

ORDINANCE NO. 1098

AN ORDINANCE AUTHORIZING THE MAYOR TO EXECUTE A PURCHASE AND SALE AGREEMENT WITH THE STATE OF OREGON, DEPARTMENT OF PARKS AND RECREATION FOR THE ACQUISITION OF APPROXIMATELY 76.85 ACRES FOR PUBLIC PARK PURPOSES, AND DECLARING AN EMERGENCY.

WHEREAS, the Canby City Council (City) has heretofore held discussions with the State of Oregon, Department of Parks and Recreation (Parks), in accordance with ORS 226.320 for the acquisition of approximately 76.85 acres of property located within Clackamas County, Oregon, north and east of the present Urban Growth Boundary and corporate limits of the City of Canby; and

WHEREAS, Parks wishes to transfer ownership of this parcel to the City at no financial cost to the City for future use as public open space and recreation purposes and has proposed a Purchase and Sale Agreement for the transfer of the parcel to the City, a copy of the Agreement which contains a legal description of the property is attached hereto and by this reference incorporated herein; and

WHEREAS, the City wishes to accept this donation of land from Parks for the benefit of the citizens of Canby and State of Oregon; now therefore,

THE CITY OF CANBY ORDAINS AS FOLLOWS:

Section 1. In order to acquire property for public park and recreation purposes in accordance with ORS 226.320, the Canby City Council hereby authorizes the Mayor to sign the proposed Purchase and Sale Agreement on behalf of the City and to return an executed original to the State of Oregon, Department of Parks and Recreation as soon as possible.

Section 2. In as much as it is in the best interest of the citizens of Canby to complete the transaction as soon as possible to secure this property, an emergency is hereby declared to exist and this ordinance shall therefore take effect immediately upon its enactment after final reading.

SUBMITTED to the Canby City Council and read the first time at a regular meeting thereof on Wednesday, June 5 , 2002, and ordered posted in three (3) public

and conspicuous places in the City of Canby as specified in the Canby City Charter and to come before the City Council for final reading and action at a regular meeting thereof on Wednesday, June 19, 2002, commencing at the hour of 7:30 P.M. in the Council Meeting Chambers at Canby City Hall in Canby, Oregon.

Chaunee F. Seifried

Chaunee Seifried
City Recorder - Pro Tem

PASSED on second and final reading by the Canby City Council at a regular meeting thereof on the 5th day of June, 2002, by the following vote:

YEAS 6

NAYS 0

Terry L Prince

Terry L Prince, Mayor

ATTEST:

Chaunee F. Seifried

Chaunee Seifried, City Recorder - Pro Tem

PURCHASE AND SALE AGREEMENT

This Purchase and Sale Agreement (the "Agreement") is made by and between the STATE of OREGON, by and through the Department of Parks and Recreation ("Seller"), and the City of Canby, Oregon, a public corporation ("Buyer"), and shall be effective as of April 30, 2002.

Recitals

- A. Seller owns certain real property as described herein (the "Property"), consisting of approximately 76.85 acres located within the Willamette River Greenway and in the vicinity of property being acquired by Buyer for use as city parkland.
- B. Buyer desires to acquire the Property for the purpose of integrating it into Buyer's city park system and thereafter managing the Property for the common use of the public.
- C. Seller has concluded that ownership of the Property by Buyer and its management as public parkland will be consistent with the goals and requirements of the Willamette River Greenway Plan and Seller's long-term goals for the Property.
- D. Seller possesses statutory authority to dispose of the Property under ORS 390.121(3), and the transfer of the Property to Buyer has been approved by the State Parks and Recreation Commission.

