

**Date:** November 14, 2018  
**To:** Board of Directors  
**From:** Doug Kelsey  
**Subject:** **ORDINANCE 351 OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) AMENDING TRIMET CODE CHAPTER 29 AND UPDATING PROCEDURES FOR REQUESTS FOR PROOF OF PAYMENT (SECOND READING)**

**1. Purpose of Item**

Ordinance 351 requests that the TriMet Board of Directors (Board) adopt changes and update procedures for fare inspections contained in TriMet Code Chapter 29.

**2. Type of Agenda Item**

- Initial Contract
- Contract Modification
- Other: Ordinance

**3. Reason for Board Action**

The Board may amend the TriMet Code only by adoption of an ordinance.

**4. Type of Action**

- Resolution
- Ordinance 1<sup>st</sup> Reading
- Ordinance 2<sup>nd</sup> Reading
- Other \_\_\_\_\_

**5. Background<sup>1</sup>**

Ordinance 351 adopts changes related to the inspection of fares under TriMet Code Chapter 29. The proposed changes are in response to a recent judicial ruling in a criminal matter to which TriMet was not a party, *State v. Valderrama*. In short, in the context of a suppression hearing in a criminal case, a Multnomah County Circuit Court judge issued an opinion that concluded that a request for proof of payment by a TriMet fare inspector under the circumstances was an unlawful seizure under Article I Section 9 of the Oregon Constitution. The opinion did not prohibit TriMet from conducting fare enforcement. Its application is

<sup>1</sup> This memorandum is not meant to be a comprehensive or exclusive explanation of TriMet's legal position as it relates to the constitutionality of fare enforcement. TriMet believes its current fare enforcement practices are constitutional, and any changes are simply to provide clarity and certainty. This memorandum is not a legal submission for a court proceeding, but a summary description that may not include all arguments or considerations. Nothing in this document should be construed to limit TriMet from advocating additional or alternative legal theories in any proceeding. Nothing in this document should be construed as an admission.

limited to that case, and it is not binding precedent in a subsequent case. Still, the decision has created uncertainty in the public about TriMet's ability to conduct fare enforcement.

## A. Summary of the Decision

The opinion and order in *State v. Valderrama* examined two legal issues. First, the court examined whether or not the request for proof of payment, under the circumstances, was considered a stop (and therefore a seizure) under the Oregon Constitution. The court concluded that the defendant was stopped without reasonable suspicion when a TriMet fare inspector asked for proof of payment, which was unlawful. TriMet respectfully disagrees and considers a request for proof of payment to be a lawful encounter, similar to those approved by the Oregon Supreme Court in *State v. Backstrand*, which held that it was not a stop when a police officer asked for the identification of an individual in an establishment that prohibited minors. To that end, we have located two decisions from two different Washington County trial court judges in criminal cases each of which concluded that a request for proof of payment on a TriMet train by a police officer was not a stop and denied motions to suppress.

After concluding a stop occurred, the court in the *Valderrama* case then examined whether the request for proof of payment could be considered an administrative search, which is an exception to the prohibition on suspicionless searches. An example of an authorized administrative search is the one used in courthouses, where all persons entering the building are subject to search.

The four elements that must be met for a valid administrative search are:

- (1) the search must be noncriminal in nature;
- (2) the search must be properly authorized by a politically accountable lawmaking body;
- (3) the search must be designed and systematically administered to control the discretion of the officers; and
- (4) the scope of the search must be reasonable in relation to its purpose.<sup>2</sup>

The court concluded that TriMet's procedures complied with elements three and four above, but did not comply with the first two elements of the test. The opinion concluded that, because someone could be charged with a crime such as theft, fare inspection is not non-criminal. We respectfully disagree with the court's analysis. The fare inspector who requested proof of payment was not authorized to issue any criminal charges, only a non-criminal violation citation. As to the second element—whether there is authority from a politically accountable lawmaking body—ORS Chapter 267 provides a mass transit district broad authority to charge and collect fares, as well as to enact police ordinances for the use and enjoyment of the transit system.

Based on the above, TriMet continues to believe its fare enforcement is constitutional. Nevertheless, Ordinance 351 represents an effort to bolster TriMet's position related to the first two parts of the test for a valid administrative search: whether the search is non-criminal and whether it is properly authorized by a politically accountable lawmaking body. The intent is to provide certainty and clarity for the public and staff with respect to the authority for fare enforcement and the requirement to show proof of payment while on TriMet vehicles and

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<sup>2</sup> *State v. Atkinson*, 298 Or 1 (1984); *Nelson v. Lane County*, 304 Or 97 (1987); *Smith v. Washington County*, 180 Or App 505 (2002); *Weber v. Oakridge School Dist.*, 76, 184 Or App 415 (2002).

stations. While we continue to believe that a request for proof of payment is an encounter and not a seizure, if a court were to conclude otherwise, these changes would make it clear that a request for proof of payment is an authorized administrative search

## **B. Changes to Fare Enforcement Under Ordinance 351**

First, Ordinance 351 ensures that nonpayment of fare is non-criminal. Ordinance 351 provides that, following a request for proof of payment, where the only violation is the non-payment of fare in violation of TMC 29.15 A-C or TMC 29.15 F-G, then the only penalty will be a warning, citation, or exclusion. A citation in such circumstances is not only non-criminal in nature, but under the administrative process for resolving citations the Board adopted earlier this year, an individual has 90 days to resolve the citation outside of the court system entirely, by either paying a fine, completing community service, or enrolling in the Honored Citizen program and loading \$10 on their reloadable card.

Second, Ordinance 351 reinforces the legislative authority for TriMet to conduct requests for proof of payment. The authority to conduct an administrative search can be implied, and need not capture all details of implementation. *See Smith v. Washington County*, 180 Or App 505 (2002) (statute granting presiding judge ability to exercise “administrative authority and supervision over their respective courts” provided implied authority to mandate administrative searches of those entering courthouse); *State v. Boone*, 327 Or 314 (1998) (authority to conduct inventory of car implied from authorization to impound vehicle); *State v. Ketelson*, 163 Or App 70 (1999) (authority to conduct inventory at detoxification center implied from decision by politically accountable body to establish center).

We believe TriMet’s authority meets the standard established in the cases noted above. TriMet’s legislative authority includes the ability to “enact police ordinances relating to the protection, use and enjoyment of district property and facilities” and to “fix and collect charges for the use of the transit system and other district facilities.” ORS 267.150(2); ORS 267.200(6). That authority, as captured at the beginning of Exhibit A to Ordinance 351, articulates how the legislature has authorized the TriMet Board of Directors to request proof of payment from passengers, including those boarding and exiting vehicles.

Third, anyone authorized to request proof of payment who intends to rely on Chapter 29 as authority for requesting proof of payment must comply with this Code provision. The ordinance does not prohibit conducting any activities reasonably related to the investigation of a fare violation. Moreover, if a person has committed a violation other than or in addition to TMC 29.15 A-C or TMC 29.15 F-G, nothing in this ordinance prohibits other enforcement that may be appropriate based on the circumstances.

Finally, Ordinance 351 also includes findings that describe the rationale for TriMet’s approach to proof of payment. The purpose is to describe clearly for the public the underpinnings of TriMet’s fare enforcement program. Among other things, the findings state that collecting fares is essential to TriMet’s budget, that TriMet has always had an open system that necessarily relies on inspection (as do most light rail systems), and that any inspection system should be fair, systematic, and nondiscriminatory.

## **6. Financial/Budget Impact**

While there is no direct budget impact for Ordinance 351, fare collection represents a critical portion of TriMet’s revenue. Over the last four years, fare revenue represents approximately

21% of TriMet's revenue. For fiscal year 2018-2019, TriMet's approved budget anticipates revenue from fare collection to total \$117,340,000. The proposed changes enhance the certainty of revenue collection from fares.

**7. Impact if Not Approved**

Not adopting this Ordinance will retain the status quo for fare inspection under the TriMet Code.

**ORDINANCE NO. 351**

**ORDINANCE OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET) AMENDING TRIMET CODE CHAPTER 29 AND UPDATING PROCEDURES FOR REQUESTS FOR PROOF OF PAYMENT (SECOND READING)**

THE BOARD OF DIRECTORS OF THE TRI-COUNTY METROPOLITAN TRANSPORTATION DISTRICT OF OREGON (TRIMET), pursuant to the authority of Oregon Revised Statutes Chapter 267, does hereby ordain and decree the following Ordinance:

**Section 1- Amendment of TriMet Code Chapter 29**

Amendments to TriMet Code Chapter 29 are adopted as set forth in the attached Exhibit A, which is incorporated into and made part of this Ordinance.

Dated: November 14, 2018

\_\_\_\_\_  
Presiding Officer

Attest:

\_\_\_\_\_  
Recording Secretary

Approved as to Legal Sufficiency:

  
\_\_\_\_\_  
Legal Department

**ORDINANCE NO. 351**

**EXHIBIT A**

TriMet Code (TMC) Chapter 29, Regulations Governing Proof of Payment, is amended as set for below. Additions are show in underline, bold text.

**CHAPTER 29 – REGULATIONS GOVERNING PROOF OF FARE PAYMENT**

**29.01 Authority:**

- A. ORS 267.200 provides that TriMet, as a mass transit district, constitutes “a municipal corporation of this state, and a public body, corporate and politic, exercising public power.”**
- B. ORS 267.150(1) provides that the “legislative authority of a district board shall be exercised by ordinance.”**
- C. ORS 267.150(2) provides that TriMet’s Board may “enact police ordinances relating to the protection, use and enjoyment of district property and facilities.”**
- D. ORS 267.200 provides that TriMet has the “full power to carry out the objects of its formation.”**
- E. ORS 267.200(6) provides that TriMet may “fix and collect charges for the use of the transit system and other district facilities.”**
- F. ORS 267.140(2) provides that the General Manager shall have “full charge of the administration of the business affairs of the district.”**
- G. ORS 267.140(3) provides that the General Manager shall enforce “all ordinances adopted by the board.”**

**29.5 Findings.** The Board of Directors finds as follows:

- A. That TriMet’s ability to collect fares is essential to TriMet’s budget and its ability to provide mass transportation services to the region;**
- B. That TriMet’s MAX light rail system has always had a self-service, barrier-free fare collection system, as do most light rail transit systems in North America;**
- C. That MAX light rail station and platform characteristics on the TriMet system originally and as currently designed make self-service, barrier-free fare collection the optimal policy;**
- D. That a system of self-service fare payment will create substantial cost savings to the residents and taxpayers of TriMet and to the users of its transportation facilities;~~and~~**
- E. That moving from a self-service, barrier free system to a fully gated system with**

turnstiles would be prohibitively expensive and would fundamentally alter the open nature of the light rail system and its role in the environment where TriMet operates. In addition to cost, barriers would not eliminate the need for fare inspections based on the experience of closed transit systems that continue to be challenged by non-compliance with fare requirements in the form of fare gate jumping;

- F. That a self-service, **barrier free** system will contribute to a more efficient and more convenient transportation service, both for drivers and for passengers;~~;~~~~and~~
- ~~C. That in order to establish a viable self-service system it is necessary to adopt incentives and disincentives to encourage TriMet passengers to pay the required fares and to carry proof of payment while occupying TriMet vehicles.~~
- G. That a self-service, barrier-free fare system necessarily relies on the inspection of fares by asking passengers and prospective passengers to show valid proof of payment upon request;
- H. That to establish a viable self-service, barrier-free system it is necessary to adopt a system to monitor fares that is fair and equitable;
- I. That to ensure nondiscrimination on any basis, any system to check fares in a self-service barrier-free system may not target any person or groups of people;
- J. That a program of checking fares in a safe and systematic manner that is directed at all customers on a given train or platform to the greatest extent practicable and consistent with safety considerations under the circumstances ensures that there is no perceived or actual bias in the process of checking fares;
- K. That TriMet has several programs that offer free and reduced fares for qualified individuals;
- L. That TriMet, through Ordinance 349 enacted reduced penalties in 2018 that provided an opportunity to resolve a fare evasion citation outside of the court system directly with TriMet for 90-days following issuance of the citation by paying a fine, performing community service, enrolling in the Honored Citizen program, or seeking administrative review of the citation;
- M. That those cited only for fare evasion are eligible for a voluntary administrative resolution of a citation that allows the cited party to avoid the court process entirely;
- N. TriMet supports personnel involved in providing a safe and secure system and, in the development of any policies and procedures pursuant to this ordinance, consideration should be made to safety and de-escalation to reduce conflict on the system;
- O. That the policy for inspecting fares in Chapter 29 of the TriMet Code is designed

**to establish uniform, non-criminal, non-discriminatory procedure to govern fare inspections and fare evasion and to effectuate the intent of these findings.**

29.10 **Definitions.** A used in this Chapter, unless the context requires otherwise:

- A. “Activated mobile ticket” means a TriMet authorized mobile ticket that has been time validated and in active use by a person clicking the “Use” function of the mobile ticket application on their phone.
- B. “Commuter Rail Platform”, as used in this Chapter, means an area used exclusively for boarding and deboarding, or waiting for, a commuter rail train, including adjoining stairways, ramps and elevators.
- C. “Inspector” means a person other than a “peace officer” authorized by the General Manager or by the provisions of TMC Chapters 28, 29 or 30 to demand proof of fare payment and to issue citations as provided hereunder.
- D. “Light Rail Platform”, as used in this Chapter, means an area used exclusively for boarding and deboarding, or waiting for, a light rail train, including adjoining stairways, ramps and elevators.
- E. “Proof of Fare Payment” means:
  - (1) A TriMet pass or a C-Tran (Clark County Public Transportation Authority) pass valid for the status of the person and the time of use;
  - (2) A receipt, including a digital image of an activated mobile ticket on a person’s phone, showing or evidencing payment of the applicable fare, valid for the status of the person, used within the time applicable to the receipt;
  - (3) A prepaid ticket or series of tickets showing validation by TriMet time stamp, valid for the status of the person, used within the time applicable to the ticket;
  - (4) A TriMet issued validation sticker affixed to a photo identification card that is issued by TriMet, an employer or college and is valid for the period designated on the sticker, and used by the person whose name and photo appear on the identification card;
  - (5) A valid eFare Payment Instrument; or
  - (6) Any other fare instrument and any fare identification or documentation required by TMC Chapter 19 or by experimental fare ordinance.
- F. “To Exhibit Proof of Fare Payment” for a mobile ticket means:
  - (1) To display the digital image of an activated mobile ticket on the person’s phone;



- (2) To tap or otherwise display the mobile ticket application fare security features on the person's phone;
- (3) To permit mobile ticket bar code scanning of the person's phone by Inspectors or peace officers; or
- (4) To show any other fare instrument and any fare identification or documentation required by TMC Chapter 19 or by experimental fare ordinance for use of the mobile ticket.

G. "To Exhibit Proof of Fare Payment" for an eFare Payment Instrument means:

- (1) To present a valid eFare Payment Instrument and to permit scanning of the person's eFare Payment Instrument by Inspectors or peace officers, to demonstrate the eFare Payment's validity; or
- (2) To show any other fare instrument and any fare identification or documentation required by TMC Chapter 19 or by experimental fare ordinance for use of the eFare Payment Instrument.

H. "Valid eFare Payment Instrument" means an eFare card or ticket, or any contactless financial instrument authorized by TMC Chapter 19 for payment of electronic fare that has been:

- (1) Tapped and accepted at an eFare card reader; or
- (2) Validated by a TriMet ticket vending machine or other TriMet validation equipment;

prior to each vehicle boarding or upon occupying any district area requiring proof of fare payment.

*(29.10 amended by Ordinance No. 179, Section 2; Ordinance No. 239, Section 1; Ordinance Nos. 266; 297, 303, 323, 330 and 342)*

#### 29.15 **Prohibitions.**

- A. It shall be unlawful for any person to occupy, ride in or use, any District Vehicle without paying the applicable fare.
- B. It shall be unlawful for any person to occupy, ride in or use, any District Vehicle without carrying proof of fare payment.
- C. It shall be unlawful for any person occupying a District Vehicle, or occupying a light rail platform upon disembarking a light rail vehicle, or occupying a commuter rail platform upon disembarking a commuter rail vehicle, to fail to carry or to fail to exhibit proof of

fare payment upon demand of an Inspector or a peace officer.

- D. It shall be unlawful for any person to fail to provide his or her name, address or identification to an Inspector or a peace officer, as required by TMC 29.20.
- E. It shall be unlawful for any person, required by TMC 29.20 to provide his or her name, address or identification to provide a false name, address or identification.
- F. It shall be unlawful for any person to occupy without carrying proof of fare payment, the 42nd Avenue (Hollywood), 60th Avenue, 82nd Avenue, Parkrose/Sumner or Sunset Transit Center light rail station platforms, or the Washington Park Station light rail platforms and elevators, or any light rail or commuter rail platform where signage is posted requiring the carrying of proof of fare payment.
- G. It shall be unlawful for any person occupying the 42nd Avenue (Hollywood), 60th Avenue, 82nd Avenue, Parkrose/Sumner or Sunset Transit Center light rail station platforms, or the Washington Park Station light rail platforms and elevators, or any light rail or commuter rail platform where signage is posted requiring the carrying of proof of fare payment, to fail to exhibit proof of fare payment upon demand of an Inspector or a peace officer.

*(29.15 amended by Ordinance No. 179, Section 2; Ordinance No. 216, Section 1; Ordinance No. 228, Section 1; Ordinance No. 266; Ordinance No. 278; Ordinance No. 291 and Ordinance No. 303)*

- 29.20 **Identification.** A person failing to exhibit Proof of Payment upon demand by an Inspector or a peace officer shall provide the Inspector or peace officer, his or her name and residence address and shall exhibit upon request of the Inspector or peace officer whatever written identification, if any, may be carried by the person. Pursuant to ORS 153.039, an Inspector or a peace officer may stop and detain persons for the purpose of issuing a citation.

*(29.20 amended by Ordinance No. 266)*

- 29.25 **Administration.** The General Manager may adopt such procedures as may be necessary from time to time for the administration of this Chapter.

- 29.30 **Administrative Request for Proof of Payment Construction**

**A. Any person authorized by TMC 29.40 to issue citations may request proof of payment as provided by Chapter 29 of the TriMet Code and the rules, policies, and procedures issued by the General Manager or the General Manager's authorized designee. All rules, policies, and procedures developed by the General Manager or the General Manager's designee shall be:**

**(1) Reasonable in relation to the purposes of ensuring compliance with the requirements of Chapter 29 of the TriMet Code; and**

**(2) Designed and administered to systematically control the discretion of anyone requesting proof of payment.**

**B. Any request for proof of payment made pursuant to the authority in TriMet Code Chapter 29 must comply with all parts of Chapter 29.**

**C. Following a request for proof of payment as authorized by the TriMet Code, if a person's sole offense is failing to show proof of payment in violation of TMC 29.15 A-C or 29.15 F-G, the only penalty issued shall be a warning, a citation pursuant to TMC 29.35 or an exclusion. Nothing in this section prohibits removal from the premises as provided by TMC 29.40 C. Nothing in this section prohibits conducting any authorized activities reasonably related to the investigation of the violation.**

D. Nothing herein is intended to compromise or waive the right to enforce concurrently, or in the alternative, other remedies **under the TriMet Code or** available pursuant to the Oregon Criminal Code, including those applicable to the crime of Theft of Service or Trespass **when a person has committed any violation other than or in addition to TMC 29.15A-C or TMC 29.15 F-G.**

29.35 **Penalties.**

A. Any person who violates any provision of TMC Section 29.15 commits a violation as defined in ORS 153.005 and 153.008 punishable by a fine of not more than \$250. The presumptive fine amount for a violation of TMC Section 29.15 is \$175.

B. Pursuant to ORS 267.153, for every citation issued to a person age 18 or over on or after July 1, 2018, where the sole violation of the TriMet Code is a violation of any of the fare payment requirements in TMC Section 29.15 A-C; or 29.15 F-G, the violation proceeding shall be stayed for a period of 90-days. During the 90-day stay period, the complaint, abstract of court record, or any other materials associated with the citation will not be filed with any court. Except as otherwise provided, for a citation subject to a 90-day stay, any resolution of the violation citation will take place directly with TriMet through the administrative process described in this section.

