

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING THE ) RESOLUTION NO. 05-3621A  
TERMS OF THE TRANSACTION SET FORTH )  
IN RESOLUTION NO. 05-3555A TO ACQUIRE ) Introduced by Michael J. Jordan, Chief Operating  
PROPERTY IN MILWAUKIE TOWN CENTER ) Officer, Metro Councilors Robert Liberty and  
FOR A TRANSIT-ORIENTED ) Brian Newman with the concurrence of Metro  
DEVELOPMENT/CENTERS PROJECT ) Council President David Bragdon

WHEREAS, on April 9, 1998, the Metro Council adopted Resolution No. 98-2619 (For the Purpose of Authorizing Start-Up Activities for the Transit-Oriented Development (TOD) Implementation Program at Metro), which authorized start-up activities for the Metro Transit-Oriented Development Implementation Program (the "TOD Program") and set forth the operating parameters of the TOD Program in a Work Plan providing for the acquisition and joint development of real property satisfying certain criteria and identified as "Opportunity Sites"; and

WHEREAS, the TOD Work Plan was amended to expand the TOD Program area and initiate an Urban Centers Program by Resolution No. 04-3479 (For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program), adopted July 15, 2004; and

WHEREAS, the TOD Work Plan authorizes the Chief Operating Officer to purchase Urban Centers Opportunity Sites that have been evaluated by the TOD Steering Committee for compliance with the TOD Program's Urban Centers site selection criteria (the "TOD Urban Centers Selection Implementation Criteria") and approved by the TOD Steering Committee for acquisition by Metro, subject to seven days notice by the Chief Operating Officer to the Metro Council (the "Seven Day Letter") providing the Metro Council with the opportunity to request review of the proposed acquisition in executive session; and

WHEREAS, on March 17, 2005, the Metro Council adopted Resolution No. 05-3555A (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project) which authorized the Chief Operating Officer to: "1) purchase the Milwaukie TOD/Centers Property subject to the TOD Steering Committee preconditions; 2) secure financing for said acquisition from Seller for a term of no more than 5 years, subject to the provisions set forth in Attachment 2 to the Staff Report, setting forth the essential terms of the transaction between Metro and the Seller, and subject to other legal terms acceptable to the Metro Attorney; and 3) enter into an Intergovernmental Agreement with the City of Milwaukie on the terms set forth in the Letter of Intent attached as Attachment 3 to the Staff Report, providing for a joint offering of the Milwaukie TOD/Centers Property and the adjacent half block of City of Milwaukie real property for TOD development"; and

WHEREAS, Metro's due diligence revealed unforeseen environmental issues that compelled the renegotiation of the proposed transaction on terms substantially different than the terms approved by the authorizing resolution, and therefore reauthorization must be sought from the Metro Council; now, therefore

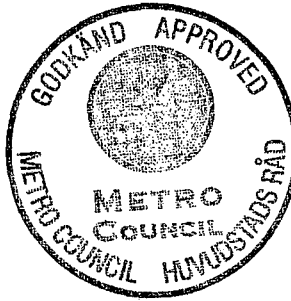
BE IT RESOLVED, that the Metro Council authorizes the Chief Operating Officer to:  
1) purchase the Milwaukie TOD/Centers Property subject to the TOD Steering Committee preconditions;  
2) secure financing for said acquisition from Seller for a term of no more than 2 years, subject to the provisions set forth in Attachment 1 to the Staff Report, setting forth the revised terms of the transaction between Metro and the Seller, and subject to other legal terms acceptable to the Metro Attorney; 3) enter into a Prospective Purchaser Agreement with the Oregon Department of Environmental Quality on terms substantially as set forth in Exhibit A attached hereto; and 4) enter into an Intergovernmental Agreement with the City of Milwaukie on terms substantially as set forth in Exhibit B attached hereto.

ADOPTED by the Metro Council this 22nd day of September, 2005.

  
\_\_\_\_\_  
David Bragdon, Council President

Approved as to Form:

  
\_\_\_\_\_  
Daniel B. Cooper, Metro Attorney



**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

**PROSPECTIVE PURCHASER AGREEMENT**

DEQ No. \_\_\_\_\_

BETWEEN: Oregon Department of Environmental Quality

AND: Metro, a Municipal Corporation and Political Subdivision  
of the State of Oregon

This Agreement is entered between the Oregon Department of Environmental Quality (DEQ) and Metro pursuant to ORS 465.260 and 465.327. This Agreement contains the following provisions:

Table of Contents

	<u>Page</u>
1. Recitals .....	2
2. Measures to be Undertaken.....	4
3. General Provisions .....	6
A. DEQ Oversight.....	6
B. Access.....	7
C. Notice .....	7
D. Progress Reports.....	8
E. DEQ Costs .....	8
F. Dispute Resolution.....	9
G. Enforcement of Agreement and Reservation of Rights.....	10
H. Waivers.....	11
I. Hold Harmless and Indemnification .....	11
J. Public Notice .....	11
K. Recording .....	12
L. Transfer of Ownership .....	12
4. Release from Liability.....	12
5. Parties Bound .....	13
6. Signatures.....	14
Attachment A -- Legal Description of Property	

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

1. RECITALS

A. The subject property (Property) is located at 10700 SE McLoughlin Boulevard, Milwaukie, Oregon. The legal description of the Property is set forth as Attachment A to this Agreement.

B. The Property has been operated as a retail gasoline service station since approximately 1957 and is currently used as a retail gasoline facility. In 1992, multiple releases were reported from several underground storage tanks (USTs). That year, three Underground Storage Tanks (USTs) were decommissioned by removal. At that time, approximately 1093 cubic yards of contaminated soil were excavated from the UST pit in the center of the Property and a soil vapor extraction(SVE)system was installed to remediate residual contamination adjacent to the former UST cavity, the pump islands, and a utility trench. The SVE system operated until [DATE] .

C. Investigations in November 2002 identified a low level of residual soil contamination adjacent to the former UST cavity, the pump islands, and a utility trench. No groundwater was encountered during this investigation, and boring refusal was generally encountered at a dense basalt layer 15 to 20 feet below land surface. An NFA determination was made by DEQ for continued commercial use of the Property.

D. In 2005, additional investigations were conducted at the site to define the magnitude and extent of contamination. Fourteen push-probe borings were advanced at various locations. The investigations identified residual gasoline contamination north of the dispenser islands, between the islands, south of the former excavation and UST cavity,

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

and on the south-central and southeastern property boundary. Residual contaminant concentrations were generally highest between the two dispenser islands.

E. Additional borings were advanced south and southwest of the Property to determine the nature and extent of soil and groundwater contamination off the Property. The extent of petroleum contamination from the site was determined to be limited to the Property and adjacent rights-of-way of Jackson street and McLoughlin Boulevard.

F. Gasoline-range total petroleum hydrocarbons, 1,2-4 trimethylbenzene, and 1,3,5-trimethylbenzene concentrations in soil exceed DEQ's urban residential vapor intrusion buildings risk-based concentrations (RBNCs). No contaminants in groundwater exceeded the applicable urban residential or occupational RBCs.

G. The contaminants on the property, total petroleum hydrocarbons, 1,2-4 trimethylbenzene, and 1,3,5-trimethylbenzene, are "hazardous substances" within the meaning of ORS 465.200(15). The presence of hazardous substances at the Property constitutes a "release" of hazardous substances within the meaning of ORS 465.200(21), and makes the Property a "facility" within the meaning of ORS 465.200. Removal or remedial action may be necessary at the Property to protect human health or the environment.

H. On April 26, 2005 Metro applied to DEQ for entry of this Agreement, and agreed to reimburse DEQ's costs of technical review and agreement preparation.

I. Metro is an Oregon municipal corporation and a "person" within the meaning of ORS 465.200(20). According to information provided by Metro, Metro is not

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

currently liable under ORS 465.255 for the release of hazardous substances existing at the facility as of the date of this Agreement.

J. Metro proposes to make the Property available for transit oriented development. Proposed uses may include commercial, office and/or urban residential buildings. These uses will enhance efforts to revitalize downtown Milwaukie, encouraging continued economic development in the City's downtown core.

K. Metro agrees to perform the activities described in Section 2 of this Agreement at its expense. DEQ has determined that a "substantial public benefit" will result from this Agreement, within the meaning of ORS 465.327 (1)(d).

L. Based upon the information submitted by Metro, DEQ has further determined that the proposed development activities at the Property will not contribute to or exacerbate existing contamination, increase health risks, or interfere with remedial measures necessary at the Property.

M. In determining to enter this Agreement, DEQ has consulted with the City of Milwaukie and has considered reasonably anticipated future land uses at the Property and surrounding properties.

N. Metro recognizes that implementation of remedial measures at the Property in the future might interfere with Metro's residential use of the Property.

2. MEASURES TO BE UNDERTAKEN

A. Metro agrees that, for areas of the Property where soil contamination levels exceed DEQ's urban residential vapor intrusion buildings risk-based concentrations (RBNCs), the Property shall not be used for residential purposes unless and until Metro

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

completes measures to reduce the risk from vapor intrusion to levels acceptable to DEQ. Such measures may include, but are not limited to, excavation of contaminated soil or installation of engineering controls approved by DEQ. DEQ agrees that, subject to DEQ approval of a final construction plan, for development where residential units are not on the ground floor, construction that provides a separate HVAC system for the residential units will be an acceptable engineering control. This restriction on use shall run with the land pursuant to ORS 465.327(5).

B. Any development, construction, or other use of the Property shall be consistent with and shall not interfere with decommissioning or remedial activities necessary at the Property. To ensure such consistency and prevent exacerbation of existing contamination at the Property, Metro must notify DEQ before any material physical changes or disturbances are made to any area of the Property that is subject to residential use restrictions under Section 2.

C. At DEQ's request, Metro must submit for DEQ review and approval, development, use, and building plans, or other similar and adequate documentation, for the proposed activities before any material changes or disturbances occur to any area of the Property that is subject to such use restrictions.

D. Metro shall require all tenants, employees, authorized and regular users, and other occupants of the Property who perform activities on the Property that might affect the soils, groundwater, other contaminated media, or affect necessary investigation, decommissioning, or remedial measures, to also submit development and/or construction plans to Metro for review by DEQ, pursuant to Subsection 2.D. of this Agreement. This

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

requirement is necessary to ensure that the actions of others do not exacerbate existing contamination. This review and approval requirement will expire upon the Property receiving an unconditional No Further Action determination.

E. Metro shall record and abide by any additional use restrictions DEQ deems necessary at the Property, which restrictions, pursuant to ORS 465.327(5), shall run with the land

F. Nothing in this Agreement obligates DEQ to conduct or pay for any actions at the Property.

3. GENERAL PROVISIONS

A. DEQ Oversight

DEQ shall provide review, approval/disapproval, and oversight as described in Section 2 and Subsection 3.F.(2) of this Agreement. Where DEQ approval is required for any plan or activity under this Agreement, Metro shall not proceed to implement the plan or activity until DEQ approval is received. DEQ will make good faith efforts to conduct plan and activity review promptly so that any proposed development activities are not unduly delayed.

B. DEQ Access

(1) Metro grants an irrevocable right of entry to DEQ and its authorized representatives to enter and move freely about the Property at all reasonable times for purposes of overseeing implementation of this Agreement, or conducting removal or remedial measures DEQ deems necessary.



**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

(2) Except for documents covered by the attorney-client privilege, the Commission shall allow DEQ to inspect and copy all records in Metro's possession or control relating to measures undertaken at the Property under this Agreement. Metro shall preserve all such records for six (6) years after the effective date of this Agreement, and, after such six-year period, shall provide DEQ with sixty (60) days notice before destruction or other disposal of such records and make the records available for inspection and copying.

