previous owner of the Property shall be released from any and all obligations hereunder to the extent such obligations arise after such owner's sale, transfer or disposition of the Property to a successor-owner.

7. **Notices.** Any notice or demand desired or required to be given hereunder shall be in writing and deemed given when personally delivered or deposited in the mail, postage prepaid, sent certified or registered, and addressed as respectively set forth below, or to such other address as any party shall have previously designated by a notice given pursuant to this section. Any notice so delivered personally shall be deemed to be received on the date of delivery and any notice so mailed shall be deemed to be received three days after the date on which it was mailed.

To Indemnitor: Eastbank Development, LLC
7900 SE Luther Road
Portland, OR 97206
Attn: Aaron Jones

with a copy to: Schwabe Williamson & Wyatt
1211 SW 5th Ave, Suite 1900
Portland, OR 97204
Attention: Joseph O. Gaon

To the County: Clackamas County
2051 Kaen Road, 2nd Floor
Oregon City, OR 97045
Attention: Nathan Boderman

To WES: Water Environment Services
150 Beavercreek Road, Suite 430
Oregon City, OR 97045
Attention: WES Director

with a copy to: County Counsel
2051 Kaen Road, 2nd Floor
Oregon City, OR 97045
Attention: Amanda Keller

8. **Severability.** If one or more provisions of this Agreement are held to be unenforceable under applicable law, such provision shall be excluded from this Agreement, and the balance of this Agreement shall be interpreted as if such provision was so excluded and shall be enforceable in accordance with its terms.

9. **Entire Understanding.** The terms set forth in this Agreement are intended by the parties as a final, complete and exclusive expression of the terms of their agreement as to the subject matter hereof and may not be contradicted, explained or supplemented by evidence of any prior agreement, any contemporaneous oral agreement or any consistent additional terms.

10. **Counterparts.** This Agreement may be executed simultaneously in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

[signatures and acknowledgments to follow]

CLACKAMAS COUNTY,
a municipal corporation

By: _____
Name: _____
Title: _____

STATE OF OREGON)
)
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2022, the _____ of the County of Clackamas, on behalf of such municipal corporation.

Dated this ____ day of _____, 2022.

Notary Public for Oregon
My Commission Expires: _____

**WATER ENVIRONMENT SERVICES,
an ORS Chapter 190 intergovernmental entity**

By: _____
Name: _____
Title: _____

STATE OF OREGON }
County of _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2022, by _____, the _____ of Water Environment Services, on behalf of such intergovernmental entity.

Dated this _____ day of _____, 2022.

Notary Public for Oregon
My Commission Expires: _____

EXHIBIT A



**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON**

In the matter of the Vacation of
a portion of 79th Avenue
County Road No. 3225, situated in
Section 29, T.1 S., R.2 E., W.M.
Clackamas County, Oregon



Board Order No. 2022-09

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This matter coming before the Board of County Commissioners at this time and appearing to the Board that in accordance with ORS 368.341 and pursuant to ORS 368.351, a petition has been filed with the determined fee and acknowledged signatures of owners of 100 percent of property abutting public property proposed to be vacated, and a written report finding this vacation to be in the public interest from the County Road Official, Dan Johnson, Director, have been submitted in the matter of the vacation of a portion of 79th Avenue, County Road Number 3225, said portion described as follows:

All that portion of 79th Avenue, situated in the northeast ¼ of Section 29, T.1 S., R.2 E., W.M., Clackamas County, Oregon, as more particularly described and shown on attached Exhibits "A" and "B" by this reference being a part of this Board Order.