C. For the duration of the 90-day stay period, the presumptive fine described in TMC 29.35 A shall be temporarily reduced to the following amounts:

1. First offense: \$75
2. Second offense: \$100
3. Third offense: \$150
4. Fourth offense and beyond: \$175

D. In lieu of payment of a fine, for the duration of the 90-day stay period the cited person shall be allowed to complete community service with an approved community service program in the following amounts:

1. First offense: 4 hours

2. Second offense: 7 hours
3. Third offense: 12 hours
4. Fourth offense and beyond: 15 hours

Satisfaction of the community service option will require a cited party to provide evidence to TriMet of successful completion of the required community service hours at an approved community organization as described in rules issued by the General Manager.

- E. A prior offense is determined by an examination of TriMet's records when the citation is issued. If the person issuing the citation is unable to complete a check of TriMet's records, the offense will be considered a first offense for purposes of the penalties in this section only.
- F. Any person cited for fare evasion subject to a stay shall have the citation reduced to \$0 upon verification of the following information in the manner required by TriMet:
  - (1) The person is eligible for but not enrolled in TriMet's Low Income Fare or Honored Citizen program;
  - (2) The person successfully enrolls in the Low Income Fare or Honored Citizen program during the 90-day stay period; and
  - (3) The person loads a minimum of \$10 per citation on their reloadable fare card during the 90-day stay period.
- G. The General Manager may adopt Administrative Rules to provide for in-person or written hearings for any citation subject to a 90-day stay. The rules shall establish the type of violations on which review may be considered. The General Manager is further authorized to appoint a Hearings Officer(s), establish hearing procedures, and establish any other requirements necessary to effectively implement this subsection. Any administrative hearing conducted under this subsection must be completed within 60 days of the issuance of the citation.
- H. A citation subject to a stay is successfully resolved through the administrative process if:
  - (1) The person pays the required fine in the manner prescribed by TriMet within the stay period;
  - (2) The person fully performs community service in lieu of paying a fine, according to standards established by TriMet, within the stay period; or
  - (3) TriMet, within the stay period, determines that the person did not commit the violation for which the person was cited or otherwise determines that no penalty should be assessed.

If a citation subject to a 90-day stay is successfully resolved through the administrative process during the 90-day stay as described, TriMet shall not file the complaint or

abstract of court record with any court or otherwise initiate court proceedings relating to the citation.

- I. Upon the expiration of the 90-day stay for any citation not successfully resolved as provided in this section, TriMet will file with the appropriate court the complaint, abstract of record, and any other relevant documents for adjudication as provided in TMC 29.35A and applicable law.
- J. A person whose citation is subject to a 90-day stay may, at any time during the stay period, request that the citation be filed with the appropriate court. The request may be made before, during, or after an administrative process conducted under the authority of this section. Upon such request, TriMet shall cease the administrative process with respect to the citation and shall file the complaint and abstract of court record with the appropriate court pursuant to ORS 153.054.
- K. Once a citation is filed with the court for any reason the citation shall not be eligible for any of the administrative options for resolution described in this section.
- L. Pursuant to ORS 267.153(8), for any citation subject to a stay under this section, the running of any applicable statutory time limitation for the commencement of a trial is tolled during the stay period.

*(29.35 amended by Ordinance No. 266; Ordinance No. 275; Ordinance No. 303; Ordinance No. 310; Ordinance No. 337; and Ordinance 349)*

29.40 **Enforcement.**

- A. Inspectors, peace officers appointed by the General Manager and all peace officers of the State of Oregon are authorized to issue citations, as provided by Oregon law, to any person who violates any provision of TMC Chapter 29.

Inspectors are not police officers as defined by ORS Chapter 237, and only have the powers to arrest afforded a private person under ORS 133.225.

- B. Citation forms as authorized pursuant to ORS Chapter 153 may be used for any violation of TMC 29.15.
- C. Any peace officer, Inspector, vehicle operator, or District Rail Controller, has the authority to refuse entrance on a District Vehicle or District Station or to require departure from a District Vehicle or District Station of any person who violates any provision of TMC 29.15.

*(29.40 amended by Ordinance No. 179, Section 2; Ordinance No. 182, Section 2; Ordinance No. 208, Section 1; and Ordinance No. 266)*