(3) Metro may assert a claim of confidentiality regarding any records submitted to or copied by DEQ pursuant to this Agreement. DEQ shall treat documents and records for which a claim of confidentiality has been made in accordance with ORS 192.410 to 192.505. If Metro does not make a claim of confidentiality at the time the records are submitted to or copied by DEQ, the records may be made available to the public without notice to Metro. DEQ reserves any rights to obtain documents withheld from DEQ as privileged.

C. Notice

All reports, notices, and other communications required under or relating to this Agreement shall be directed to:

For DEQ:

Bijan Pour  
2020 SW 4<sup>th</sup> Avenue  
Portland, Or 97201  
Tel: (503) 229-  
FAX: (503) 229-6945

For Metro:

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

D. Progress Reports

On a quarterly basis upon commencement and continuing until completion of the development activities described in this Agreement, Metro shall submit to DEQ one (1) copy of a progress report describing its activities at the Property under this Agreement. Metro is not required to submit progress reports to DEQ until development begins at the Property. DEQ anticipates that the progress report will not exceed two (2) pages in length. The progress report shall address, at a minimum, the following:

- (1) Activities undertaken by Metro at the Property during the previous quarter;
- (2) Actions scheduled to be taken by Metro in the next quarter;
- (3) Sampling and test results and any other data generated by Metro during the previous quarter; and
- (4) A description of any problems experienced by Metro during the previous quarter and the actions taken to resolve them.

Submission to DEQ of the plans and specs and permits prior to development, followed by quarterly construction progress reports that include, as appropriate, information required by (1) through (4) above, and that document the installation of the engineering controls described in 2.A. of this Agreement, will satisfy the requirements of this section.

E. DEQ Costs

- (1) DEQ shall submit to Metro a monthly statement of costs incurred after the effective date of this Agreement by DEQ in connection with the oversight of Metro's implementation of this Agreement. Metro also agrees to reimburse DEQ its costs incurred

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

between January 1, 2005 and the effective date of this agreement to review and comment on initial site assessment reports and development of this PPA.

(2) DEQ oversight costs payable by Metro shall include both direct and indirect costs. Direct costs include site-specific expenses, DEQ contractor costs, and DEQ legal costs. Indirect costs include general management, support, and program development costs of DEQ and the Land Quality Division allocable to DEQ oversight of this Agreement and not charged as direct site-specific costs. Indirect costs are based on a percentage of direct personal service costs.

(3) Within thirty (30) days of receipt of the monthly statement, Metro shall pay the amount of costs billed by check made payable to the "State of Oregon, Hazardous Substance Remedial Action Fund." Metro shall pay simple interest of 9% per annum on the unpaid balance of any oversight costs, which interest shall begin to accrue at the end of the 30-day payment period, unless dispute resolution has been invoked.

F. Dispute Resolution

In the event of any disagreement between DEQ and Metro regarding implementation of this Agreement, including but not limited to review and approval of a plan or activity or DEQ costs, DEQ and Metro shall, in the following order:

(1) Make a good faith effort to resolve the dispute between project managers;

(2) If necessary, refer the dispute for resolution by the immediate supervisors of the project managers; and

(3) If necessary, provide to each other their respective positions in writing and refer the dispute for resolution to DEQ's Administrator of the Land Quality Division or

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

Northwestern Regional Division Administrator, and Metro's Chief Operating Officer.

DEQ's final decision after such dialogue shall be enforceable in accordance with Subsection 3.H. of this Agreement.

G. Enforcement of Agreement and Reservation of Rights

(1) In the event of any failure of Metro to comply with any obligation of this Agreement, DEQ may enforce this Agreement under ORS 465.260(5) or exercise any authority or pursue any claim or cause of action that DEQ might have. Metro reserves any defenses or counterclaims it might have in the event of such action by DEQ.

(2) In addition, without limiting the foregoing, upon any failure of Metro to comply with any material obligation of this Agreement, DEQ may terminate this Agreement by written notice; provided that before such termination: (a) DEQ initiates dispute resolution in accordance with Subsection 3.F., (b) DEQ gives Metro written notice of the deficiency describing what is necessary to correct the deficiency, and (c) Metro fails to cure the deficiency within 30 days of the notice, or conclusion of dispute resolution, whichever is later (or such longer period to which DEQ agrees in writing). Failure by DEQ to seek termination of this Agreement upon a failure of Metro to comply with any material obligation of this Agreement shall not constitute a waiver by DEQ of that or any other obligation. DEQ may not terminate this Agreement under this paragraph 3.G.(2) during the pendency of any action to enforce or construe this Agreement.

(3) Except as provided in Subsections 3.I and 3.J of this Agreement, DEQ and Metro reserve any claim or cause of action they respectively have as to any person or entity not a signatory to this Agreement.

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

(4) Metro does not admit any liability or violation of law by virtue of entering this Agreement.

(5) DEQ reserves its authority to perform remedial measures regarding a release of hazardous substances at or from the Property.

H. Waivers

(1) Metro waives any claim or cause of action it might have against the State of Oregon arising from contamination at the Property existing as of the date of acquisition of ownership or operation of the Property.

(2) Metro waives any right it might have under ORS 465.260(7) to seek reimbursement from the Hazardous Substance Remedial Action Fund or the Orphan Site Account for cost incurred under this Agreement.

I. Hold Harmless and Indemnification

To the extent provided by Oregon law, Metro shall save and hold harmless the State of Oregon and its commissions, agencies, officers, employees, contractors, agents, and authorized representatives, and indemnify the foregoing, from and against any and all claims arising from acts or omissions related to this Agreement of Metro or its officers, employees, contractors, agents, receivers, trustees, or assigns. DEQ shall not be considered a party to any contract made by Metro or its agents in carrying out activities under this Agreement.

J. Public Notice

(1) Upon execution of this Agreement, DEQ will provide public notice of this Agreement in a local newspaper of general circulation, describing the measures to be

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

undertaken under this Agreement. Copies of the Agreement will be made available to the public. DEQ shall provide Metro a draft of such notice and consider any comments by Metro on the draft notice, before publication. Metro is responsible for the publication costs, if any, of such notice per Subsection 3.F. of this Agreement.

(2) Before approval of any remedial action, DEQ will provide public notice and opportunity for comment on the proposed remedy in accordance with ORS 465.320.

**K. Recording**

(1) Within thirty (30) days of the date Metro receives an ownership interest in the Property, Metro shall submit a copy or original of this Agreement (whichever is required by the county) to be recorded in the real property records of Washington County, State of Oregon. Metro shall provide DEQ with written evidence of such recording within seven (7) days of recording.

(2) Upon any termination of this Agreement, DEQ may record, or require Metro to record, notice of such termination in the real property records of Washington, State of Oregon.

**L. Transfer of Interest**

Upon transfer of any interest in the Property, or a portion of the Property, from Metro to another person or entity, Metro shall provide written notice to the DEQ project manager not less than (30) days prior to such transfer.

**4. RELEASE FROM LIABILITY**

A. Subject to the satisfactory performance by Metro of its obligations under this Agreement, Metro shall not be liable to the State of Oregon under ORS 465.200

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

through 465.455 and 465.900 for any release of the hazardous substances described in Section 1 above at the Property existing as of the date of Metro's acquisition of its interest in or operation of the Property. Metro shall bear the burden of proving that any hazardous substance release existed before the date of acquisition of its interest in or operation of the Property.

B. The release from liability under Subsection 4.A of this Agreement shall not apply to any liability regarding:

- (1) A release of hazardous substances at the Property after the date of acquisition of an interest in or operation of the Property;
- (2) Contribution to or exacerbation of a release of hazardous substances;
- (3) Interference or failure to cooperate with DEQ, or with persons conducting remedial measures under DEQ's oversight at the Property;
- (4) Failure to exercise due care or take reasonable precautions with respect to any hazardous substance at the Property;
- (5) Violation of federal, state, or local law;
- (6) Any ownership, operation, or release of hazardous substances at the Property by Metro before the effective date of this Agreement;
- (7) Any ownership, operation, or other ground of liability of Metro for a release of hazardous substances at an off-site location affecting the Property; and
- (8) Any matters as to which the State of Oregon is owed indemnification under Subsection 3.I of this Agreement.

**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

5. PARTIES BOUND

A. This Agreement shall be binding on the signatories and their respective commissions, agencies, officers, assigns, successors, employees, contractors, agents, and authorized representatives. The undersigned representative of each party certifies that he or she is fully authorized to execute and bind such party to this Agreement. No change in ownership or corporate or partnership status relating to the Property shall in any way alter Metro's obligations under this Agreement, unless approved otherwise in writing by DEQ.

B. The benefits and burdens of this Agreement shall run with the land; however, the release from liability set forth in Subsection 4.A of this Agreement shall limit or otherwise affect the liability only of persons who are not potentially liable under ORS 465.255 for a release of hazardous substances at the Property as of the date of that person's acquisition of ownership or operation of the Property. 6.

C. SIGNATURES

\_\_\_\_\_ Date: \_\_\_\_\_  
[NAME]

SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_\_  
day of \_\_\_\_\_, 2005 by \_\_\_\_\_  
in capacity as \_\_\_\_\_ of Metro.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission expires: \_\_\_\_\_



**EXHIBIT A TO RESOLUTION NO. 05-3621A  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

\_\_\_\_\_ Date: \_\_\_\_\_  
Alan Kiphut, Administrator  
Land Quality Division  
Oregon Department of Environmental Quality

SUBSCRIBED AND SWORN TO BEFORE ME this  
\_\_\_\_\_ day of \_\_\_\_\_, 2005 by, Alan Kiphut in  
his capacity as Administrator of the Land Quality Division,  
Oregon Department of Environmental Quality.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission expires: \_\_\_\_\_

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**INTERGOVERNMENTAL AGREEMENT  
MAIN STREET VILLAGE PHASE II**

THIS INTERGOVERNMENTAL AGREEMENT ("Agreement") is entered into by and between Metro, a municipal corporation established pursuant to Oregon law and the Metro Charter ("Metro") and the City of Milwaukie (the "City"), a municipal corporation (collectively, "the Parties"). This Agreement is effective as of the last date of execution set forth below (the "Effective Date").

**RECITALS**

A. Metro Council Resolution No. 98-2619 ("For the Purpose of Authorizing Start-Up Activities for the Transit-Oriented Development (TOD) Implementation Program at Metro") adopted on April 9, 1998, as amended by Metro Council Resolution No. 04-3479 ("For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program") adopted on July 15, 2004, authorizes the acquisition and "Joint Development" of real property satisfying certain criteria and identified as "Opportunity Sites." Metro's TOD Program utilizes joint development tools such as land acquisition and development agreements to encourage the development of projects located in close proximity to rail transit stations, "Frequent Bus Stops" and in Urban Centers throughout the region.

B. On March 17, 2005, the Metro Council authorized Metro to purchase the Property for the Transit-Oriented Development/Urban Centers Program, via Metro Council Resolution No. 05-3555A ("For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project"). The Metro Council approved the acquisition of the Property subject to specific preconditions, including the entry into this Agreement by the Parties on terms set forth in the Letter of Intent set forth below.

C. Metro and the City have entered into a Letter of Intent expressing the mutual intent of the Parties to provide for the acquisition of a Texaco filling station site located at 10700 SE McLoughlin Boulevard, Milwaukie, Oregon, and described and depicted in the attached Exhibit A (the "Property") as TOD Program Urban Centers Opportunity Site. The Letter of Intent attached as Exhibit B sets forth the general terms of acquisition and co-ownership of the Property by Metro and the City, and provides for a joint offering of the Property with the adjacent City property at 10721 SE Main Street ("City Property"), also described and depicted in the attached Exhibit A, so that the entire block may be developed by a future purchaser. The development called for in the Letter of Intent is a landmark signature mixed-use project of 4-5 stories, with retail uses on the ground floor and residential uses on higher floors.