NOW, THEREFORE, in consideration of the mutual promises, representations and warranties of the parties, the parties enter into the following:

Agreement

- 1. **Incorporation of Recitals.** The foregoing Recitals are incorporated herein as additional promises, representations and warranties of the parties as though set forth herein.
- 2. **Agreement to Transfer Property.** Seller agrees to transfer to Buyer, by bargain and sale deed and subject to Seller's reservation of all mineral rights and the retention by Seller of a conservation easement as herein described, the following real property (the "Property"):

See attached EXHIBIT A

- 3. **Consideration.** The entire consideration for the transfer of the Property from Seller to Buyer shall be Seller's retention of all mineral rights in the Property

and the grant by Buyer to Seller of a conservation easement over the Property, as described herein, and other value given and received.

4. **Conditions of Seller.** Seller's obligation to transfer the Property to Buyer is conditioned upon the occurrence of each of the following:

4.1 approval by the Oregon Attorney General's office of the form of all documents relating to the transaction.

5. **Conditions of Buyer.** Buyer's obligation to accept the Property is conditioned upon the occurrence of each of the following:

5.1 Buyer's reasonable certainty of its ability to acquire certain real property adjacent to the Property known as the Canby Log Boom property; and

5.2 Approval by the Canby City Attorney of the form of all documents relating to the transaction.

6. **Form of Deed.** Seller shall deliver to Buyer at Closing a statutory bargain and sale deed in the form attached hereto as EXHIBIT B (the "Deed"), reserving to Seller all mineral rights and a conservation easement as herein described.

7. **Closing.** The transaction contemplated by this Agreement shall be closed by delivery from Seller to Buyer of the Deed at such time as Seller and Buyer shall mutually agree.

8. **Possession.** Buyer shall be entitled to possession of the Property, subject to the reservations and easements contemplated herein, upon delivery from Seller to Buyer of the Deed.

9. **"As Is" Sale.** Buyer acknowledges that it has examined the Property to its own satisfaction and has formed its own opinion as to the condition (including environmental condition) and value thereof. Buyer has not relied on any statements or representations from Seller or any person acting on behalf of Seller concerning any of the following: the size or area of the Property or any of the parcels (if any) of the Property; the location of corners or boundaries of any parcel of the Property; the condition of the Property, including but not limited to, environmental condition above or below the surface of the Property or compliance with environmental laws and other governmental requirements; the availability of services to the Property; the ability of Buyer to use the Property or any portion thereof for any intended purpose; or any other matter affecting or relating to Property or any portion thereof. Buyer is acquiring the Property, in the condition existing at the time of closing, AS IS, with all defects, if any. Buyer waives, releases and forever discharges Seller and Seller's successors and assigns, of and from all claims, actions, causes of action, fines, penalties, damages (including consequential, incidental and special damages), costs (including the cost of complying with any judicial or governmental order), and expenses (including attorney fees), direct or indirect, known or unknown,

foreseen or unforeseen, which may arise on account of or in any way growing out of or in connection with any physical characteristic or condition of the Property, including any surface or subsurface condition, or any law, rule or regulation applicable to the Property. These above provisions shall be included in the Bargain and Sale Deed, and shall be binding on the Buyer and Buyer's successors and assigns.

10. **Title Insurance.** Seller shall provide no policy of title insurance.

11. **Reservation of Mineral Rights.** Pursuant to ORS 273.780(3), Seller shall retain rights in the Property to all minerals and geothermal resources, as defined in ORS 273.775(1) and (2).

12. **Conservation Easement.** Buyer shall grant to Seller, and Seller shall retain, a conservation easement in the Property ensuring that Buyer and its successors and assigns maintain and protect the natural and recreational values of the Property for the benefit of all citizens of the State of Oregon.

13. **Proceeds of Future Sales.** In the event that Buyer resells the Property or any portion thereof (the subject of any such sale being a "Resale Property"), Seller shall use the proceeds from the sale of the Resale Property to acquire that property adjacent to the Property known as the Canby Log Boom site. Upon receipt from Buyer of a legal description of the Resale Property, Seller will execute a quitclaim deed releasing the Resale Property from the terms of the conservation easement retained by Seller in the remainder of the Property. Buyer agrees to dedicate all proceeds from the sale of the Resale Property over and above that needed to acquire the Canby Log Boom site for the purpose of acquisition or development of public park land.

