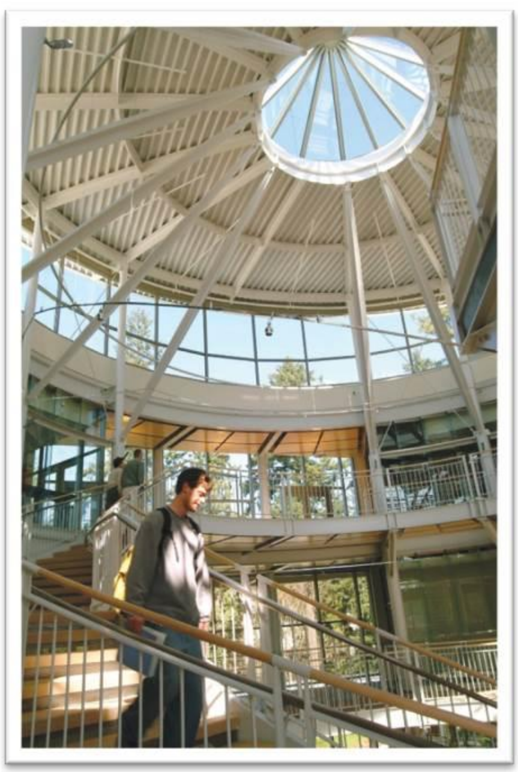
HIGHER EDUCATION COORDINATING COMMISSION

HB 5005

CAPITAL REPAIR AND RENEWAL ACCESSIBILITY IMPROVEMENTS REPORT



CAPITAL REPAIR AND RENEWAL TECHNICAL WORKGROUP

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WORKGROUP

The Capital Repair and Renewal Technical Workgroup is comprised of finance, accounting, capital and facilities management staff from the public universities, the University Shared Services Enterprise (USSE), the Higher Education Coordinating Commission (HECC) and the Department of Administrative Services (DAS). The workgroup has been assigned multiple tasks by the Commission, including the development of a report recommendation to HECC staff in response to a budget note relating to Capital Repair and Renewal (CR&R) funding which accompanied HB 5005 (2015). The budget note tasked the Commission with recommending whether and how changes in law or administrative rule could be made to increase the capacity of public universities to deploy CR&R funding for "implement[ing] disability access improvements."

The workgroup, having explored frictions created by the current funding system, recommends an adjustment to both the CR&R Project Scope and project name, as provided by the Legislature, which would better align funding with the desires of the Legislature and the improvement and renewal needs of institutions. This would enable more effective deployment of funds for accessibility and academic modernization projects at all public universities and allow them to better steward assets under their control. Certain frictions remain which are related to the funding of CR&R exclusively through bond proceeds as well as related to the formula by which funds are distributed amongst institutions. These frictions are identified in the report, but no recommendation is made.

RECOMMENDATIONS

The Higher Education Coordinating Commission submits the following recommendations to the Legislature, in accordance with the budget note attached to HB 5005 (2015), in order to improve the ability of institutions to utilize "capital repair and renewal funds to implement disability access improvements." The project scope adopted in HB 5005 (2015) Budget Report and name of this project should be amended, as follows, in order to broaden the use of bond proceeds to include access and accessibility issues as well as classroom modernization efforts.

PROJECT NAME:

The HECC recommends that the project name should be changed from Capital Repair and Renewal (CR&R) to *Capital Improvement and Renewal (CI&R)* to better capture the intent and use of the funds. This is largely due to the fact that "repairs" are typically not "capitalizable" and thus not eligible under bond funded programs. Thus, the name should be adjusted in order to reflect the allowed use of these funds. Within this report Capital Repair and Renewal funds are hereafter referred to as Capital Improvement and Renewal funds or CI&R funds.