D. Soil and water contamination have been discovered on the Property in concentrations that exceed permissible levels if the Property is to be developed for residential use. The Oregon Department of Environmental Quality ("DEQ") has agreed

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

to issue Metro a Prospective Purchaser Agreement (“PPA”). The PPA requires that the existing underground gasoline storage tanks be decommissioned and that measures be taken to reduce the risk from vapor intrusion into buildings to levels acceptable to DEQ.

E. Metro has entered into an Agreement of Purchase and Sale with Olson Brothers Enterprises, L.L.C., to purchase the Property, has performed due diligence in accord with Metro standard real estate acquisition guidelines, and is prepared to close the acquisition of the Property upon execution of this Agreement.

F. On August 16, 2005, the Milwaukie City Council approved Resolution No. 39-2005, authorizing the City to enter into this Agreement with Metro.

**NOW, THEREFORE**, in reliance on the above recitals and in consideration of the mutual promises described below, the Parties agree as follows:

1. **General Objective.** To provide for the acquisition of the Property as a TOD Program Urban Centers Opportunity Site, setting forth the terms of co-ownership of the Property by Metro and the City, and providing for a joint offering of the Property with the City Property for the development of Main Street Village, Phase II, a landmark signature mixed-use project of 4-5 stories with housing above ground floor retail.

2. **Property Acquisition**

2.1 Metro shall close escrow and acquire the Property upon the execution of this Agreement by both Parties.

2.2 At closing, the City shall take an undivided 5% interest in title to the Property, and Metro shall take an undivided 95% interest in title to the Property as tenants-in-common.

3. **Project Management/Joint Offering**

3.1 The Parties will cooperate jointly to offer the entire city block, consisting of the Property, the City Property, and the ROW Parcels (defined below) for development (“Block 14”). The initial development concept is for a landmark signature mixed-use development of 4-5 stories of housing above ground floor retail, with the building footprint covering most of Block 14, to be called Main Street Village, Phase II (the “Joint Offering”). The terms of the Joint Offering shall be established by mutual agreement, but shall conform to the parameters set forth in the TOD/Urban Centers Workplan.

3.2 Metro and the City agree to establish a project management committee to manage parcel consolidation, craft and market a public Joint Offering document, determine the appropriate land value write-down, solicit proposals and select a developer. The Joint Offering may be made either through an open competitive process or an unsolicited proposal process, upon the mutual written agreement of the Parties. The Parties shall

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

share equally in the cost of conducting the Joint Offering, and shall exert best efforts to complete the Joint Offering within 18 months from the Effective Date.

3.3 Metro agrees to write down the land value of the Property to an amount that will ensure the desired development as set forth in Section 3.1 above, subject to TOD/Centers Steering Committee and Metro Council approval. The City agrees to market the City Property at an equivalent value per square foot as Metro markets the Property. The proceeds of any sale of Block 14 shall be allocated pro rata between the Parties based on the square footage of their respective properties.

3.4 Metro and the City agree that the Joint Offering will include a requirement that the purchaser implement such measures as are needed to satisfy the terms of the DEQ PPA as part of any residential development and before any residential occupancy is permitted. Metro and the City acknowledge that requiring the purchaser to take such actions will affect the price a developer will pay for Block 14.

3.5 The City agrees to support and recommend to the Milwaukie City Council the vacation of certain portions of the right-of-way of SE Harrison Street and SE Jackson Street (the "ROW Parcels"), as depicted on Exhibit A, and the incorporation of said ROW Parcels into the Joint Offering.

3.6 City will exert its best efforts to amend its zoning and development ordinance and regulations to permit a project to be developed on Block 14 consisting of residential over ground floor retail, a minimum of 5 stories with a floor area ratio ("FAR") of 1 to 1, a housing/parking ratio not to exceed one space per housing unit and a building type that is economically feasible.

3.7 Metro agrees to demolish the existing buildings on the Property, close and stub all utilities and remove all demolition materials in accord with all state and local regulations, such that the Property is in a reasonably safe condition after closing.

3.8 Metro agrees to decommission the Underground Storage Tanks ("UST") located in the tank nest on the Property after closing, in compliance with all DEQ UST decommissioning rules and regulations, either by removal or in place, such that they may be used as stormwater storage vessels for future development.

3.9 Metro agrees to exert its best efforts to obtain a No-Further-Action Letter from DEQ, stating that no further investigation, remediation or cleanup is required to be performed upon the Property in connection with commercial use.

**4. Environmental Assessment and Indemnity**

4.1 Environmental Assessment. Metro's Phase I and Phase II Environmental Assessments revealed that petroleum contamination exists in the Property's soil and groundwater, in concentrations that are acceptable for commercial development but exceed permissible levels if the Property is to be developed for residential use, and that

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

petroleum contamination originating on the Property has migrated from the Property in a southwesterly direction, into the soil and groundwater underlying SE Jackson Street and SE McLoughlin Boulevard. In accord with the Letter of Intent, and in consideration for Metro's agreement to acquire the Property for purposes of mixed-use development, the City has agreed to indemnify Metro as set forth below.

4.2 Environmental Indemnity. The City hereby covenants to indemnify and defend (with legal counsel reasonably acceptable to Metro) Metro and hold Metro, its officers and employees, successors and assigns, harmless from and against all claims, demands, causes of action, or any other action or proceeding, meritorious or not, and all liabilities, losses, damages, costs and expenses relating to or arising, in whole or in part, directly or indirectly, from: (a) the past, present or future Environmental Condition of the Property; (b) past, present or future Adverse Environmental Activity occurring on or related to the Property; (c) any and all Government Action related to the Property or past, present or future activities thereon; (d) the past, present or future Environmental Condition of real property surrounding the Property, relating to or resulting from the Environmental Condition of the Property or Adverse Environmental Activity on the Property; and (d) City or City's agents failure to comply with any and all future Environmental Requirements relating to the Property.

Metro hereby covenants to indemnify and defend (with legal counsel reasonably acceptable to the City) the City, and hold the City, its officers and employees, successors and assigns, harmless from and against all claims, demands, causes of action, or any other action or proceeding, meritorious or not, and all liabilities, losses, damages, costs and expenses relating to or arising, in whole or in part, directly or indirectly, from Metro's activities under Sections 3.7 and 3.8 above.

4.2.1 For purposes of this Section, "Environmental Condition" shall be interpreted to include, but not be limited to, the release of or contamination by any Hazardous Substance(s), pollutant or contaminant, as those terms are defined in CERCLA, TOSCA, ORS Chapters 465 and 466, and all other applicable federal and state environmental statutes, rules and regulations now or hereafter in effect, but shall not include conditions directly resulting from the acts of Metro, its officers and employees, agents and contractors.

4.2.2 For purposes of this Section, "Government Action" shall be interpreted to include any investigation, inquiry, order, hearing, action or other proceeding by or before any governmental agency which results directly or indirectly from the Environmental Condition of the Property or Environmental Activity related on or related to the Property.

4.2.3 For purposes of this Section, "Adverse Environmental Activity" shall be interpreted to include any past or current, actual, proposed or threatened surface or subsurface, storage, holding, existing, release, emission, discharge, generation, processing, abatement, removal, remediation, disposition, handling or transportation of any Hazardous Substance(s), pollutant or contaminant (as though they are defined in CERCLA, TOSCA, ORS Chapters 465 and 466, and other applicable federal and state

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

environmental statutes, rules and regulations hereinafter in effect), from, under, into or on, the Property, or otherwise relating to the Property or the use of the Property or neighboring properties, or any other activity or occurrence, cause or causes that would cause any such event to exist, but shall not include activity by Metro, or on behalf of Metro by its officers and employees, agents and contractors

4.2.4 For purposes of this Section, “Environmental Requirements” shall be interpreted to include past, present and future state and federal local laws and ordinances, including CERCLA, TOSCA, and ORS Chapters 465 and 466, as amended from time to time, including any administrative court order, judgment or decree arising therefrom.

4.2.5 The City and Metro hereby agree that the Environmental Indemnity contained herein shall survive the sale of the Property to a third party. Metro may, at its option, tender any defense of any claim, action or suit covered under this Environmental Indemnity to the City.

**5. Property Management.** Upon acquisition of the Property by Metro and the City, the City shall manage the Property until it is conveyed to a developer pursuant to the Joint Offering. The City shall maintain security of the Property, and shall provide additional fencing, gates, signage, and other measures necessary to maintain public safety on the Property, and to deter public nuisance use of the Property. Access to the Property shall be controlled by the City, and the City shall respond to neighborhood or citizen complaints regarding nuisance uses or noise on the Property. Any permits granted to third parties by the City to use the Property shall comply with the terms and limitations set forth in this Agreement. The City shall be responsible for obtaining all necessary permits and for complying with all state and local rules and regulations in managing and maintaining the Property. The City shall be responsible for contacting and coordinating with other local or state agencies regarding any and all management, maintenance or operation issues that may arise with respect to the Property. Funding for the management and maintenance of the Property and the payment of taxes or assessments applying to the Property, if any, shall be provided from the City’s own resources.

**6. General Provisions**

6.1 General Indemnification. The City shall indemnify and defend Metro, and hold Metro harmless from and against any claim, loss, liability or cost suffered directly or from a third-party claim arising out of or related to the City’s management of the Property or any condition on the Property in the possession or under the control of the City. Metro shall have no liability to the City for any injury, loss, or damage caused by third parties, except to the extent caused by Metro’s negligence or breach of duty under this Agreement. The indemnity obligations of the City under this clause shall survive any expiration or termination of this Agreement.

Metro shall indemnify and defend the City, and hold the City harmless from and against any claim, loss, liability or cost suffered directly or from a third-party claim arising out of or related to Metro’s activities under Sections 3.7 and 3.8, above. The indemnity

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

obligations of Metro under this clause shall survive any expiration or termination of this Agreement.

6.2 Liens. Except with respect to activities for which Metro is responsible, the City shall pay as due all claims for work done on and for services rendered or material furnished to the Property, and shall keep the Property free from any liens. If the City fails to pay any such claims or to discharge any lien, Metro may do so and collect the cost from the City. Such action by Metro shall not constitute a waiver of any right or remedy that Metro may have on account of the City's default. The City may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, as long as Metro's property interests are not jeopardized. If a lien is filed as a result of nonpayment, the City shall, within 10 days after knowledge of the filing, secure the discharge of the lien or deposit with Metro cash or sufficient surety bond or other surety satisfactory to Metro in an amount sufficient to discharge the lien plus any costs or attorney fees.

6.3 Signage. The City may provide on-site signage informing the public that the City is managing the site, but said signage shall state that funding for the acquisition came from Metro's Transit-Oriented Development/Urban Centers Program. The City shall also document in any publication, media presentation or other presentations on the Property that funding was provided by Metro's Transit-Oriented Development/Urban Centers Program.

6.4 Term. The term of this Agreement shall be five (5) years from the Effective Date of this Agreement, renewable by mutual written agreement for additional five (5) year periods. The indemnities set forth herein shall survive and shall not be affected by the expiration or termination of this Agreement.

6.5 Joint Termination for Convenience. Metro and the City may jointly terminate all or part of this Agreement based upon a determination that such action is in the public interest. Termination under this provision shall be effective upon 10 days' written notice of termination issued by Metro, subject to the mutual written agreement of the Parties.