14. **Appraisal of Resale Property.** Buyer acknowledges that Seller acquired the Property using funds allocated under the federal Land and Water Conservation Fund Act of 1965, 16 USC 4601-4 through 4601-11 ("L&WCF"). Under the LWCF and implementing regulations, property so acquired may not be converted to other than public outdoor recreation uses unless other recreational property of at least equal fair market value and of reasonably equivalent usefulness and location is substituted. In the event that Seller is unable to acquire such substitute property prior to Buyer's sale of the Resale Property as contemplated in Section 13, Buyer shall provide to Seller an appraisal of the Resale Property that meets all conversion requirements of Section 6(f)(3) of the L&WCF, 16 USC 4601-8(f)(3), and implementing regulations and shall otherwise cooperate with and assist Seller in meeting such conversion requirements.

15. **Brokers.** Seller and Buyer each hereby represent and warrant to the other that it did not employ or use any broker or finder to arrange or bring about this transaction and that there are no claims or rights for brokerage commissions or finders fees in connection with the transactions contemplated by this Agreement.

16. **Amendment and Modification.** This Agreement may be amended, modified, or supplemented only by a written agreement signed by Buyer and Seller.

17. **Notices.** All notices required or permitted hereunder shall be in writing and shall be served on the Parties at the following addresses:

to Seller: Oregon Department of Parks and Recreation
Attn: Dave Wright
1115 Commercial St NE
Suite 1
Salem, OR
(503) 378-4168 x 251

to Buyer: City Administrator
City of Canby
P.O. Box 930
Canby, OR 97013
(503) 266-4021

Any such notices may be sent by (a) certified mail, return receipt requested, in which case notice shall be deemed delivered five (5) business days after deposit, postage prepaid in the U.S. mail or (b) a nationally recognized overnight courier, in which case notice shall be deemed delivered one business day after deposit with such courier or (c) facsimile transmission, in which case notice shall be deemed delivered upon electronic verification that transmission to recipient was completed.

18. **Governing Law; Venue.** All matters with respect to this Agreement, including but not limited to matters of validity, construction, effect, and performance, will be governed by the laws of the State of Oregon applicable to contracts made and to be performed therein between residents thereof. Venue for any action brought to enforce any provision of this Agreement shall lie in the Circuit Courts of the State of Oregon for the County of Marion.

19. **Counterparts.** This Agreement may be executed in two or more fully or partially executed counterparts, each of which will be deemed an original binding the signer thereof against the other signing parties, but all counterparts together will constitute one and the same instrument.

20. **Entire Agreement.** This Agreement and any other document to be furnished pursuant to the provisions hereof embody the entire agreement and understanding of the parties hereto as to the subject matter contained herein. There are no restrictions, promises, representations, warranties, covenants, or undertakings other than those expressly set forth or referred to in such documents. This Agreement and such documents supersede all prior

agreements and understandings among the parties with respect to the subject matter hereof.

21. **Severability.** Any term or provision of this Agreement that is invalid or unenforceable in any jurisdiction will, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms or provisions of this Agreement.

22. **Survival.** The provisions of Section 13 (Proceeds of Future Sales) and Section 14 (Appraisal of Resale Property) shall survive closing and shall not merge with the Deed.

23. **Compliance with Law.** Buyer shall comply with all federal, state and local laws and ordinances applicable to this Agreement, including (to the extent applicable) ORS 279.312, 279.314, 279.316, and 279.320.

IN WITNESS WHEREOF, the parties to this Agreement have signed below as of the date first above written.