PROJECT SCOPE:

The HECC recommends that the project scope for Capital Improvement and Renewal (CI&R) be adjusted as follows to enable institutions to utilize bond proceeds for accessibility and academic modernization improvements. This adjusted scope broadens the available uses of funds to better match the needs of institutions. The recommended changes are underlined below, and should be carried forward to subsequent biennia;

> *Capital renewal, code compliance, and safety: approved $65,770,000 Article XI-Q bonds to improve facilities by addressing deferred maintenance and by supporting capital renewal, code compliance, academic modernization and life, safety and physical accessibility related projects. These projects do not involve acquisition of buildings, structures, or land. The approved amount includes $65,000,000 for project costs and $770,000 for issuance costs. HECC initially will allocate funds to the individual universities based on square footage in education and general services facilities, following past OUS practice. Debt service on the Article XI-Q bonds will be paid with General Fund.*

INTRODUCTION AND PROJECT SCOPE

BUDGET NOTE

The Budget Report for HB 5005 (2015), the "bond bill," included the following budget note related to CR&R funds;

> *The Higher Education Coordinating Commission, in collaboration with the seven public universities and the Department of Administrative Services, shall submit a report by December 31, 2015 to the Legislative Fiscal Office that identifies whether and how revisions in statute and/or administrative rules are needed to better enable universities to use capital repair and renewal funds to implement disability access improvements*[1]

PROJECT SCOPE

The Budget Report for HB 5005 (2015), the "bond bill," included the following project scope related to CR&R funds for the 2015-17 biennium;

> *Capital renewal, code compliance, and safety: approved $65,770,000 Article XI-Q bonds to maintain facilities and keep the deferred maintenance backlogs from growing. These projects do not involve acquisition of buildings, structures, or land. The approved amount includes $65,000,000 for project costs and $770,000 for issuance costs. HECC initially will allocate funds to the individual universities based on square footage in education and general services facilities, following past OUS practice. Debt service on the Article XI-Q bonds will be paid with General Fund.*[2]

HISTORICAL CI&R FUNDING

The Legislature has provided significant, though fluctuating, levels of funding from biennium to biennium for Capital Improvement and Renewal (CI&R) at public universities. Historically, the allocation of CI&R funding through the Oregon University System (OUS) to institutions had been on a proportional basis, according to the relative total Education and General (E&G) square footage of any one institution, as compared to the other institutions' E&G square footage. This E&G square

[1] Oregon Legislature. "HB 5005 A Budget Report and Measure Summary." Jul. 3, 2015. Pp4. <https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureAnalysisDocument/32413>
[2] Ibid. Pp4.

footage-based allocation is done regardless of the deferred maintenance or accessibility improvement needs at an institution.

Until the onset of the Great Recession, CI&R funding was provided by the Legislature in a combination of bond-funded capital and matching General Fund support. This allowed significant flexibility for institutions to deploy resources in meeting their ongoing capital improvement and renewal needs. This flexibility allowed for funding of items which had relatively short lifecycles or that were not capitalizable, such as overhead and project management expenses. As General Fund support for CI&R was withdrawn after 2007-09 biennium, only items which comported with bond regulations and had relatively long lifecycles remained fundable. The cost of project management, overhead and other expenses, which can be significant, were off-put to the operating budget of each institution. This has inhibited institutions' ability to fund minor projects, access or ADA related projects, among other ongoing maintenance and capital improvement and renewal needs. This also created, or exacerbated, a tension within institutions where spending on maintenance and capital renewal comes at the expense of investments in the education and research missions of the institutions, or pushes tuition revenue higher in order to cover both. The relatively low historic level of General Fund operating support provided by the state to public universities made this a difficult and costly choice, which institutions have often made through electing to defer maintenance and renewal projects in order to maintain investments in faculty and student support services.

OWNERSHIP AND MAINTENANCE OF REAL PROPERTY

This report is written with an understanding of the legal relationship between the ownership and care of real property entrusted to public universities. Specifically, ORS 352.113(1) and ORS 352.113(2), which delineate this relationship, reads as follows;

ORS 352.113 REAL PROPERTY HELD BY UNIVERSITY WITH A GOVERNING BOARD; LEGAL TITLE; CUSTODY; SALE AND TRANSFER.

(1) Legal title to all real property acquired by a university with a governing board shall be taken and held in the name of the State of Oregon, acting by and through the governing board. Legal title to all real property conveyed to a university with a governing board is considered to be conveyed to and vested in the State of Oregon, acting by and through the governing board. Authorized conveyances of all real property, other than university lands, acquired by or vested in the

State of Oregon for the use or benefit of the university must be executed in the name of the State of Oregon, acting by and through the governing board, by the chairperson of the governing board.

(2) The governing board has custody and control of and shall care for all real property used for university purposes. Management, maintenance, encumbrance, disposal and preservation of all real property used for university purposes, whether the real property is acquired before or after the establishment of a governing board, is the responsibility of the governing board. Unless the governing board has granted prior consent, real property taken and held under this section may only be encumbered by the State of Oregon in accordance with state law and in a manner that would not impair the financial condition of the university or the rights of the holders of any obligations of the university issued or incurred under any master indenture or other financing agreement.