6.6 Termination for Cause. Either party may terminate this Agreement before the date of expiration, if that party determines, in its sole discretion, that the other party has failed to comply with the terms and conditions of this Agreement and is therefore in default. The terminating party shall promptly notify the defaulting party in writing of that determination and document said default with reasonable particularity. Thereafter, the defaulting party shall have 30 days to cure the default. If the default is of such a nature that it cannot be completely remedied within the 30-day period, this provision shall be complied with if the defaulting party begins correction of the default within the 30-day period and thereafter proceeds with reasonable diligence and in good faith to cure the default as soon as practicable. If this Agreement is terminated under this provision, the City shall quitclaim its interest in the Property to Metro.

6.7 Metro Termination for Failure to Vacate Right of Way and/or Obtain Necessary Zone Change. If the City's best efforts do not result in the incorporation of the ROW

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

Parcels and/or the amendment of its zoning ordinance as set forth in Section 3 above, then Metro may at its sole option terminate this Agreement, and the City shall quitclaim its interest in the Property to Metro.

6.8 City Termination for Failure to Obtain No Further Action Letter. If Metro's best efforts do not result in the receipt of a No-Further-Action Letter from DEQ as set forth in Section 3.9 above, then the City may at its sole option terminate this Agreement, and the City shall quitclaim its interest in the Property to Metro.

6.9 Laws of Oregon. This Agreement shall be governed by the laws of the State of Oregon, and the Parties agree to submit to the jurisdiction of the courts of the State of Oregon. All applicable provisions of ORS Chapter 279, and all other terms and conditions necessary to be inserted into public contracts in the State of Oregon, are hereby incorporated as if such provisions were a part of this Agreement, including but not limited to ORS 279.015 to 279.320.

6.10 Assignment. No party may sell its undivided interest in the Property, or assign any of its rights or responsibilities under this Agreement without prior written consent from the other party, except the Parties may subcontract for performance of any of their responsibilities under this Agreement.

6.11 Notices. All notices or other communications required or permitted under this Agreement shall be in writing, and shall be personally delivered (including by means of professional messenger service) or sent by fax and regular mail.

To Metro: Metro  
Phil Whitmore, TOD Program Manager  
600 N.E. Grand Avenue  
Portland, OR 97232-2736

To City: City of Milwaukie  
Mike Swanson, City Manager  
10722 SE Main Street  
Milwaukie, OR 97222

6.12 Severability. If any covenant or provision in this Agreement shall be adjudged void, such adjudication shall not affect the validity, obligation, or performance of any other covenant or provision which in itself is valid, if such remainder would then continue to conform to the terms and requirements of applicable law and the intent of this Agreement.

6.13 Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes any prior oral or written agreements or representations relating to this Property. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by both Parties.



**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

IN WITNESS WHEREOF, the Parties hereto have set their hands on the day and year set forth below.

CITY OF MILWAUKIE

METRO

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: Chief Operating Officer

**Exhibits:**

- Exhibit A – Legal Description and Depiction of Property and City Property
- Exhibit B – Signed Letter of Intent

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**EXHIBIT A**

**Legal Description of Property and City Property**

**Property:**

**Lots 5, 6, 7 and 8, Block 14, MILWAUKIE, in the County of Clackamas, and State of Oregon. The Easterly boundary of said lots to be a line more particularly described:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE, thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35 recorded in Book 516, Page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14, said iron pipe being the point of terminus of said boundary as shown by Survey 2615 in the office of the Clackamas County Surveyor.**

**City Property:**

**Lots 1, 2, 3 and 4, Block 14, MILWAUKIE, according to the duly recorded plat thereof, said western boundary of said lots to be a line described particularly as follows:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE; thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35, recorded in Book 516, page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14; said iron pipe being the point of terminus of said boundary, as shown by Survey 2615 in the Office of the Clackamas County Surveyor.**

**EXHIBIT B TO RESOLUTION NO. 05-3621A  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**EXHIBIT B**

Signed Letter of Intent

Exhibit B to IGA - Signed Letter of Intent Between Metro & City of Milwaukie

**LETTER OF INTENT**

The purpose of this Letter of Intent is to set forth the terms for discussion by Metro, a Metropolitan Service District ("Metro"), and the City of Milwaukie ("City") for the purpose of entering into an agreement to provide a joint offering ("TOD/Centers Joint Offerings") of the Olson Bros service station ("Olson Property") site and the adjacent city-owned surface parking lot ("City Parking Lot") depicted in Exhibit A, subject to the legislative approval of each party's governing body. The TOD/Centers Joint Offering will provide for the development of an Urban Centers Project of 4-5 stories, containing housing above retail, in downtown Milwaukie, Oregon hereafter referred to as "Main Street Village, Phase II." Unless and until such time as a definitive written agreement has been approved and properly executed by all parties, no party shall have any legal obligation to the other with respect to the potential transactions discussed in this Letter. This Letter of Intent shall in no way be construed as a binding agreement between the parties. Subject to the foregoing, the following is a statement of potential deal points and actions by the parties that are intended to provide a framework for negotiation of a definitive written agreement.

**Metro Participation**

1. Metro will obtain an appraisal and appraisal review for the Olson Property at 10700 SE McLoughlin, Milwaukie, Oregon.
2. Metro will seek the approval of the TOD/Centers Steering Committee and the Metro Council for the acquisition of the Olson Property.
3. Metro will complete said acquisition and become the record owner of the Olson Property.
4. Metro will cooperate with the City to jointly offer the Olson Property and the adjacent City parking lot for development as a signature mixed-use project of 4-5 stories with housing above retail to be called the Main Street Village, Phase II.
5. Metro will write down the land value of the Olson Property to an amount that will ensure the construction of a mixed-use development, subject to TOD/Centers Steering Committee and Metro Council approval.

**City of Milwaukie Participation**

1. City will offer the City Parking Lot at 10721 SE Main Street in a joint offering with the Olson Property, at an equivalent value per square foot as Metro offers the Olson Property. By writing down the land value of the City Parking Lot Property, the City will share in the financial burden of ensuring the construction of a mixed use project. However, it is understood that because Metro is purchasing land supporting a service station and converting it to commercial-residential use, Metro's total land value write down for the Olson Property will likely exceed the City's, despite equivalent sale values.

Exhibit B to IGA - Signed Letter of Intent Between Metro & City of Milwaukee

2. City will complete the necessary process to have the right-of-way parcels at SE Harrison Street and SE Jackson Street ("ROW Parcels"), depicted on Exhibit B, become part of the TOD/Centers Joint Offering.
3. City will use its best efforts to modify its planning and development regulations to permit a project composed of a minimum of five stories with a floor area ratio ("FAR") of 1 to 1, housing/parking ratio not to exceed one space per housing unit and a building type that is economically feasible
4. City will execute an environmental indemnity prior to Metro's acquisition of the Olson Property, agreeing to indemnify, defend and hold harmless Metro against all liability relating to the environmental condition of the Olson Property.

**Joint Participation**

1. Metro and the City will establish a project management committee to manage parcel consolidation including the ROW Parcels, craft and market a public offering document, solicit proposals and select a developer. The City and Metro will share decision-making equally for the project.
2. The Joint Offering may be offered through either an open competitive process or an unsolicited proposal process. The initial development concept is for a landmark mixed-use development of four to five stories, with the building footprint covering most of the parcel.

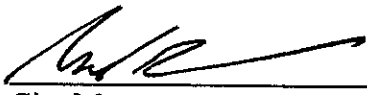
**Schedule**

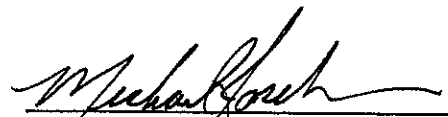
The parties' intent is that the Joint Offering will issue within 18 months or less from the date of this Agreement.

Neither Metro nor City shall have any obligation to the other with respect to transactions and matters discussed above until a definitive written agreement encompassing said transactions and matters has been approved by the respective governing bodies of Metro and the City and executed by the parties. Unless and until such a written agreement has been so executed, neither party shall have any obligation to the other with respect to any costs incurred, including but not limited to, legal and consulting fees incurred in connection with the proposed transactions and actions described herein.

**City of Milwaukee**

**Metro**

  
\_\_\_\_\_  
City Manager

  
\_\_\_\_\_  
Chief Operating Officer

**EXHIBIT B TO RESO. 05-3621A  
IGA Between Metro & City of Milwaukie**

**Exhibit A - Signed Letter of Intent Between Metro & City of Milwaukie  
City's Legal Description and Depiction of City Parking Lot**

**City Property:**

**Lots 1, 2, 3 and 4, Block 14, MILWAUKIE, according to the duly recorded plat thereof, said western boundary of said lots to be a line described particularly as follows:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE; thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35, recorded in Book 516, page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14; said iron pipe being the point of terminus of said boundary, as shown by Survey 2615 in the Office of the Clackamas County Surveyor.**

Exhibit A to Signed Letter of Intent Between Metro & City of Milwaukee  
Depiction of City Parking Lot



Olson Property

City Parking Lot

200 Ft

Harrison St.

Main Street

McLaughlin Blvd.

Existing Downtown Core



## STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 05-3621A, FOR THE PURPOSE OF AMENDING THE TERMS OF THE TRANSACTION SET FORTH IN RESOLUTION NO. 05-3555A TO ACQUIRE PROPERTY IN MILWAUKIE TOWN CENTER FOR A TRANSIT-ORIENTED DEVELOPMENT/CENTERS PROJECT

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Date: September 22, 2005

Prepared by: Andy Cotugno  
Phil Whitmore

### BACKGROUND

#### *Milwaukie Main Street Mixed Use Project – Site Acquisition*

Metro Council Resolution No. 05-3555A (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project) authorizes the Chief Operating Officer to purchase the Texaco Station at 10700 SE McLoughlin Blvd (the “Property”), located between Harrison and Jackson Streets at the entrance to downtown Milwaukie, as a Metro TOD/Centers Implementation Program “opportunity site.” This 1/2 block parcel is judged to be a strategically important location within downtown Milwaukie. The parcel will be jointly offered with an adjacent 1/2 block City Hall parking lot and the entire parcel will link the existing downtown, which is south of this parcel, to the N. Main TOD/Centers project currently breaking ground (the old Safeway site). The development concept would be for a 4-5 story structure with 80-100 housing units above approximately 9,000 square feet of retail.

The terms of sale originally approved via Resolution 05-3555A have been revised due to the unforeseen results of Metro’s due diligence and the consequent renegotiation of the transaction with the Seller. Attachment 1 to this staff report lists the final terms of sale that have been tentatively agreed to by Metro, the Seller and the City of Milwaukie.

The total purchase price for the property has been reduced from \$775,000 to \$750,000, reflecting a credit to Metro because Seller will no longer be demolishing the service station and decommissioning the underground fuel storage tanks prior to closing.

The down payment at closing has increased from \$175,000 to \$300,000, and the balance of \$450,000 will be paid over a two-year term at 6.5% interest, rather than a five-year term. The TOD/Centers program can accommodate this shorter term utilizing funding approved in the last MTIP allocation.

The purchase price has been verified by an independent fair market appraisal, reviewed and approved by an MAI appraiser.

Metro’s due diligence revealed a plume of petroleum contaminated soil and groundwater on the Property. The contamination is acceptable to the Oregon Department of Environmental Quality (“DEQ”) for purposes of commercial development, but the DEQ will not allow residential development on the Property unless further protective actions are taken. As a result, pending Metro Council approval, Metro has agreed to enter into a Prospective Purchaser Agreement (“PPA”) with DEQ prior to closing, on the terms set forth in Exhibit A to the Resolution. The PPA will protect Metro from liability to DEQ for the petroleum plume, as long as Metro and Milwaukie require the incorporation of certain protective features into the proposed mixed-use development. If housing is placed on the Property, as Metro anticipates,



separate HVAC systems will be required by DEQ to provide ventilation to housing units, and the housing units are not to be constructed on the ground floor, to prevent vapor intrusion. The TOD/Centers Program anticipates no difficulty in meeting these conditions, as Metro intends to offer the Property for a vertical mixed-use project with housing over retail. Commercial development is currently allowed on the site without remediation or other measures.