SELLER:

The STATE of OREGON, by and through the Department of Parks and Recreation

By: Michael Carrier
Michael Carrier

As its: Director

BUYER:

The City of Canby, Oregon, a public corporation

By: Terry L. Linn

As its: MAYOR

EXHIBIT A
Legal Description of the Property

A parcel of land lying in Sections 22 and 27, Township 3 South, Range 1 East, W.M., Clackamas County, Oregon and being that property described in those deeds to Weyerhaeuser Timber Company, recorded in Book 370, Page 197; in Book 374, Page 3; in Book 441, Page 307 and in Book 460, Page 353, Clackamas County Record of Deeds.

ALSO the land between the low and high water mark of the Willamette River lying adjacent to the property described in said Book 370, Page 197 and Book 374, Page 3.

ALSO a strip of land 50.00 feet in width upon, over and across the fractional $W\frac{1}{2}NW\frac{1}{2}$ of Section 27, Township 3 South, Range 1 East of the W.M., being 25.00 feet on each side of and measured at right angles to the following described center line:

Beginning at a point on the center line of the Oregon City – Salem Territorial Road in said Section 27, which point is North $89^{\circ} 57'$. East a distance of 635 feet and North $0^{\circ} 03'$ West a distance of 2442.6 feet from the corner common to Lots 65, 66, 72 and 73 of CANBY GARDENS in Sections 33 and 34 of said township and range; thence North $0^{\circ} 03'$ West a distance of 2305.07 feet to a point which is hereinafter called "Point X"; thence North $0^{\circ} 03'$ West a distance of 572.49 feet to a point which is hereinafter called "Point Y" and the true point of beginning of the center line herein to be described; thence continuing from "Point Y" along a 15° curve to the right through a central angle of $61^{\circ} 25'$ a distance of 409.44 feet; thence North $61^{\circ} 22'$ East a distance of 80.43 feet; thence along a 20° curve to the right through a central angle of $14^{\circ} 14'$ a distance of 71.17 feet; thence North $75^{\circ} 36'$ East a distance of 52.19 feet; thence along a 20° curve to the right through a central angle of $50^{\circ} 24'$ a distance of 252.00 feet; thence South $54^{\circ} 00'$ East a distance of 93.97 feet; thence along a 64° curve to the right through a central angle of $106^{\circ} 15'$ a distance of 166.02 feet; thence South $52^{\circ} 15'$ West a distance of 704.64 feet and thence along a 15° curve to the left through a central angle of $52^{\circ} 18'$ a distance of 348.67 feet to "Point X" and the terminus of said center line.

EXCEPTING THEREFROM any portion of the above described property lying within a strip of land 50.00 feet in width when measured at right angles to a center line commencing at "Point X" and running North $0^{\circ} 03'$ West to a point of intersection with the Northerly line of the point of curve first described from "Point Y."

ALSO EXCEPTING therefrom that property described in that deed to Crown Zellerbach Corporation, recorded in Book 495, Page 198 of Clackamas County Record of Deeds and the land between the low and high water mark of the Willamette River adjacent thereto.

ALSO EXCEPTING therefrom that property described in that deed to Farrel Johnson and Bock Soon Brunner, recorded as document number 2001-035373 of Clackamas County Record of Deeds.

SUBJECT TO reservations and easements of record, unrecorded rights which may be determined by an inspection and survey of the property and the lease rights, if any, of Gordon Andrus which were to expire January 1, 1975.

**EXHIBIT B
Form of Deed**

**BARGAIN AND SALE DEED
and
RESERVATION OF MINERAL RIGHTS
ORS 93.860**

**Section 1:
Conveyance by Bargain and Sale Deed**

The State of Oregon, by and through its State Parks and Recreation Department, Grantor, conveys to the City of Canby, Grantee, the following described real property (the "Property"):

See Attached Exhibit "A"

Subject to the terms, conditions and reservations of rights and easements contained herein.