WHEREAS, the Board having read said petition and report from the County Road Official and having determined the vacation of the above described portion of road right of way to be in the public interest; and,

WHEREAS, Clackamas County Department of Transportation and Development, including its Maintenance, Engineering, Planning, and Traffic divisions, along with all local utility companies, have been contacted and do not have any objections to this vacation, provided that utility access and maintenance rights are reserved;

IT IS HEREBY ORDERED, that the Board adopts as its own, the findings and conclusions contained in the written report from the County Road Official dated December 7, 2021; and,

IT IS FURTHER ORDERED that rights for all existing utilities within the vacated 79th Avenue right of way, be reserved. Nothing contained herein shall cause or require the removal or abandonment of any surface water or storm drainage pipeline, sanitary sewer pipeline, water main, gas line, conduit of any kind, wires, or poles which are now installed in said right-of-way and used or intended to be used for any public service or utility, including but not limited to those improvements under the ownership, management or control of Water Environment Services ("WES"). In addition, the rights are reserved to access, inspect, operate, perpetually maintain, repair, replace, construct or reconstruct, install, renew, and enlarge all utilities or improvements that are now used for any public service or utility. No building, structure, or other improvements shall be constructed upon the reservation area without the prior written consent of Clackamas County, or WES if the proposed improvements would encroach on infrastructure owned, managed or controlled by WES, nor shall any property owner engage in an activity or use that would harm or impair the reservation area or impede the proper functioning of the improvements described in this paragraph. This reservation of rights shall not obligate Clackamas County or WES to replace any improvements constructed in the reservation area that may impede the ability of Clackamas County or WES to use the area for the purposes described herein; and,

**BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON**

In the matter of the Vacation of
a portion of 79th Avenue
County Road No. 3225, situated in
Section 29, T.1 S., R.2 E., W.M.
Clackamas County, Oregon



Board Order No. 2022-09

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IT IS FURTHER ORDERED that the attached described portion of 79th Avenue, County Road Number 3225, containing 9,786 square feet, more or less, as described and shown on attached Exhibits "A" and "B" be vacated; and,

IT IS FURTHER ORDERED, that this Order and attached exhibits be recorded in the Deed Records for Clackamas County and that a copy be filed with the County Surveyor, County Assessor, and Finance Office/Fixed Assets.

DATED this 3rd day of February, 2022

BOARD OF COUNTY COMMISSIONERS

Chair

Recording Secretary

EXHIBIT A
VACATED PORTION OF SE 79TH AVENUE
COUNTY ROAD NO. 3225
IN THE NE 1/4 OF SECTION 29, T1S, R2E, WM,
IN CLACKAMAS COUNTY, OREGON
APRIL 25, 2019

A PORTION OF SE 79TH AVENUE, LOCATED IN THE NE 1/4 OF SECTION 29, T1S, R2E, WILLAMETTE MERIDIAN, CLACKAMAS COUNTY, OREGON, AND MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE SE CORNER OF SE 79TH AVENUE AS PER "COATES HOME TRACTS", SAID POINT IS ALSO THE NE CORNER OF THE LAND DESCRIBED IN DEED DOCUMENT NO. 2018-017978, PARCEL 5, CLACKAMAS COUNTY DEED RECORDS, AND IS S38°46'53"W, 981.27 FEET FROM A 4-1/4 INCH BRASS DISK AT THE NE CORNER OF SAID SECTION 29; THENCE S89°29'16"W ALONG THE NORTH LINE OF THE LAND DESCRIBED IN SAID DOCUMENT NO. 2018-017978, 40.01 FEET TO A 5/8 INCH IRON REBAR WITH YELLOW PLASTIC CAP INSCRIBED "COMPASS CORP" AT THE SW CORNER OF SAID SE 79TH AVENUE AND ON THE EAST LINE OF LOT 10, "COATES HOME TRACTS"; THENCE N00°28'53"E ALONG THE EAST LINES OF LOTS 10, 9, 8, AND 7, "COATES HOME TRACTS", 203.59 FEET TO THE BEGINNING OF A NON-TANGENT CIRCULAR CURVE CONCAVE TO THE NW AND HAVING A RADIUS OF 228.50 FEET, CHORD BEARING AND DISTANCE OF N17°41'24"E, 135.20' FEET, AND DELTA ANGLE OF 34°25'01", SAID POINT IS S00°28'53"W, 148.55 FEET FROM A 1/2 INCH IRON PIPE AT THE NE CORNER OF LOT 5, "COATES HOME TRACTS"; THENCE NORTHEASTERLY ALONG SAID CURVE 137.26 FEET TO THE EAST RIGHT-OF-WAY LINE OF 79TH AVENUE AND THE WEST LINE OF THE LAND DESCRIBED IN DEED DOCUMENT NO. 2000-000175; THENCE S00°28'53"W ALONG SAID EAST AND WEST LINES 108.00' FEET TO THE NORTHWESTERLY NW CORNER OF PARCEL 1, PARTITION PLAT 1991-8, SAID NORTHWESTERLY NW CORNER IS S23°35'00"E 0.46 FEET FROM A 1/2 INCH IRON PIPE; THENCE S00°28'53"W ALONG THE NORTHWESTERLY WEST LINE OF PARCEL 1, PARTITION PLAT NO. 1991-8, 224.04 FEET TO THE POINT OF BEGINNING.