If the Metro TOD/Centers Program and the City of Milwaukie decide to surpass the DEQ's requirements and remove the contaminated soil, the selected developer will be required to perform this task, which we currently estimate at a maximum cost of \$59,000. The Metro TOD/Centers Program anticipates that the condition of the Property and the PPA encumbrance will have no adverse impact on the feasibility, marketability or potential financing of the proposed mixed use project by developers.

The terms of sale originally outlined in the Staff Report required that the Seller provide Metro's standard representations and warranties in regard to the condition of the Property and required that the members of the LLC that is selling the property to Metro indemnify Metro against all future environmental liability. The Seller is no longer willing to do so, and now will only sell the Property to Metro "AS-IS." However, the combination of the PPA set forth above, Metro's conveyance of partial ownership in the Property to Milwaukie, and the indemnity by Milwaukie set forth below provides Metro with equivalent or better environmental liability protection.

Resolution No. 05-3555A stipulated that the acquisition would be contingent upon the execution of a Letter of Intent with the City of Milwaukie for the joint offering of the adjacent parking lot for development. The Letter of Intent has been executed and will be supplanted by an Intergovernmental Agreement with the City of Milwaukie. The City of Milwaukie has agreed to enter into said Intergovernmental Agreement with Metro prior to closing on the terms set forth in Exhibit B as follows: Milwaukie will perform the joint offering with Metro as set forth above, Milwaukie will take over management of the Property, Milwaukie will take a 5% share of the title with Metro as a tenant in common, and Milwaukie will indemnify Metro against environmental liability relating to the Property.

## **ANALYSIS/INFORMATION**

### **1. Known Opposition**

There is no known opposition to this site acquisition although there are groups and individuals who oppose TOD projects and public private partnerships.

### **2. Legal Antecedents**

The Federal Transit Administration (FTA) approved a grant for Metro to start the TOD Program in 1997. Authority to use FTA funds for joint development are included in the Intermodal Surface Transportation Act of 1991 (ISTEA) and codified under 49 USC 5309, 49 USC 5307, 23 USC 133 (STP) and 23 USC 149 (CMAQ). According to these laws, TOD Program activities are defined as transportation projects provided there is (1) a physical or functional relationship to the transit project; and (2) an enhanced effectiveness of the existing transit system.

The TOD Program was originally transferred from TriMet to Metro by Intergovernmental Agreement (IGA) adopted by the Metro Council, Resolution No. 96-2279 (For the Purpose of Authorizing an Intergovernmental Agreement With Tri-Met to Assist in Establishing a Transit-Oriented Development and Implementation Program at Metro), on May 16, 1996. The Metro Council authorized start-up activities on April 9, 1998, by Resolution No. 98-2619 (For the Purpose of Authorizing Start-Up Activities For the Transit-Oriented Development (TOD) Implementation Program at Metro). The Work Plan was amended to include provisions for initiation of an Urban Centers Program on July 15, 2004 by

Resolution No. 04-3479 (For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program).

The Council adopted Resolution 05-3555A on March 17, 2005 (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project), authorizing the Chief Operating Officer to purchase this site for a TOD/Centers Project.

### **3. Anticipated Effects**

Approval of the amended terms of sale will enable Metro to move forward with the site acquisition as planned.

As an Urban Centers Project the proposed project would respond to the Centers Implementation Selection Criteria as follows: 1) The project will be mixed-use higher density development with an FAR exceeding 1:1; 2) project will create a sense of place; 3) site control by Metro and Milwaukie; 4) other public partners including Milwaukie for 1/2 block, possible tax abatement and possibly Oregon Housing & Community Services at a later date; 5) reduction in VMT work trip length by locating housing in an urban center; 6) increase in walk, bike and transit trips and 7) floor area ratio of 1 to 1 or higher.

### **4. Budget Impacts**

There are no budget impacts to the Metro General Fund as a result of the acquisition or the amended terms of purchase, since federal transportation funds, which are part of the IGA with TriMet are used for the program.

### **RECOMMENDED ACTION**

It is recommended that the Metro Council approve Resolution No. 05-3621A to allow for the acquisition of the Olson Bros Texaco at 10700 SE McLaughlin Blvd at \$750,000 with \$300,000 down and the balance of \$450,000 paid at 6.5% annually with interest only for a term of 2 years.

**Attachment 1 to Staff Report  
Resolution No. 05-3621A**

**Revised Terms of Sale:**

- Purchase Price: \$750,000
- Down Payment: \$300,000 at closing
- Promissory Note in the amount of \$450,000, 6.5% interest, two-year term, annual payments
- Secured by a Trust Deed in favor of Seller
- Purchase Price has been verified by an independent fair market value appraisal, reviewed and approved by an MAI appraiser
- Metro to execute a Prospective Purchase Agreement with the Oregon DEQ providing Metro with protection for environmental liability
- City of Milwaukie to provide Metro with full indemnity against all future environmental liability arising out of or relating to the Property
- Seller is selling the Property with limited representations and warranties “AS-IS”
- Metro to receive fee title by Statutory Warranty Deed
- Metro to receive partially extended Owner’s Title Insurance Coverage
- Closing Costs to be shared equally between Seller and Metro, Seller to pay for title insurance coverage and a pro rata share of taxes and assessments applicable to the property
- Metro to demolish the service station and decommission the existing underground gasoline storage tank in place

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING THE ) RESOLUTION NO. 05-3621  
TERMS OF THE TRANSACTION SET FORTH )  
IN RESOLUTION NO. 05-3555A TO ACQUIRE ) Introduced by Michael J. Jordan, Chief Operating  
PROPERTY IN MILWAUKIE TOWN CENTER ) Officer, Metro Councilors Robert Liberty and  
FOR A TRANSIT-ORIENTED ) Brian Newman with the concurrence of Metro  
DEVELOPMENT/CENTERS PROJECT ) Council President David Bragdon

WHEREAS, on April 9, 1998, the Metro Council adopted Resolution No. 98-2619 (For the Purpose of Authorizing Start-Up Activities for the Transit-Oriented Development (TOD) Implementation Program at Metro), which authorized start-up activities for the Metro Transit-Oriented Development Implementation Program (the "TOD Program") and set forth the operating parameters of the TOD Program in a Work Plan providing for the acquisition and joint development of real property satisfying certain criteria and identified as "Opportunity Sites"; and

WHEREAS, the TOD Work Plan was amended to expand the TOD Program area and initiate an Urban Centers Program by Resolution No. 04-3479 (For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program), adopted July 15, 2004; and

WHEREAS, the TOD Work Plan authorizes the Chief Operating Officer to purchase Urban Centers Opportunity Sites that have been evaluated by the TOD Steering Committee for compliance with the TOD Program's Urban Centers site selection criteria (the "TOD Urban Centers Selection Implementation Criteria") and approved by the TOD Steering Committee for acquisition by Metro, subject to seven days notice by the Chief Operating Officer to the Metro Council (the "Seven Day Letter") providing the Metro Council with the opportunity to request review of the proposed acquisition in executive session; and

WHEREAS, on March 17, 2005, the Metro Council adopted Resolution No. 05-3555A (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project) which authorized the Chief Operating Officer to: "1) purchase the Milwaukie TOD/Centers Property subject to the TOD Steering Committee preconditions; 2) secure financing for said acquisition from Seller for a term of no more than 5 years, subject to the provisions set forth in Attachment 2 to the Staff Report, setting forth the essential terms of the transaction between Metro and the Seller, and subject to other legal terms acceptable to the Metro Attorney; and 3) enter into an Intergovernmental Agreement with the City of Milwaukie on the terms set forth in the Letter of Intent attached as Attachment 3 to the Staff Report, providing for a joint offering of the Milwaukie TOD/Centers Property and the adjacent half block of City of Milwaukie real property for TOD development"; and

WHEREAS, Metro's due diligence revealed unforeseen environmental issues that compelled the renegotiation of the proposed transaction on terms substantially different than the terms approved by the authorizing resolution, and therefore reauthorization must be sought from the Metro Council; now, therefore

BE IT RESOLVED, that the Metro Council authorizes the Chief Operating Officer to:  
1) purchase the Milwaukie TOD/Centers Property subject to the TOD Steering Committee preconditions;  
2) secure financing for said acquisition from Seller for a term of no more than 2 years, subject to the provisions set forth in Attachment 1 to the Staff Report, setting forth the revised terms of the transaction between Metro and the Seller, and subject to other legal terms acceptable to the Metro Attorney; 3) enter into a Prospective Purchaser Agreement with the Oregon Department of Environmental Quality on terms substantially as set forth in Exhibit A attached hereto; and 4) enter into an Intergovernmental Agreement with the City of Milwaukie on terms substantially as set forth in Exhibit B attached hereto.

ADOPTED by the Metro Council this \_\_\_\_\_ day of \_\_\_\_\_, 2005.

---

David Bragdon, Council President

Approved as to Form:

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Daniel B. Cooper, Metro Attorney

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

**PROSPECTIVE PURCHASER AGREEMENT**

DEQ No. \_\_\_\_\_

BETWEEN: Oregon Department of Environmental Quality

AND: Metro, a Municipal Corporation and Political Subdivision  
of the State of Oregon

This Agreement is entered between the Oregon Department of Environmental Quality (DEQ) and Metro pursuant to ORS 465.260 and 465.327. This Agreement contains the following provisions:

Table of Contents

	<u>Page</u>
1. Recitals .....	2
2. Measures to be Undertaken.....	4
3. General Provisions .....	6
A. DEQ Oversight.....	6
B. Access.....	7
C. Notice .....	7
D. Progress Reports.....	8
E. DEQ Costs .....	8
F. Dispute Resolution.....	9
G. Enforcement of Agreement and Reservation of Rights.....	10
H. Waivers.....	11
I. Hold Harmless and Indemnification .....	11
J. Public Notice .....	11
K. Recording .....	12
L. Transfer of Ownership .....	12
4. Release from Liability.....	12
5. Parties Bound .....	13
6. Signatures.....	14
Attachment A -- Legal Description of Property	

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

1. RECITALS

A. The subject property (Property) is located at 10700 SE McLoughlin Boulevard, Milwaukie, Oregon. The legal description of the Property is set forth as Attachment A to this Agreement.

B. The Property has been operated as a retail gasoline service station since approximately 1957 and is currently used as a retail gasoline facility. In 1992, multiple releases were reported from several underground storage tanks (USTs). That year, three Underground Storage Tanks (USTs) were decommissioned by removal. At that time, approximately 1093 cubic yards of contaminated soil were excavated from the UST pit in the center of the Property and a soil vapor extraction(SVE)system was installed to remediate residual contamination adjacent to the former UST cavity, the pump islands, and a utility trench. The SVE system operated until [DATE] .

C. Investigations in November 2002 identified a low level of residual soil contamination adjacent to the former UST cavity, the pump islands, and a utility trench. No groundwater was encountered during this investigation, and boring refusal was generally encountered at a dense basalt layer 15 to 20 feet below land surface. An NFA determination was made by DEQ for continued commercial use of the Property.

D. In 2005, additional investigations were conducted at the site to define the magnitude and extent of contamination. Fourteen push-probe borings were advanced at various locations. The investigations identified residual gasoline contamination north of the dispenser islands, between the islands, south of the former excavation and UST cavity,

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

and on the south-central and southeastern property boundary. Residual contaminant concentrations were generally highest between the two dispenser islands.