**Section 2:
Reservation of Mineral Estate**

A. Mineral Estate Reserved. Grantor excepts and reserves to itself, its successors and assigns all minerals as defined in ORS 273.775(1), including soil, clay, stone, sand and gravel, and all geothermal resources, as defined in ORS 273.775(2), together with the right to make such use of the surface as may be reasonably necessary for prospecting for, exploring for, mining, extracting, reinjecting, storing, drilling for, and removing, such minerals, materials and geothermal resources.

B. Compensation for Diminution of Value. In the event use of the Property by a surface rights owner would be damaged by one or more of the activities described above, then such owner shall be entitled to compensation from the State's lessee to the extent of the diminution in value of the real property, based on the actual use by the surface owner at the time the State's lessee conducts any of the above activities. For purposes of this paragraph, the "surface rights owner" shall be Grantee and its successors and assigns.

**Section 3:
"As Is" Transfer**

A. Acceptance of Property. Grantee acknowledges that it has examined the above described Property to its own satisfaction and has formed its own opinion as to the condition (including environmental condition) and value thereof. Grantee has not relied on any statements or representations from Grantors or any person acting on behalf of Grantors concerning any of the following:

- i) the size or area of the Property or any of the parcels of the Property;

- ii) the location of corners or boundaries of any parcel of the Property;
- iii) the condition of the Property, including but not limited to, environmental condition above or below the surface of the Property or compliance with environmental laws and other governmental requirements;
- iv) the availability of services to the Property;
- v) the ability of Purchaser to use the Property or any portion thereof for any intended purpose; or
- vi) any other matter affecting or relating to the Property or any portion thereof.

Grantee is acquiring the Property, both above surface and below surface, in the condition existing at the time of closing, AS IS, with all defects, if any.

B. Waiver of Claims. Grantee waives, releases and forever discharges Grantor of and from all claims, actions, causes of action, fines, penalties, damages (including consequential, incidental and special damages), costs (including the cost of complying with any judicial or governmental order), and expenses (including attorney fees), direct or indirect, known or unknown, foreseen or unforeseen, which may arise on account of or in any way growing out of or in connection with any physical characteristic or condition of the Property, including any surface or subsurface condition, or any law, rule or regulation applicable to the Property. These provisions shall be binding on Grantee and Grantee's successors and assigns.

Section 4: Consideration

The true consideration for this conveyance is other value given and received.

Section 5: Reservation of Conservation Easement

A. Reservation and Authority. Grantor does hereby reserve to the State of Oregon, acting by and through its Department of Parks and Recreation as Holder, a perpetual, non-possessory conservation easement on and over the Property in accordance with ORS 271.715 to 271.795.

B. Purpose and Nature of Easement. The purpose of the conservation easement is to impose restrictions and affirmative obligations on Grantee as described herein to insure that Grantee and Grantee's successors and assigns maintain and protect the natural and recreational values of the Property, as provided in the federal Land and Water Conservation Fund Act of 1965 (L&WCF), 16 USC Sections 4601-4 through 4601-11, for the benefit of all citizens of the State of Oregon and the United States. To that end, Grantee shall protect the natural and recreational values of the easement. Grantee's use or occupancy of any portion of the easement shall not degrade or diminish the natural and recreational values in the easement.

C. Permitted Uses. Except as otherwise provided herein, the Property shall be used for those public outdoor recreation uses only that are permitted under the L&WCF and consistent with the Willamette River Greenway Plan, ORS 390.310 through 390.368.

D. No Restriction on Agricultural Activity. Notwithstanding any other provision in this easement, there shall be no restriction of accepted agricultural practices provided the agricultural use does not occur within 100 feet of the banks of the Willamette River. Removal and transport of irrigation water from the Willamette River to agricultural lands situated 100 feet or more from the banks of the Willamette River shall not be deemed to violate this section.

E. Preservation of Water Rights. As a condition of the easement, Grantee shall preserve and maintain all water rights appurtenant to the Property subject to the easement. Grantor reserves the right to take such steps as may be necessary to prevent loss of appurtenant water rights through non-use by Grantee or its lessees.