ISSUE FRAMING AND RECOMMENDATIONS

Two primary issues confront the HECC and institutions in effectively deploying "capital repair and renewal funds to implement disability access improvements." These issues are, broadly defined, what projects fall within the project scope as established by the Legislature, and whether such projects are "bondable," or eligible for debt financing. These issues are discussed below, in reverse order. Recommendations for changes to better enable institutions to utilize CI&R funds to maintain and extend the useful life and capability of capital assets follow the discussion.

BONDING RESTRICTIONS

The HECC in collaboration with DAS and the public universities were asked to consider what statutory or rule-making changes might be needed to better accommodate disability access improvement. A number of issues were discussed, the most significant of which are noted here for context and reference.

The Legislature has approved only bond funding for CI&R since the 2009-11 biennium. As discussed above, previous to the 2009-11 biennium, the Legislature approved a mix of General Fund and bond funding for CI&R projects. This mix of capital and General Funds allowed for greater flexibility by institutions in the deployment of resources. While larger and longer-term – capitalizable – projects were funded with bond proceeds, relatively short-term maintenance projects were funded with General Fund, both of which were provided by the state. Concomitant with the state's shift away from providing General Fund support for CI&R, the state also significantly reduced overall operating support to the public universities, causing a well-documented spike in tuition and cost control measures. The impact of this shift was significant at every public university and particularly challenging for those universities which are more reliant on state funding or have a limited tuition base. With a fixed, or limited amount, of, state support institutional investment in ongoing maintenance and capital renewal projects must come at the expense of either tuition increases or limiting expenditures on education or student support services. It has been difficult for all institutions to strike a balance between funding current needs and deferring maintenance which will cause costs to increase over the long-run.

The sole reliance on bond funding in general, and particular issues relating to the use of tax-exempt and Article XI-Q bonds for CI&R projects create unique frustrations and administrative burdens for institutions which inhibit the deployment and expenditure of funds for the purposes indicated by the Legislature. This is due to the complex set of restrictions or administrative duties inherent to the use of bond proceeds. These include;

- the tracking of fund uses and splits as it relates to private use of university capital assets (which can include research along with other commercial activities),
- overhead assessments, non-hourly or non-direct billed staff time and project management costs, as well as miscellaneous non-capitalizable expenses which are integral to CI&R programs cannot be funded or have very low caps on funding, and
- Projects with relatively short life-cycles or that are below institutional capitalization thresholds and, though capitalizable are not capitalized.

Bond funded projects are required to have a lifecycle such that the bond maturity is no more than 120% of the life of the underlying asset. This has historically been managed by institutions and by the former OUS either through the use of General Fund CI&R support or through Certificates of Participation (COPs), neither of which are currently available, or by avoiding investment in relatively short-lifecycle projects. Further, the average lifecycle of all institution's investments needed to match the maturity of the bond financing CI&R projects when they were one combined legal entity allowed for some flexibility among institutions within the OUS. In the new governance and bonding structure each institution will be allocated CI&R funds independently and will be responsible to manage its allotted funds such that they are congruent with the overall bond agreement. This change arises from the separation of institutions into multiple distinct legal entities and the bond issuance and servicing structures developed through HB 3199 (2015).

As is typical with most General Fund funded debt, the bonds to finance the CI&R projects are not sold until the end of the biennium in which they are approved. Bond proceeds must then be spent within three years of the issuance. This creates a significant time lag between when a CI&R project is identified as highest need for funding by the institution and when funds and capacity are available or the institution. Given the significant time difference between the legislative session in which bonds are authorized, when they sold and when funds expended by the institution a particular project may have moved up or down the priority list for an institution. Wear and failure of capital assets cannot be perfectly predicted in advance, unforeseen needs of institutions and the significant delays between initial approval and the utilization of funds creates the need to ensure maximal flexibility in issuance to ensure efficient and effective deployment by the institutions.

Among the many items taken into account during the bond issuance process, ensuring a proper matching of the bond term with the expected life of financed assets will be in order. These issues will be evaluated at the time of issuance and in conjunction with all parties to the transaction, and estimated when CI&R funds are requested by the HECC for the Governor's Recommended Budget. This may result in using a conservative term for the bonds issued to ensure that, even with changes made to which capital assets are financed with the bonds, the State will continue to meet relevant IRS regulations. .