E. Additional borings were advanced south and southwest of the Property to determine the nature and extent of soil and groundwater contamination off the Property. The extent of petroleum contamination from the site was determined to be limited to the Property and adjacent rights-of-way of Jackson street and McLoughlin Boulevard.

F. Gasoline-range total petroleum hydrocarbons, 1,2-4 trimethylbenzene, and 1,3,5-trimethylbenzene concentrations in soil exceed DEQ's urban residential vapor intrusion buildings risk-based concentrations (RBNCs). No contaminants in groundwater exceeded the applicable urban residential or occupational RBCs.

G. The contaminants on the property, total petroleum hydrocarbons, 1,2-4 trimethylbenzene, and 1,3,5-trimethylbenzene, are "hazardous substances" within the meaning of ORS 465.200(15). The presence of hazardous substances at the Property constitutes a "release" of hazardous substances within the meaning of ORS 465.200(21), and makes the Property a "facility" within the meaning of ORS 465.200. Removal or remedial action may be necessary at the Property to protect human health or the environment.

H. On April 26, 2005 Metro applied to DEQ for entry of this Agreement, and agreed to reimburse DEQ's costs of technical review and agreement preparation.

I. Metro is an Oregon municipal corporation and a "person" within the meaning of ORS 465.200(20). According to information provided by Metro, Metro is not



**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

currently liable under ORS 465.255 for the release of hazardous substances existing at the facility as of the date of this Agreement.

J. Metro proposes to make the Property available for transit oriented development. Proposed uses may include commercial, office and/or urban residential buildings. These uses will enhance efforts to revitalize downtown Milwaukie, encouraging continued economic development in the City's downtown core.

K. Metro agrees to perform the activities described in Section 2 of this Agreement at its expense. DEQ has determined that a "substantial public benefit" will result from this Agreement, within the meaning of ORS 465.327 (1)(d).

L. Based upon the information submitted by Metro, DEQ has further determined that the proposed development activities at the Property will not contribute to or exacerbate existing contamination, increase health risks, or interfere with remedial measures necessary at the Property.

M. In determining to enter this Agreement, DEQ has consulted with the City of Milwaukie and has considered reasonably anticipated future land uses at the Property and surrounding properties.

N. Metro recognizes that implementation of remedial measures at the Property in the future might interfere with Metro's residential use of the Property.

2. MEASURES TO BE UNDERTAKEN

A. Metro agrees that, for areas of the Property where soil contamination levels exceed DEQ's urban residential vapor intrusion buildings risk-based concentrations (RBNCs), the Property shall not be used for residential purposes unless and until Metro

**EXHIBIT A TO RESOLUTION NO. 05-3621**  
**PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

completes measures to reduce the risk from vapor intrusion to levels acceptable to DEQ. Such measures may include, but are not limited to, excavation of contaminated soil or installation of engineering controls approved by DEQ. DEQ agrees that, subject to DEQ approval of a final construction plan, for development where residential units are not on the ground floor, construction that provides a separate HVAC system for the residential units will be an acceptable engineering control. This restriction on use shall run with the land pursuant to ORS 465.327(5).

B. Any development, construction, or other use of the Property shall be consistent with and shall not interfere with decommissioning or remedial activities necessary at the Property. To ensure such consistency and prevent exacerbation of existing contamination at the Property, Metro must notify DEQ before any material physical changes or disturbances are made to any area of the Property that is subject to residential use restrictions under Section 2.

C. At DEQ's request, Metro must submit for DEQ review and approval, development, use, and building plans, or other similar and adequate documentation, for the proposed activities before any material changes or disturbances occur to any area of the Property that is subject to such use restrictions.

D. Metro shall require all tenants, employees, authorized and regular users, and other occupants of the Property who perform activities on the Property that might affect the soils, groundwater, other contaminated media, or affect necessary investigation, decommissioning, or remedial measures, to also submit development and/or construction plans to Metro for review by DEQ, pursuant to Subsection 2.D. of this Agreement. This

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

requirement is necessary to ensure that the actions of others do not exacerbate existing contamination. This review and approval requirement will expire upon the Property receiving an unconditional No Further Action determination.

E. Metro shall record and abide by any additional use restrictions DEQ deems necessary at the Property, which restrictions, pursuant to ORS 465.327(5), shall run with the land

F. Nothing in this Agreement obligates DEQ to conduct or pay for any actions at the Property.

3. GENERAL PROVISIONS

A. DEQ Oversight

DEQ shall provide review, approval/disapproval, and oversight as described in Section 2 and Subsection 3.F.(2) of this Agreement. Where DEQ approval is required for any plan or activity under this Agreement, Metro shall not proceed to implement the plan or activity until DEQ approval is received. DEQ will make good faith efforts to conduct plan and activity review promptly so that any proposed development activities are not unduly delayed.

B. DEQ Access

(1) Metro grants an irrevocable right of entry to DEQ and its authorized representatives to enter and move freely about the Property at all reasonable times for purposes of overseeing implementation of this Agreement, or conducting removal or remedial measures DEQ deems necessary.

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

(2) Except for documents covered by the attorney-client privilege, the Commission shall allow DEQ to inspect and copy all records in Metro's possession or control relating to measures undertaken at the Property under this Agreement. Metro shall preserve all such records for six (6) years after the effective date of this Agreement, and, after such six-year period, shall provide DEQ with sixty (60) days notice before destruction or other disposal of such records and make the records available for inspection and copying.

(3) Metro may assert a claim of confidentiality regarding any records submitted to or copied by DEQ pursuant to this Agreement. DEQ shall treat documents and records for which a claim of confidentiality has been made in accordance with ORS 192.410 to 192.505. If Metro does not make a claim of confidentiality at the time the records are submitted to or copied by DEQ, the records may be made available to the public without notice to Metro. DEQ reserves any rights to obtain documents withheld from DEQ as privileged.

C. Notice

All reports, notices, and other communications required under or relating to this Agreement shall be directed to:

For DEQ:

Bijan Pour  
2020 SW 4<sup>th</sup> Avenue  
Portland, Or 97201  
Tel: (503) 229-  
FAX: (503) 229-6945

For Metro:

**EXHIBIT A TO RESOLUTION NO. 05-3621**  
**PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

D. Progress Reports

On a quarterly basis upon commencement and continuing until completion of the development activities described in this Agreement, Metro shall submit to DEQ one (1) copy of a progress report describing its activities at the Property under this Agreement. Metro is not required to submit progress reports to DEQ until development begins at the Property. DEQ anticipates that the progress report will not exceed two (2) pages in length. The progress report shall address, at a minimum, the following:

- (1) Activities undertaken by Metro at the Property during the previous quarter;
- (2) Actions scheduled to be taken by Metro in the next quarter;
- (3) Sampling and test results and any other data generated by Metro during the previous quarter; and
- (4) A description of any problems experienced by Metro during the previous quarter and the actions taken to resolve them.

Submission to DEQ of the plans and specs and permits prior to development, followed by quarterly construction progress reports that include, as appropriate, information required by (1) through (4) above, and that document the installation of the engineering controls described in 2.A. of this Agreement, will satisfy the requirements of this section.

E. DEQ Costs

- (1) DEQ shall submit to Metro a monthly statement of costs incurred after the effective date of this Agreement by DEQ in connection with the oversight of Metro's implementation of this Agreement. Metro also agrees to reimburse DEQ its costs incurred

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

between January 1, 2005 and the effective date of this agreement to review and comment on initial site assessment reports and development of this PPA.

(2) DEQ oversight costs payable by Metro shall include both direct and indirect costs. Direct costs include site-specific expenses, DEQ contractor costs, and DEQ legal costs. Indirect costs include general management, support, and program development costs of DEQ and the Land Quality Division allocable to DEQ oversight of this Agreement and not charged as direct site-specific costs. Indirect costs are based on a percentage of direct personal service costs.

(3) Within thirty (30) days of receipt of the monthly statement, Metro shall pay the amount of costs billed by check made payable to the "State of Oregon, Hazardous Substance Remedial Action Fund." Metro shall pay simple interest of 9% per annum on the unpaid balance of any oversight costs, which interest shall begin to accrue at the end of the 30-day payment period, unless dispute resolution has been invoked.

F. Dispute Resolution

In the event of any disagreement between DEQ and Metro regarding implementation of this Agreement, including but not limited to review and approval of a plan or activity or DEQ costs, DEQ and Metro shall, in the following order:

(1) Make a good faith effort to resolve the dispute between project managers;

(2) If necessary, refer the dispute for resolution by the immediate supervisors of the project managers; and

(3) If necessary, provide to each other their respective positions in writing and refer the dispute for resolution to DEQ's Administrator of the Land Quality Division or

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

Northwestern Regional Division Administrator, and Metro's Chief Operating Officer.

DEQ's final decision after such dialogue shall be enforceable in accordance with Subsection 3.H. of this Agreement.

G. Enforcement of Agreement and Reservation of Rights

(1) In the event of any failure of Metro to comply with any obligation of this Agreement, DEQ may enforce this Agreement under ORS 465.260(5) or exercise any authority or pursue any claim or cause of action that DEQ might have. Metro reserves any defenses or counterclaims it might have in the event of such action by DEQ.

(2) In addition, without limiting the foregoing, upon any failure of Metro to comply with any material obligation of this Agreement, DEQ may terminate this Agreement by written notice; provided that before such termination: (a) DEQ initiates dispute resolution in accordance with Subsection 3.F., (b) DEQ gives Metro written notice of the deficiency describing what is necessary to correct the deficiency, and (c) Metro fails to cure the deficiency within 30 days of the notice, or conclusion of dispute resolution, whichever is later (or such longer period to which DEQ agrees in writing). Failure by DEQ to seek termination of this Agreement upon a failure of Metro to comply with any material obligation of this Agreement shall not constitute a waiver by DEQ of that or any other obligation. DEQ may not terminate this Agreement under this paragraph 3.G.(2) during the pendency of any action to enforce or construe this Agreement.

(3) Except as provided in Subsections 3.I and 3.J of this Agreement, DEQ and Metro reserve any claim or cause of action they respectively have as to any person or entity not a signatory to this Agreement.

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

(4) Metro does not admit any liability or violation of law by virtue of entering this Agreement.

(5) DEQ reserves its authority to perform remedial measures regarding a release of hazardous substances at or from the Property.

H. Waivers

(1) Metro waives any claim or cause of action it might have against the State of Oregon arising from contamination at the Property existing as of the date of acquisition of ownership or operation of the Property.

(2) Metro waives any right it might have under ORS 465.260(7) to seek reimbursement from the Hazardous Substance Remedial Action Fund or the Orphan Site Account for cost incurred under this Agreement.

I. Hold Harmless and Indemnification

To the extent provided by Oregon law, Metro shall save and hold harmless the State of Oregon and its commissions, agencies, officers, employees, contractors, agents, and authorized representatives, and indemnify the foregoing, from and against any and all claims arising from acts or omissions related to this Agreement of Metro or its officers, employees, contractors, agents, receivers, trustees, or assigns. DEQ shall not be considered a party to any contract made by Metro or its agents in carrying out activities under this Agreement.

J. Public Notice

(1) Upon execution of this Agreement, DEQ will provide public notice of this Agreement in a local newspaper of general circulation, describing the measures to be



**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

undertaken under this Agreement. Copies of the Agreement will be made available to the public. DEQ shall provide Metro a draft of such notice and consider any comments by Metro on the draft notice, before publication. Metro is responsible for the publication costs, if any, of such notice per Subsection 3.F. of this Agreement.