F. Storm and Waste Water. Grantee, with prior approval of Grantor, may utilize a portion of the Property for storm/wastewater run-off provided said utilization does not appreciably diminish the natural and recreational values of the easement. Grantee shall not fence or otherwise restrict public access to such portion of the Property used for storm/wastewater run-off, except as part of a policy intended to regulate access to the Property generally in furtherance of Grantee's ordinances and policies, without permission from Grantor having been requested and obtained in advance.

G. Historic Preservation. Grantee shall notify the State Historic Preservation Office prior to any subsurface disturbance of the property. Grantor reserves the right to monitor the subsurface disturbance for the purpose of identifying, recording and collecting all cultural materials deemed historically significant. All such material would remain the property of Grantor or any tribal entity with a legitimate claim.

H. Compliance With Federal Law. The Property was acquired by Grantor with federal financial assistance provided under the L&WCF. Therefore, pursuant to Section 6(f)(3) of the L&WCF, 16 USC Section 4601-8(f)(3), this Property shall not be converted to any other than public outdoor recreation use without the approval of the Secretary of Interior. Requirements for approval of any conversions of the described property's use are set forth in Section 6(f)(3) of the L&WCF and in 36 CFR § 59.3.

I. Remedies. Grantor shall have the following remedies in the event of violation of the conservation easement by Grantee or its successors in interest and subsequent owners of the Property:

a. *Notice and Demand.* If Grantor determines that Grantee is in violation of this conservation easement, or that a violation is threatened, Grantor shall provide written notice to Grantee unless the violation constitutes potential immediate and irreparable harm to the Property and/or the purpose of the conservation easement and prior notice is not possible or practicable. The written notice will identify the violation and request corrective action to cure the violation or to restore the Property. Written notice may be by electronic mail or similar written communication.

b. *Commencement of Action.* Grantor may bring an action at law or in equity to enforce the terms of the conservation easement. Without limitation, Grantor may enjoin the violation through injunctive relief, seek specific performance, declaratory relief, restitution, reimbursement of expenses or an order compelling restoration of the Property.

c. *Remedies Cumulative.* The preceding remedies of Grantor are cumulative and in addition to any other remedies available to Grantor under the law. Grantor may invoke any or all of the remedies if there is an actual or threatened violation of the conservation easement.

d. *Delay in Enforcement.* A delay in enforcement or recourse to one or more of the remedies provided herein shall not be construed as a waiver of Grantor's right to enforce the terms of this conservation easement.

J. Force Majeure and Other Limitations of Liability. Grantee shall not be responsible for, nor in violation of this conservation easement because of modifications to the Property resulting from causes beyond Grantee's control including, without limitation, unintentional fires; storms; natural earth movement; and trespassers (although Grantee shall take reasonably prudent actions to prevent trespasser access to the Property). In addition, Grantee shall not be responsible for the adverse results of any good faith, well-intentioned action taken by Grantee in response to an emergency.

K. Rights of Action Against Third Parties. Grantor may bring any action it deems necessary or prudent against third parties if, in its good faith judgement, it believes such third parties' actions may impair the purpose of the conservation easement retained herein.

L. Assignment. Grantor may assign its rights under this conservation easement to any person or entity that now or in the future may be entitled to hold such rights under ORS 271.715.

M. Severability. If any portion of this conservation easement is determined to be invalid, the remaining provisions will remain in force.

N. Successors. This conservation easement is perpetual, runs with the land, and is binding upon, and inures to the benefit of Grantee and Grantor and their successors in interest. All subsequent owners of the Property are bound to all provisions of this conservation easement to the same extent as the current Grantee.

O. Modification. This conservation easement may not be modified, changed, amended, deleted, or eliminated without the express written consent of both Grantor and Grantee, their heirs, successors or assigns.

P. Liberal Construction. This conservation easement shall be liberally construed in favor of accomplishing the purposes stated herein.

THIS INSTRUMENT WILL NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE

