

## JOINT DEFENSE AND CONFIDENTIALITY AGREEMENT

**THIS AGREEMENT** is entered into by and among the undersigned counsel, acting for and on behalf of their respective clients, the City of Newport and the Oregon Department of Transportation (ODOT) (collectively, the "Agencies" and singularly "Agency").

- A. WHEREAS, the agencies propose to make certain improvements to the transportation network through the US 101: SE 32<sup>nd</sup> Street to SE 35<sup>th</sup> Street project ("Project");
- B. WHEREAS, for various reasons, the Project has generated or may generate substantial public controversy;
- C. WHEREAS, it is reasonably anticipated that the agencies may need to file one or more condemnation cases to acquire right of way; or one or more civil actions or proceedings in connection with the Project may be initiated by interested persons or organizations (collectively, the "Cases");
- D. WHEREAS, the Cases and Condemnation Actions will likely involve common issues and thus create a mutuality of interest among the Agencies in the defense of these matters;
- E. WHEREAS, the Agencies desire to cooperate and to share factual, evidentiary, legal, and equitable information related to the defense of the Cases;
- F. WHEREAS, the undersigned counsel desire to protect the interests of their respective clients in information and material subject to claims of attorney-client privilege, attorney work product protections, or other privileges against disclosure;
- G. WHEREAS, the Agencies and their respective counsel, agents, employees, consultants and representatives have previously shared, and from time to time will continue to share, both orally and in writing, documents, factual material, mental impressions, strategies, legal theories, notes, research, memoranda, and other information that includes confidential materials (hereinafter "Joint Defense Materials") to better enable counsel to pursue the separate but common interests of their clients; and
- H. WHEREAS, the Agencies would not disclose such Joint Defense Materials to each other but for their mutual and common interest in defense of the Cases and but for the undertakings of this Agreement.

NOW THEREFORE, in consideration of the mutual covenants and understandings contained herein, the Agencies and undersigned counsel agree as follows:

1. This Agreement establishes the terms and conditions for sharing Joint Defense Materials.

2. The Joint Defense Materials may reflect and incorporate confidential communications made by the Agencies to their counsel, and by their counsel to them, that are protected by the attorney-client privilege from disclosure, and therefore are intended to be insulated from exposure beyond the confines of the Agencies. In addition, the Joint Defense Materials may be or may contain material that is protected from disclosure as a result of the attorney work-product doctrine or other applicable privileges against disclosure. The Agencies recognize and agree that all written and oral communications related to any investigations, litigation strategies, or settlement strategies for the claims asserted, or expected to be asserted, in the Cases are being made in defense of litigation and in pursuit of a common defense against the claims in the Cases. This Agreement does not diminish in any way the confidentiality of the Joint Defense Materials or constitute a waiver of any privilege or legal protection otherwise available to such materials. The Agencies participating in this Agreement intend and expect the joint defense doctrine to protect their sharing of Joint Defense Materials. *See generally In re Premera Blue Cross Customer Data Sec. Breach Litig.*, 296 F. Supp. 3d 1230, 1240 (D. Or. 2017), *citing Sanders v. State*, 169 Wash.2d 827, 853, 240 P.3d 120 (2010).
3. Neither the Agencies nor their respective counsel will voluntarily disclose Joint Defense Materials received from each other to anyone other than the other Agencies, experts or consultants working on the Cases, or other attorneys representing the Agencies, without first obtaining the written consent of the Agency (through counsel) who may be entitled to claim any privilege with respect to such materials. The Agencies agree and acknowledge that the Agencies jointly hold the common interest privilege and confidentiality obligations established by this Agreement, and that no Agency, if acting alone, is authorized to waive the privilege with respect to any Joint Defense Materials received by that Agency from the other Agency pursuant to this Agreement. Those receiving Joint Defense Materials will be informed that the materials are confidential and subject to this Agreement, privilege, and other protections. The Agencies shall take all customary and appropriate measures to ensure that the Joint Defense Materials are maintained in a secure manner that protects the confidentiality and privilege.
4. This Agreement is subject to all applicable state and federal open records laws. In the event either Agency receives a request for records associated with the Project, that Agency will inform the other Agency in writing and provide a copy of the request. If either Agency determines that a response to such a request may include Joint Defense Materials, the Agency receiving the request shall prepare responsive materials and provide the other Agency with an opportunity to review. If a statement asserting privilege is appropriate, each Agency asserting privilege shall prepare its own statement. Each Agency and each Agency's respective counsel shall take all steps necessary to assert all applicable rights and privileges with respect to such Joint Defense Materials and shall cooperate fully with the other Agencies in any judicial proceedings related to the disclosure of the Joint Defense Materials.
5. This Agreement, its terms, the fact of its execution, and all discussions among the Agencies, their counsel, agents, employees, consultants and representatives with regard to the Agreement, are themselves subject to the attorney-client and work-product privileges, and each Agency agrees that the joint defense privilege and any privilege shall be asserted in

response to any subpoena, open records request or request for the production of the Agreement or in response to any inquiry as to its terms, the fact of its execution, or discussions relating to it.

6. The Agencies recognize that Joint Defense Materials may be used to prepare defenses and papers, including briefs or other pleadings, in the Cases, but the Agencies may not attach or otherwise disclose Joint Defense Materials that are privileged or otherwise legally-protected without the written consent of the other agency to this Agreement. Joint Defense Materials may not be used for any purposes other than defense or settlement of the Cases.
7. This Agreement shall not prohibit disclosure by an Agency of materials that Agency alone has prepared or obtained that contain no privileged or protected information obtained directly or indirectly from the other Agency, and that are Joint Defense Materials only because that Agency has delivered them to the other Agency, nor shall this Agreement prevent an Agency from using in ongoing or subsequent litigation non-privileged facts, documents and theories that are learned or derived from Joint Defense Materials.
8. The Agencies may, solely as a matter of convenience, mark documentary Joint Defense Materials disclosed pursuant to this Agreement, "Confidential Materials," and, where appropriate, "Privileged and Confidential Attorney-Client Communication" and "Attorney Work Product." The failure to so mark any such Joint Defense Materials, however, shall not limit the application of any applicable privilege, including but not limited to the joint defense privilege.
9. The confidentiality obligations established by this Agreement shall remain in full force and effect, without regard to termination of this Agreement and without regard to termination of the Cases by final judgment or settlement. Either Agency may terminate this Agreement, subject to the provisions of this paragraph, by sending written notice to the other Agency's undersigned counsel stating its intention to withdraw from this Agreement. However, this Agreement shall continue to protect all Joint Defense Materials disclosed to or by the withdrawing Agency prior to any notification of withdrawal.
10. If any other person or entity requests or demands any of the Joint Defense Materials by subpoena or otherwise, counsel for the Agency receiving the demand shall immediately notify the other Agency with rights in that material and their counsel. Subject to state and federal public records laws, the receiving Agency or Agencies shall inform the person or entity requesting the Joint Defense Material that those materials are on loan and that demand should be made to the appropriate Agency. The Agencies will take all steps necessary or appropriate to assert all applicable rights and privileges over the Joint Defense Materials. In any judicial or other proceeding related to the disclosure of the Joint Defense Materials, the Agencies will cooperate fully to protect those materials from disclosure.
11. Nothing in this Agreement shall be deemed to create an attorney-client relationship between any counsel and anyone other than the clients of that counsel. Although the Agencies, through counsel, have entered into this Agreement, they do not intend or expect it to preclude counsel from meeting all professional and ethical obligations to represent the interests of

their clients, including representing any interest of their client that may be adverse to the clients of the other counsel. Nothing in this Agreement shall be used to seek the disqualification of any counsel for any Agency.

12. The Agencies understand that the purpose of this Agreement is to facilitate common interest representation by increasing the information flow between the Agencies. However, nothing in this Agreement shall obligate any Agency to share or communicate any materials with the other Agency.
13. Notwithstanding any provision of this Agreement, all Agencies reserve all claims, causes of action, and any and all other rights they may have against the other Agency, and the Agencies do not intend or expect this Agreement to release or to waive those claims or rights. The Agencies acknowledge they may now or in the future have adverse interests, and that the sharing of confidences pursuant to this Agreement may lead to potential conflicts of interest of the various attorneys in the future. The Agencies do not intend that this Agreement or the exchange of the Joint Defense Materials shall be used to support the future disqualification of their respective attorneys and agree that they will waive any conflicts arising from the sharing of Joint Defense Materials pursuant to this Agreement.
14. The Agencies agree that this Agreement shall not be offered or received in evidence, nor shall it be admissible at any trial or other proceeding, except for the purpose of enforcing its terms, unless all parties agree in writing to allow it.
15. Nothing in this Agreement shall be deemed to obligate any Agency to reimburse the other Agency for their costs in defending the Cases.
16. This Agreement may be executed in any number of counterparts, each of which shall be deemed original, and such counterparts shall together constitute one and the same instrument.
17. By signing this Agreement, the undersigned counsel certify that each has explained the contents of this Agreement to his or her respective clients and that the clients agree to abide by the terms reflected herein. The undersigned counsel also certify that all discussions held and materials exchanged in contemplation of the signing of this Agreement, but prior thereto, are also protected by this Agreement.
18. This Agreement is effective upon execution by counsel for the Agencies and is applicable to Joint Defense Materials shared by the signatory Agencies prior to signing this Agreement. For purposes of this Agreement, the term "counsel" means and includes both outside and in-house counsel for any Agency and execution of this Agreement by either outside or in-house counsel for an Agency binds all in-house counsel and all outside counsel retained to provide legal services in connection with the Cases.
19. This Agreement shall be binding upon and inure to the benefit of the Agencies and their respective successors, affiliates, permitted assigns, officials, employees, and legal representatives.

20. If any provision of this Agreement is deemed invalid or unenforceable, the balance of the Agreement shall remain in full force and effect.

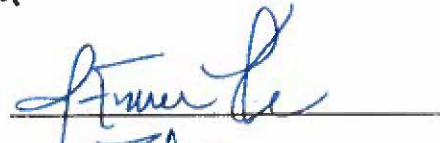
21. This Agreement may not be amended or modified except by a written agreement signed by the Agencies.

**CITY OF NEWPORT**

**OREGON DEPARTMENT OF  
TRANSPORTATION**

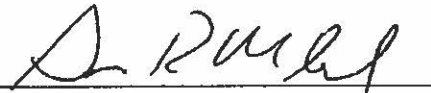
By: Ross M. Williamson, Attorney  
Local Government Law Group P.C.  
A Member of Speer Hoyt LLC  
ross@localgovlaw.com localgovlaw.com  
(Contract Legal Counsel)

By: Justin Emerson Kidd  
Assistant Attorney General  
Justin.kidd@doj.state.or.us

  
Dated: Feb 6, 2020.

Dated: Feb. 6, 2020.

By: Spencer Nebel  
Newport City Manager  
S.Nebel@NewportOregon.gov



Dated: 02-06, 2020.