THE LAND DESCRIBED ABOVE CONTAINS 9786 SQUARE FEET, MORE OR LESS, AND IS SUBJECT TO AND TOGETHER WITH ALL EASEMENTS AND RESERVATIONS OF RECORD.

REGISTERED
PROFESSIONAL
LAND SURVEYOR



OREGON
JULY 25, 1995
ROBERT ALAN JOHNSON
#2725

EXPIRES 6/30/19



JOHNSON LAND SURVEYING, INC.

10185 SW HOODVIEW DR, TIGARD, OR 97224
503-407-9966 jsurvey@frontier.com jlsurvey.com

EXHIBIT B

VACATED PORTION OF SE 79TH AVENUE COUNTY ROAD NO. 3225








IN THE NE 1/4 OF SECTION 29, T1S, R2E, WM,
IN CLACKAMAS COUNTY, OREGON
APRIL 25, 2019

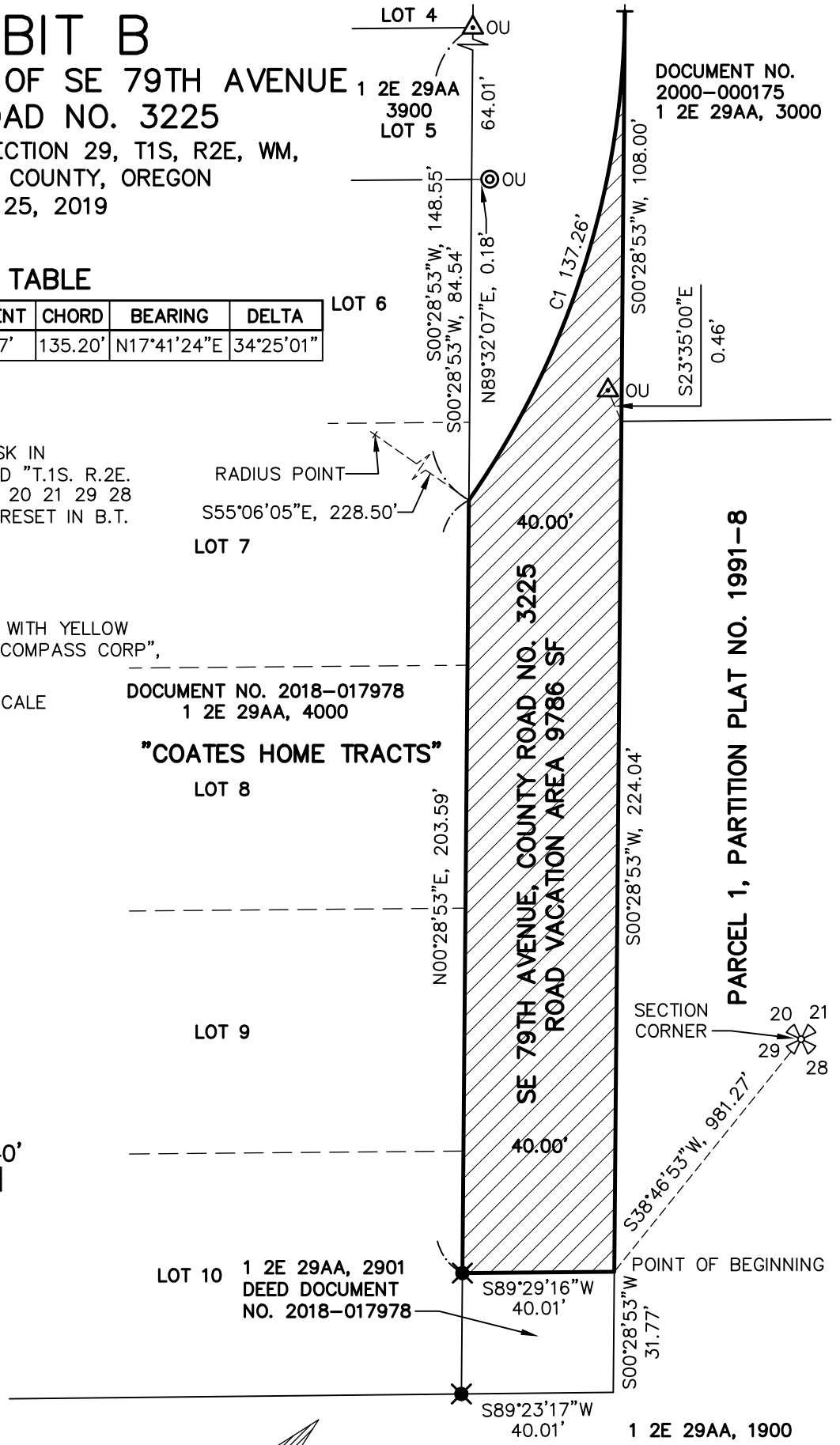
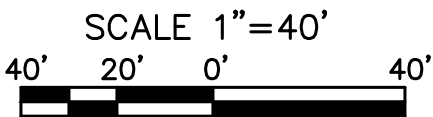
DOCUMENT NO.
2000-000175
1 2E 29AA, 3000