(2) Before approval of any remedial action, DEQ will provide public notice and opportunity for comment on the proposed remedy in accordance with ORS 465.320.

**K. Recording**

(1) Within thirty (30) days of the date Metro receives an ownership interest in the Property, Metro shall submit a copy or original of this Agreement (whichever is required by the county) to be recorded in the real property records of Washington County, State of Oregon. Metro shall provide DEQ with written evidence of such recording within seven (7) days of recording.

(2) Upon any termination of this Agreement, DEQ may record, or require Metro to record, notice of such termination in the real property records of Washington, State of Oregon.

**L. Transfer of Interest**

Upon transfer of any interest in the Property, or a portion of the Property, from Metro to another person or entity, Metro shall provide written notice to the DEQ project manager not less than (30) days prior to such transfer.

**4. RELEASE FROM LIABILITY**

A. Subject to the satisfactory performance by Metro of its obligations under this Agreement, Metro shall not be liable to the State of Oregon under ORS 465.200

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

through 465.455 and 465.900 for any release of the hazardous substances described in Section 1 above at the Property existing as of the date of Metro's acquisition of its interest in or operation of the Property. Metro shall bear the burden of proving that any hazardous substance release existed before the date of acquisition of its interest in or operation of the Property.

B. The release from liability under Subsection 4.A of this Agreement shall not apply to any liability regarding:

- (1) A release of hazardous substances at the Property after the date of acquisition of an interest in or operation of the Property;
- (2) Contribution to or exacerbation of a release of hazardous substances;
- (3) Interference or failure to cooperate with DEQ, or with persons conducting remedial measures under DEQ's oversight at the Property;
- (4) Failure to exercise due care or take reasonable precautions with respect to any hazardous substance at the Property;
- (5) Violation of federal, state, or local law;
- (6) Any ownership, operation, or release of hazardous substances at the Property by Metro before the effective date of this Agreement;
- (7) Any ownership, operation, or other ground of liability of Metro for a release of hazardous substances at an off-site location affecting the Property; and
- (8) Any matters as to which the State of Oregon is owed indemnification under Subsection 3.I of this Agreement.

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

5. PARTIES BOUND

A. This Agreement shall be binding on the signatories and their respective commissions, agencies, officers, assigns, successors, employees, contractors, agents, and authorized representatives. The undersigned representative of each party certifies that he or she is fully authorized to execute and bind such party to this Agreement. No change in ownership or corporate or partnership status relating to the Property shall in any way alter Metro's obligations under this Agreement, unless approved otherwise in writing by DEQ.

B. The benefits and burdens of this Agreement shall run with the land; however, the release from liability set forth in Subsection 4.A of this Agreement shall limit or otherwise affect the liability only of persons who are not potentially liable under ORS 465.255 for a release of hazardous substances at the Property as of the date of that person's acquisition of ownership or operation of the Property. 6.

C. SIGNATURES

\_\_\_\_\_ Date: \_\_\_\_\_  
[NAME]

SUBSCRIBED AND SWORN TO BEFORE ME this \_\_\_\_\_  
day of \_\_\_\_\_, 2005 by \_\_\_\_\_  
in capacity as \_\_\_\_\_ of Metro.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission expires: \_\_\_\_\_

**EXHIBIT A TO RESOLUTION NO. 05-3621  
PROSPECTIVE PURCHASER AGREEMENT BETWEEN METRO AND DEQ**

\_\_\_\_\_ Date: \_\_\_\_\_  
Alan Kiphut, Administrator  
Land Quality Division  
Oregon Department of Environmental Quality

SUBSCRIBED AND SWORN TO BEFORE ME this  
\_\_\_\_\_ day of \_\_\_\_\_, 2005 by, Alan Kiphut in  
his capacity as Administrator of the Land Quality Division,  
Oregon Department of Environmental Quality.

\_\_\_\_\_  
NOTARY PUBLIC FOR OREGON  
My Commission expires: \_\_\_\_\_

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**INTERGOVERNMENTAL AGREEMENT  
MAIN STREET VILLAGE PHASE II**

THIS INTERGOVERNMENTAL AGREEMENT ("Agreement") is entered into by and between Metro, a municipal corporation established pursuant to Oregon law and the Metro Charter ("Metro") and the City of Milwaukie (the "City"), a municipal corporation (collectively, "the Parties"). This Agreement is effective as of the last date of execution set forth below (the "Effective Date").

**RECITALS**

A. Metro Council Resolution No. 98-2619 ("For the Purpose of Authorizing Start-Up Activities for the Transit-Oriented Development (TOD) Implementation Program at Metro") adopted on April 9, 1998, as amended by Metro Council Resolution No. 04-3479 ("For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program") adopted on July 15, 2004, authorizes the acquisition and "Joint Development" of real property satisfying certain criteria and identified as "Opportunity Sites." Metro's TOD Program utilizes joint development tools such as land acquisition and development agreements to encourage the development of projects located in close proximity to rail transit stations, "Frequent Bus Stops" and in Urban Centers throughout the region.

B. On March 17, 2005, the Metro Council authorized Metro to purchase the Property for the Transit-Oriented Development/Urban Centers Program, via Metro Council Resolution No. 05-3555A ("For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project"). The Metro Council approved the acquisition of the Property subject to specific preconditions, including the entry into this Agreement by the Parties on terms set forth in the Letter of Intent set forth below.

C. Metro and the City have entered into a Letter of Intent expressing the mutual intent of the Parties to provide for the acquisition of a Texaco filling station site located at 10700 SE McLoughlin Boulevard, Milwaukie, Oregon, and described and depicted in the attached Exhibit A (the "Property") as TOD Program Urban Centers Opportunity Site. The Letter of Intent attached as Exhibit B sets forth the general terms of acquisition and co-ownership of the Property by Metro and the City, and provides for a joint offering of the Property with the adjacent City property at 10721 SE Main Street ("City Property"), also described and depicted in the attached Exhibit A, so that the entire block may be developed by a future purchaser. The development called for in the Letter of Intent is a landmark signature mixed-use project of 4-5 stories, with retail uses on the ground floor and residential uses on higher floors.

D. Soil and water contamination have been discovered on the Property in concentrations that exceed permissible levels if the Property is to be developed for residential use. The Oregon Department of Environmental Quality ("DEQ") has agreed

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

to issue Metro a Prospective Purchaser Agreement (“PPA”). The PPA requires that the existing underground gasoline storage tanks be decommissioned and that measures be taken to reduce the risk from vapor intrusion into buildings to levels acceptable to DEQ.

E. Metro has entered into an Agreement of Purchase and Sale with Olson Brothers Enterprises, L.L.C., to purchase the Property, has performed due diligence in accord with Metro standard real estate acquisition guidelines, and is prepared to close the acquisition of the Property upon execution of this Agreement.

F. On August 16, 2005, the Milwaukie City Council approved Resolution No. 39-2005, authorizing the City to enter into this Agreement with Metro.

**NOW, THEREFORE**, in reliance on the above recitals and in consideration of the mutual promises described below, the Parties agree as follows:

1. **General Objective.** To provide for the acquisition of the Property as a TOD Program Urban Centers Opportunity Site, setting forth the terms of co-ownership of the Property by Metro and the City, and providing for a joint offering of the Property with the City Property for the development of Main Street Village, Phase II, a landmark signature mixed-use project of 4-5 stories with housing above ground floor retail.

2. **Property Acquisition**

2.1 Metro shall close escrow and acquire the Property upon the execution of this Agreement by both Parties.

2.2 At closing, the City shall take an undivided 5% interest in title to the Property, and Metro shall take an undivided 95% interest in title to the Property as tenants-in-common.

3. **Project Management/Joint Offering**

3.1 The Parties will cooperate jointly to offer the entire city block, consisting of the Property, the City Property, and the ROW Parcels (defined below) for development (“Block 14”). The initial development concept is for a landmark signature mixed-use development of 4-5 stories of housing above ground floor retail, with the building footprint covering most of Block 14, to be called Main Street Village, Phase II (the “Joint Offering”). The terms of the Joint Offering shall be established by mutual agreement, but shall conform to the parameters set forth in the TOD/Urban Centers Workplan.

3.2 Metro and the City agree to establish a project management committee to manage parcel consolidation, craft and market a public Joint Offering document, determine the appropriate land value write-down, solicit proposals and select a developer. The Joint Offering may be made either through an open competitive process or an unsolicited proposal process, upon the mutual written agreement of the Parties. The Parties shall

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

share equally in the cost of conducting the Joint Offering, and shall exert best efforts to complete the Joint Offering within 18 months from the Effective Date.

3.3 Metro agrees to write down the land value of the Property to an amount that will ensure the desired development as set forth in Section 3.1 above, subject to TOD/Centers Steering Committee and Metro Council approval. The City agrees to market the City Property at an equivalent value per square foot as Metro markets the Property. The proceeds of any sale of Block 14 shall be allocated pro rata between the Parties based on the square footage of their respective properties.

3.4 Metro and the City agree that the Joint Offering will include a requirement that the purchaser implement such measures as are needed to satisfy the terms of the DEQ PPA as part of any residential development and before any residential occupancy is permitted. Metro and the City acknowledge that requiring the purchaser to take such actions will affect the price a developer will pay for Block 14.

3.5 The City agrees to support and recommend to the Milwaukie City Council the vacation of certain portions of the right-of-way of SE Harrison Street and SE Jackson Street (the "ROW Parcels"), as depicted on Exhibit A, and the incorporation of said ROW Parcels into the Joint Offering.

3.6 City will exert its best efforts to amend its zoning and development ordinance and regulations to permit a project to be developed on Block 14 consisting of residential over ground floor retail, a minimum of 5 stories with a floor area ratio ("FAR") of 1 to 1, a housing/parking ratio not to exceed one space per housing unit and a building type that is economically feasible.

3.7 Metro agrees to demolish the existing buildings on the Property, close and stub all utilities and remove all demolition materials in accord with all state and local regulations, such that the Property is in a reasonably safe condition after closing.

3.8 Metro agrees to decommission the Underground Storage Tanks ("UST") located in the tank nest on the Property after closing, in compliance with all DEQ UST decommissioning rules and regulations, either by removal or in place, such that they may be used as stormwater storage vessels for future development.

3.9 Metro agrees to exert its best efforts to obtain a No-Further-Action Letter from DEQ, stating that no further investigation, remediation or cleanup is required to be performed upon the Property in connection with commercial use.

**4. Environmental Assessment and Indemnity**

4.1 Environmental Assessment. Metro's Phase I and Phase II Environmental Assessments revealed that petroleum contamination exists in the Property's soil and groundwater, in concentrations that are acceptable for commercial development but exceed permissible levels if the Property is to be developed for residential use, and that

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

petroleum contamination originating on the Property has migrated from the Property in a southwesterly direction, into the soil and groundwater underlying SE Jackson Street and SE McLoughlin Boulevard. In accord with the Letter of Intent, and in consideration for Metro's agreement to acquire the Property for purposes of mixed-use development, the City has agreed to indemnify Metro as set forth below.

4.2 Environmental Indemnity. The City hereby covenants to indemnify and defend (with legal counsel reasonably acceptable to Metro) Metro and hold Metro, its officers and employees, successors and assigns, harmless from and against all claims, demands, causes of action, or any other action or proceeding, meritorious or not, and all liabilities, losses, damages, costs and expenses relating to or arising, in whole or in part, directly or indirectly, from: (a) the past, present or future Environmental Condition of the Property; (b) past, present or future Adverse Environmental Activity occurring on or related to the Property; (c) any and all Government Action related to the Property or past, present or future activities thereon; (d) the past, present or future Environmental Condition of real property surrounding the Property, relating to or resulting from the Environmental Condition of the Property or Adverse Environmental Activity on the Property; and (d) City or City's agents failure to comply with any and all future Environmental Requirements relating to the Property.