ISSUE HIGHLIGHT

Due to institutions having only bond funds available for CI&R projects, public universities have been forced to rely on operating funds to support portions of CI&R funding which aren't capitalizable or otherwise don't meet bond restrictions. This reliance on operating funding comes in a context of a nearly two-decade long-term decline in state General Fund support. There was a major reinvestment by the Legislature for the 2015-17 biennium, which will help, but the long-term decline has worn a significant hole in institution's capacity to invest in maintaining, repairing and renewing their physical infrastructure. This is seen through large deferred maintenance backlogs, outdated academic spaces and in certain cases accessibility issues or campus improvement needs going unmet.

The inherent tradeoffs involved in shifting funds from the core academic mission of the institution to maintaining the physical assets of the institution has been difficult for institutions to manage as they focus on meeting the needs of current students. Having dedicated and sufficient General Fund resources, provided by the state, for these efforts would ensure that buildings are maintained in accordance with the highest standards. However, if these funds came at the expense of state funding dedicated towards the general operation of the institution it would inhibit institutions from investing in their students and the mission of the university.

This tradeoff is less than ideal. A continued dialogue which ensures a balance between university's responsibility to maintain the capital assets entrusted to them under ORS 352.113 and the availability of operating funds to support the ongoing maintenance and operations should continue. This is an effort which will require the long-term commitment of the institutions, the HECC and the Legislature. Ensuring that there are sufficient funds available for the necessary efforts to properly maintain, equip and modernize the portfolio of capital assets at Oregon's public universities is a responsibility of the institutions in managing the assets entrusted to them and the state in providing sufficient General Fund support.

CAPITALIZATION

Article XI-Q of the Oregon Constitution states that bonds issued under these provisions must be used for "acquiring constructing, remodeling, repairing, equipping or furnishing real or personal property… including without limitation, facilities and systems; Infrastructure related to the real or personal property[.]". This provision is sufficiently broad to allow for investment in buildings, building subsystems and infrastructure upgrades necessary for institutions to accomplish their CI&R needs. The workgroup believes the relevant constitutional provisions are sufficient for the authorization of bonds for the purposes outlined under the revised project scope described in the Recommendations section of this report.

For a project to be funded by a bond, the project must be "chargeable to a capital account." This disallows the use of CI&R funds for many minor projects or for ongoing maintenance designed to merely keep a capital asset in operating condition, but not intended to materially extend its useful life or capability. To this point, the Internal Revenue Code, Title 26 Section 1.150-1 defines a capital expenditure as follows;

Capital expenditure means any cost of a type that is properly chargeable to capital account (or would be so chargeable with a proper election or with the application of the definition of placed in service under § 1.150-2(c)) under general Federal income tax principles. For example, costs incurred to acquire, construct, or improve land, buildings, and equipment generally are capital expenditures. Whether an expenditure is a capital expenditure is determined at the time the expenditure is paid with respect to the property. Future changes in law do not affect whether an expenditure is a capital expenditure.[3]

It is important to note the Internal Revenue Code does not require that projects be capitalized, only that they are capitalizable. However, the State's bond counsel for the Article XI-Q bond program has advised the DAS that in order to comply with Article XI-Q of the Oregon Constitution, the costs must be capitalized to an asset. The DAS Oregon Accounting Manual defines "capital assets" as follows;

Capital Assets Tangible or intangible assets used in agency operations that have initial estimated useful lives beyond a single year and an initial cost (inclusive of ancillary charges) of at least $5,000.[4]

The definitions of capital assets and capital expenditures are broad in scope and allow for institutions to set capitalization thresholds which fit their size, scope and operating environment. Bond funding should continue to be available, within relevant GAAP standards, IRS and other state and federal laws and regulations, to CI&R projects.

Individual institutions establish their own accounting policies, including capitalization thresholds, which may be set at a higher threshold than that of the state and in accordance with their internal operating environment. The State's bond counsel's advice has the potential to preclude the utilization of CI&R funds on minor projects which do not meet the institution's capitalization threshold and could be particularly problematic for relatively small accessibility projects.

The capitalization requirement may create a need for institutions to revisit and revise their internal capitalization policies to more effectively utilize CI&R funds. Institutions have, in the past, managed this through the bundling of multiple small projects into a single large asset for capitalization

[3] Internal Revenue Service. "Code of Federal Regulations. "26 CFR 1.150-1 – Definitions." https://www.law.cornell.edu/cfr/text/26/1.150-1

[4] Oregon Department of Administrative Services – Statewide Accounting & Reporting Services. "Oregon Accounting Manual." <http://www.oregon.gov/DAS/cfo/SARS/pages/oam_glossary.aspx>

purposes. Other remedies may exist and are related to legal interpretation of allowable uses under Article XI-Q of the Oregon Constitution. These will be subsequently explored by the public universities, DAS and the HECC. No recommendations regarding legal interpretations or internal institutional accounting policies are made in this report as they are outside of its scope.

PROJECT SCOPE

The project scope and the project name – Capital Repair and Renewal – established by the Legislature for CI&R funds provides a narrow purpose for the utilization of these funds. This narrow project scope and name unnecessarily inhibits institutions from deploying funds to projects which the Legislature has expressed interest in and are of great need by the institutions.

Specifically, the project scope defines the purpose of these funds to "to maintain[ing] facilities and keep[ing] the deferred maintenance backlogs from growing." This definition limits the ability of institutions to deploy CI&R funds to improvements which extend the useful life or capability of a capital asset. Maintenance is not capitalizable under GAAP standards, and thus not fundable through debt financed projects and is a disallowed use. This project scope does not clearly enable institutions to spend CI&R funds to add capabilities to existing infrastructure.

Enabling institutions to expand the capabilities of existing capital assets is particularly important as it relates to "disability access improvements." Accessibility improvements necessarily require the addition of previously lacking capabilities. For example, improvements such as elevators, curb cuts or ramps which are not currently in place in or around a building would not be eligible for investment by an institution under the current project scope but are of great need in meeting accessibility barriers. There is significant question as to whether or not academic and classroom modernization projects are fundable under the current project scope.

CI&R funding is not designed to supplant campus operational maintenance but to complement campus investments. This balance, when properly struck, ensures that as buildings and the subsystems within them fail over the normal course of their usable life they are replaced and that reasonable upgrades are undertaken in order to extend the capability of buildings to meet the needs of a modern learning environment and the evolving accessibility needs of students. CI&R funds are not designed to act as maintenance funds or for the ongoing operation and necessary upkeep to buildings or their major subsystems. Because CI&R funding is provided exclusively through debt financing, institutions remain responsible for maintenance through their operating budgets, while the state continues to fund improvements and renewal of current capital assets.

Given the codification of duties assigned to institutions through ORS 352.113 it is important to provide sufficient flexibility for institutions to manage the ongoing CI&R programs to maximize their effectiveness.

RECOMMENDATIONS

The Higher Education Coordinating Commission submits the following recommendation to the Legislature in accordance with the budget note attached to the HB 5005 (2015) in order to improve institutions' ability to utilize "capital repair and renewal funds to implement disability access improvements." The project scope adopted in the HB 5005 (2015) Budget Report and name of the project should be adjusted, as follows, in order to broaden the use of funds to include academic modernization and accessibility improvements to existing capital assets.

PROJECT NAME:

The HECC recommends that the project name should be changed from Capital Repair and Renewal (CR&R) to *Capital Improvement and Renewal (CI&R)* in order to better capture the intent and use of the funds. This is due, largely to the fact that "repairs" are typically not "capitalizable" and thus not eligible under bond funded programs. Thus the name should be adjusted in order to reflect the allowed use of these funds.

PROJECT SCOPE:

The HECC recommends that the project scope for Capital Improvement and Renewal (CI&R) be adjusted as follows to enable institutions to utilize bond proceeds for accessibility and academic modernization improvements. This adjusted scope broadens the available uses of funds to better match the needs of institutions. The recommended changes are underlined below, and should be carried forward to subsequent biennia;

Capital renewal, code compliance, and safety: approved $65,770,000 Article XI-Q bonds to improve facilities by addressing deferred maintenance and by supporting capital renewal, code compliance, academic modernization and life, safety and physical accessibility related projects. These projects do not involve acquisition of buildings, structures, or land. The approved amount includes $65,000,000 for project costs and $770,000 for issuance costs. HECC initially will allocate funds to the individual universities based on square footage in education and general services facilities, following past OUS practice. Debt service on the Article XI-Q bonds will be paid with General Fund.