CURVE TABLE

CURVE	RADIUS	LENGTH	TANGENT	CHORD	BEARING	DELTA
C1	228.50'	137.26'	70.77'	135.20'	N17°41'24"E	34°25'01"

LEGEND

-  FOUND 4-1/4" BRASS DISK IN MONUMENT BOX, INSCRIBED "T.1S. R.2E. MULTNOMAH CO. LS 2832 20 21 29 28 CLACKAMAS 2010 1964", RESET IN B.T. BOOK H, PAGE 411.
-  FOUND 1/2" IRON PIPE
-  FOUND 3/4" IRON PIPE
-  FOUND 5/8" IRON REBAR WITH YELLOW PLASTIC CAP INSCRIBED "COMPASS CORP", SET IN SN 19508
-  SURVEYED LINE NOT TO SCALE
-  ORIGIN UNKNOWN
-  VACATED PORTION



REGISTERED
PROFESSIONAL
LAND SURVEYOR

Robert Alan Johnson
OREGON
JULY 23, 1995
ROBERT ALAN JOHNSON
#2725

EXPIRES 6/30/19

 **JOHNSON LAND SURVEYING, INC.**

10185 SW HOODVIEW DR, TIGARD, OR 97224
503-407-9966 jsurvey@frontier.com jlsurvey.com

MEMORANDUM

TO: Board of Commissioners

FROM: Dan Johnson, Director D.T.D.

DATE: December 7, 2021

SUBJ: **ROAD OFFICIAL'S REPORT FOR THE VACATION OF 79TH AVENUE**

LOCATION: 79th Avenue, County Road Number 3225, is situated in the NE1/4 of Section 29, T.1 S., R.2 E., W.M.

FACTS AND FINDINGS: 79th Avenue, (Center Street, plat name) dedicated in Coates Home Tracts, Plat Number 373, July 3, 1913 Clackamas County Plat Records, was later adopted as County Road Number 3225. The petitioner has approved plans to realign, extend and, construct 79th Avenue southerly to Johnson Creek Boulevard. The remaining portion of 79th Avenue outside the new alignment is a dead end road and provides no connectivity to any through streets in the area. Vacating the southerly 270 feet of the 40 foot wide, portion of 79th Avenue will not deprive public access to adjoining properties and will not affect area traffic flow.

The Petition to Vacate under ORS 368.341 has been filed with the determined fee and, acknowledged signatures of owners of 100 percent of private property proposed to be vacated and acknowledged signatures of owners of 100 percent of property abutting public property proposed to be vacated, pursuant to ORS 368.351. All abutting property owners in this instance have signed the Consent to Vacate forms that have been acknowledged by the proper authority.

Clackamas County Departments of Transportation Maintenance, Engineering, Planning, Traffic, along with all local utility companies have been contacted and do not have any objections to this vacation, provided that all utility access and maintenance rights are reserved.

After considering traffic impacts, fiscal impacts, and social impacts, it appears to be in the public interest to vacate the area petitioned.

It is my assessment to support the subject vacation.

Pursuant to ORS 368.351 and County policy, the Board may make its determination in the matter of this vacation without a public hearing. This is allowed when there is acknowledged signatures of owners of 100 percent of private property proposed to be vacated and acknowledged signatures of owners of 100 percent of property abutting any public property proposed to be vacated, this Road Official's Report is submitted, and there is no controversy related to the proposed vacation.

This road vacation does not violate any portion of Clackamas County Code 7.03.095 (4) (A). Said Code enumerated as follows;

a. Whether the vacation would inhibit or preclude access to an abutting property, and whether an access reservation would be adequate to protect that access;

Finding: Vacating this right of way would not inhibit or preclude access to any abutting property. Access to abutting properties is available through several adjoining public roads.

b. Whether it is physically possible to build a road that meets contemporary standards over the existing terrain or right of way;

Finding: The portion of 79th Avenue to be vacated currently is developed with a road. The newly realigned section of 79th Avenue will be constructed to extend southerly to Johnson Creek Boulevard. The new alignment improves the connectivity of 79th Avenue, and eliminates the need for the portion of 79th Avenue subject to this vacation.

c. Whether it is economically feasible to build a road that meets contemporary standards over the existing terrain or right of way;

Finding: It was economically feasible to build a road in a portion of this right of way, however there is no public need to further improve this portion of right of way.

d. Whether there is another nearby road that can effectively provide the same access as the right-of-way to be vacated;

Finding: There are plans to realign, extend and construct 79th Avenue southerly to Johnson Creek Boulevard, and maintain access to adjoining properties.

e. Whether the right-of-way to be vacated has present or future value in terms of development potential, use in transportation linkages, or use in road replacements;

Finding: The right of way has present and future value and will be incorporated in the developer's plans.

f. Whether there are present and future likely benefits of the right-of way to the traveling public;

Finding: The new alignment improves the connectivity of 79th Avenue, and eliminates the need for the portion of 79th Avenue subject to this vacation. After the construction of the new alignment, there will be no benefit for the traveling public in the portion of 79th Avenue subject to this vacation. The vacated portion will be incorporated as part of the petitioner's development.

g. Whether anticipated growth or changes in use of the surrounding area are likely to impact the future use of the right-of-way proposed to be vacated;

Finding: The vacated portion will be incorporated as part of the petitioner's development. The newly realigned section of 79th Avenue will be constructed to extend southerly to Johnson Creek Boulevard. The new alignment improves the connectivity of 79th Avenue, and eliminates the need for the portion of 79th Avenue subject to this vacation

h. Whether the right-of-way proposed to be vacated leads to a creek, river, or other waterway that can be used for public recreation; and

Finding: Not applicable.

i. Whether the right-of-way proposed to be vacated leads to federal, state or local public lands that can be used for public recreation.

Finding: Not applicable.

It is my assessment that, on balance, the proposed vacation is in the public interest.