OTHER WORK

The workgroup, beyond the needs identified in the budget note related to HB 5005 (2015) as listed above, recommends that the HECC, in conjunction with the public universities and the DAS, develop Administrative Rules or other mechanisms, as necessary, in order to define, allocate and deploy Capital Improvement and Renewal funding to campuses through the bond programs addressed in HB 3199 (2015). The end product of this process will be to provide a clear, equitable and readily understood process for all stakeholders and ensure prudent control and distribution of state resources to meet the goals identified by the Legislature through its creation of the CI&R project.

APPENDIX A-DEFINITIONS

The HECC incorporates into this report definitions as provided by the Association of Physical Plant Administrators (APPA), relevant federal agencies, including the Internal Revenue Service (IRS), the U.S. Department of Justice Civil Rights Division, and DAS. Below is a non-exhaustive set of definitions to terms that are included within this report. Through the adoption of this report the HECC does not attempt to set accounting policy for individual public universities. Subsequent workgroup efforts will recommend structure for the HECC to adopt definitions of terms, where necessary, to support the public university CI&R funding process. This is related to, but outside of the scope of, the HB 5005 budget note.

Accessibility Project – Projects which remedy physical barriers in and around a facility that prohibit access to programs, activities and services. “Programs, activities and services" include the functions necessary to fulfill a building’s mission.[5]

ADA – Americans with Disabilities Act of 1990, including changes made by the ADA Amendments Act of 2008 as codified in Title 42, Chapter 126 and U.S.C. Title 47, Chapter 5 of the United States Code[6].

Additions or Improvements to Existing Assets – The historical cost of a capital asset includes the cost of subsequent additions or improvements but excludes the cost of repairs and maintenance. An addition or improvement, unlike a repair, provides additional value, enhances a capital asset’s functionality (effectiveness or efficiency), or extends a capital asset’s expected useful life. Repairs and maintenance only retain value. Example: The periodic resurfacing of a road is expensed as a repair, while adding a new lane constitutes an addition that is capitalized.[7]

Capital Asset – Tangible or intangible assets used in agency operations that have initial estimated useful lives beyond a single year and an initial cost (inclusive of ancillary charges) of at least $5,000.[8]

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[5] Brennan, Martin. Association of Physical Plant Administrators (APPA). “THE ADA: What’s Your Plan?” Mar-Apr 2003. <http://www.appa.org/FacilitiesManager/article.cfm?itemnumber=1049&parentid=1045>

[6] US Dept. of Justice Civil Rights Division. Americans With Disability Act of 1990, As Amended. http://www.ada.gov/pubs/adastatute08.htm

[7] Oregon Department of Administrative Services. “Oregon Accounting Manual: Policy 15.60.10.” Paragraph 119. Jun. 1 2013. <http://www.oregon.gov/DAS/CFO/SARS/policies/oam/15.60.10.pd>

[8] Oregon Department of Administrative Services. “Oregon Accounting Manual Glossary.” <http://www.oregon.gov/D

Capital Renewal – Planned investment program that ensures that facilities will function at levels commensurate with the academic priorities and missions of an institution.[9]

Capital Renewal (DAS Definition) - Planned replacement of building systems that have or will reach the end of their useful life.[10]

Capital Repair – Repairs to Capital Assets.

Deferred Maintenance – Maintenance work that has been deferred on a planned or unplanned basis to a future budget cycle or postponed until funds are available.[11]

Maintenance – Work necessary to realize the originally anticipated life of a fixed asset, including buildings, fixed equipment, and infrastructure.[12]

Repairs – Work to restore damaged or worn-out facilities to normal operating condition. Repairs are curative, whereas maintenance is preventative.[13]

AS/cfo/SARS/pages/oam_glossary.aspx>

9 Kaiser, Harvey. "Capital Renewal and Deferred Maintenance Programs. Association of Physical Plant Administrators. Pp. 5. <http://certification.appa.org/documents/bokchapter13-capitalrenewalanddeferredmaintenanceprogram.pdf>

10 Oregon Department of Administrative Services. "Statewide Facilities Planning Process Manual" pending revision December 2015.

11 Ibid. Pp. 5.

12 Ibid. Pp. 4.

13 Ibid. Pp. 4.

APPENDIX B-CAPITAL REPAIR AND RENWAL TECHNICAL WORKGROUP PARTICIPANTS

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