Metro hereby covenants to indemnify and defend (with legal counsel reasonably acceptable to the City) the City, and hold the City, its officers and employees, successors and assigns, harmless from and against all claims, demands, causes of action, or any other action or proceeding, meritorious or not, and all liabilities, losses, damages, costs and expenses relating to or arising, in whole or in part, directly or indirectly, from Metro's activities under Sections 3.7 and 3.8 above.

4.2.1 For purposes of this Section, "Environmental Condition" shall be interpreted to include, but not be limited to, the release of or contamination by any Hazardous Substance(s), pollutant or contaminant, as those terms are defined in CERCLA, TOSCA, ORS Chapters 465 and 466, and all other applicable federal and state environmental statutes, rules and regulations now or hereafter in effect, but shall not include conditions directly resulting from the acts of Metro, its officers and employees, agents and contractors.

4.2.2 For purposes of this Section, "Government Action" shall be interpreted to include any investigation, inquiry, order, hearing, action or other proceeding by or before any governmental agency which results directly or indirectly from the Environmental Condition of the Property or Environmental Activity related on or related to the Property.

4.2.3 For purposes of this Section, "Adverse Environmental Activity" shall be interpreted to include any past or current, actual, proposed or threatened surface or subsurface, storage, holding, existing, release, emission, discharge, generation, processing, abatement, removal, remediation, disposition, handling or transportation of any Hazardous Substance(s), pollutant or contaminant (as though they are defined in CERCLA, TOSCA, ORS Chapters 465 and 466, and other applicable federal and state



**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

environmental statutes, rules and regulations hereinafter in effect), from, under, into or on, the Property, or otherwise relating to the Property or the use of the Property or neighboring properties, or any other activity or occurrence, cause or causes that would cause any such event to exist, but shall not include activity by Metro, or on behalf of Metro by its officers and employees, agents and contractors

4.2.4 For purposes of this Section, “Environmental Requirements” shall be interpreted to include past, present and future state and federal local laws and ordinances, including CERCLA, TOSCA, and ORS Chapters 465 and 466, as amended from time to time, including any administrative court order, judgment or decree arising therefrom.

4.2.5 The City and Metro hereby agree that the Environmental Indemnity contained herein shall survive the sale of the Property to a third party. Metro may, at its option, tender any defense of any claim, action or suit covered under this Environmental Indemnity to the City.

**5. Property Management.** Upon acquisition of the Property by Metro and the City, the City shall manage the Property until it is conveyed to a developer pursuant to the Joint Offering. The City shall maintain security of the Property, and shall provide additional fencing, gates, signage, and other measures necessary to maintain public safety on the Property, and to deter public nuisance use of the Property. Access to the Property shall be controlled by the City, and the City shall respond to neighborhood or citizen complaints regarding nuisance uses or noise on the Property. Any permits granted to third parties by the City to use the Property shall comply with the terms and limitations set forth in this Agreement. The City shall be responsible for obtaining all necessary permits and for complying with all state and local rules and regulations in managing and maintaining the Property. The City shall be responsible for contacting and coordinating with other local or state agencies regarding any and all management, maintenance or operation issues that may arise with respect to the Property. Funding for the management and maintenance of the Property and the payment of taxes or assessments applying to the Property, if any, shall be provided from the City’s own resources.

**6. General Provisions**

6.1 General Indemnification. The City shall indemnify and defend Metro, and hold Metro harmless from and against any claim, loss, liability or cost suffered directly or from a third-party claim arising out of or related to the City’s management of the Property or any condition on the Property in the possession or under the control of the City. Metro shall have no liability to the City for any injury, loss, or damage caused by third parties, except to the extent caused by Metro’s negligence or breach of duty under this Agreement. The indemnity obligations of the City under this clause shall survive any expiration or termination of this Agreement.

Metro shall indemnify and defend the City, and hold the City harmless from and against any claim, loss, liability or cost suffered directly or from a third-party claim arising out of or related to Metro’s activities under Sections 3.7 and 3.8, above. The indemnity

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

obligations of Metro under this clause shall survive any expiration or termination of this Agreement.

6.2 Liens. Except with respect to activities for which Metro is responsible, the City shall pay as due all claims for work done on and for services rendered or material furnished to the Property, and shall keep the Property free from any liens. If the City fails to pay any such claims or to discharge any lien, Metro may do so and collect the cost from the City. Such action by Metro shall not constitute a waiver of any right or remedy that Metro may have on account of the City's default. The City may withhold payment of any claim in connection with a good faith dispute over the obligation to pay, as long as Metro's property interests are not jeopardized. If a lien is filed as a result of nonpayment, the City shall, within 10 days after knowledge of the filing, secure the discharge of the lien or deposit with Metro cash or sufficient surety bond or other surety satisfactory to Metro in an amount sufficient to discharge the lien plus any costs or attorney fees.

6.3 Signage. The City may provide on-site signage informing the public that the City is managing the site, but said signage shall state that funding for the acquisition came from Metro's Transit-Oriented Development/Urban Centers Program. The City shall also document in any publication, media presentation or other presentations on the Property that funding was provided by Metro's Transit-Oriented Development/Urban Centers Program.

6.4 Term. The term of this Agreement shall be five (5) years from the Effective Date of this Agreement, renewable by mutual written agreement for additional five (5) year periods. The indemnities set forth herein shall survive and shall not be affected by the expiration or termination of this Agreement.

6.5 Joint Termination for Convenience. Metro and the City may jointly terminate all or part of this Agreement based upon a determination that such action is in the public interest. Termination under this provision shall be effective upon 10 days' written notice of termination issued by Metro, subject to the mutual written agreement of the Parties.

6.6 Termination for Cause. Either party may terminate this Agreement before the date of expiration, if that party determines, in its sole discretion, that the other party has failed to comply with the terms and conditions of this Agreement and is therefore in default. The terminating party shall promptly notify the defaulting party in writing of that determination and document said default with reasonable particularity. Thereafter, the defaulting party shall have 30 days to cure the default. If the default is of such a nature that it cannot be completely remedied within the 30-day period, this provision shall be complied with if the defaulting party begins correction of the default within the 30-day period and thereafter proceeds with reasonable diligence and in good faith to cure the default as soon as practicable. If this Agreement is terminated under this provision, the City shall quitclaim its interest in the Property to Metro.

6.7 Metro Termination for Failure to Vacate Right of Way and/or Obtain Necessary Zone Change. If the City's best efforts do not result in the incorporation of the ROW

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

Parcels and/or the amendment of its zoning ordinance as set forth in Section 3 above, then Metro may at its sole option terminate this Agreement, and the City shall quitclaim its interest in the Property to Metro.

6.8 City Termination for Failure to Obtain No Further Action Letter. If Metro's best efforts do not result in the receipt of a No-Further-Action Letter from DEQ as set forth in Section 3.9 above, then the City may at its sole option terminate this Agreement, and the City shall quitclaim its interest in the Property to Metro.

6.9 Laws of Oregon. This Agreement shall be governed by the laws of the State of Oregon, and the Parties agree to submit to the jurisdiction of the courts of the State of Oregon. All applicable provisions of ORS Chapter 279, and all other terms and conditions necessary to be inserted into public contracts in the State of Oregon, are hereby incorporated as if such provisions were a part of this Agreement, including but not limited to ORS 279.015 to 279.320.

6.10 Assignment. No party may sell its undivided interest in the Property, or assign any of its rights or responsibilities under this Agreement without prior written consent from the other party, except the Parties may subcontract for performance of any of their responsibilities under this Agreement.

6.11 Notices. All notices or other communications required or permitted under this Agreement shall be in writing, and shall be personally delivered (including by means of professional messenger service) or sent by fax and regular mail.

To Metro: Metro  
Phil Whitmore, TOD Program Manager  
600 N.E. Grand Avenue  
Portland, OR 97232-2736

To City: City of Milwaukie  
Mike Swanson, City Manager  
10722 SE Main Street  
Milwaukie, OR 97222

6.12 Severability. If any covenant or provision in this Agreement shall be adjudged void, such adjudication shall not affect the validity, obligation, or performance of any other covenant or provision which in itself is valid, if such remainder would then continue to conform to the terms and requirements of applicable law and the intent of this Agreement.

6.13 Entire Agreement. This Agreement constitutes the entire agreement between the Parties and supersedes any prior oral or written agreements or representations relating to this Property. No waiver, consent, modification or change of terms of this Agreement shall bind either party unless in writing and signed by both Parties.

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

IN WITNESS WHEREOF, the Parties hereto have set their hands on the day and year set forth below.

CITY OF MILWAUKIE

METRO

By: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Title: Chief Operating Officer

**Exhibits:**

- Exhibit A – Legal Description and Depiction of Property and City Property
- Exhibit B – Signed Letter of Intent

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**EXHIBIT A**

**Legal Description of Property and City Property**

**Property:**

**Lots 5, 6, 7 and 8, Block 14, MILWAUKIE, in the County of Clackamas, and State of Oregon. The Easterly boundary of said lots to be a line more particularly described:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE, thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35 recorded in Book 516, Page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14, said iron pipe being the point of terminus of said boundary as shown by Survey 2615 in the office of the Clackamas County Surveyor.**

**City Property:**

**Lots 1, 2, 3 and 4, Block 14, MILWAUKIE, according to the duly recorded plat thereof, said western boundary of said lots to be a line described particularly as follows:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE; thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35, recorded in Book 516, page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14; said iron pipe being the point of terminus of said boundary, as shown by Survey 2615 in the Office of the Clackamas County Surveyor.**

**EXHIBIT B TO RESOLUTION NO. 05-3621  
IGA BETWEEN METRO AND CITY OF MILWAUKIE**

**EXHIBIT B**

Signed Letter of Intent

Exhibit B to IGA - Signed Letter of Intent Between Metro & City of Milwaukie

**LETTER OF INTENT**

The purpose of this Letter of Intent is to set forth the terms for discussion by Metro, a Metropolitan Service District ("Metro"), and the City of Milwaukie ("City") for the purpose of entering into an agreement to provide a joint offering ("TOD/Centers Joint Offerings") of the Olson Bros service station ("Olson Property") site and the adjacent city-owned surface parking lot ("City Parking Lot") depicted in Exhibit A, subject to the legislative approval of each party's governing body. The TOD/Centers Joint Offering will provide for the development of an Urban Centers Project of 4-5 stories, containing housing above retail, in downtown Milwaukie, Oregon hereafter referred to as "Main Street Village, Phase II." Unless and until such time as a definitive written agreement has been approved and properly executed by all parties, no party shall have any legal obligation to the other with respect to the potential transactions discussed in this Letter. This Letter of Intent shall in no way be construed as a binding agreement between the parties. Subject to the foregoing, the following is a statement of potential deal points and actions by the parties that are intended to provide a framework for negotiation of a definitive written agreement.

**Metro Participation**

1. Metro will obtain an appraisal and appraisal review for the Olson Property at 10700 SE McLoughlin, Milwaukie, Oregon.
2. Metro will seek the approval of the TOD/Centers Steering Committee and the Metro Council for the acquisition of the Olson Property.
3. Metro will complete said acquisition and become the record owner of the Olson Property.
4. Metro will cooperate with the City to jointly offer the Olson Property and the adjacent City parking lot for development as a signature mixed-use project of 4-5 stories with housing above retail to be called the Main Street Village, Phase II.
5. Metro will write down the land value of the Olson Property to an amount that will ensure the construction of a mixed-use development, subject to TOD/Centers Steering Committee and Metro Council approval.

**City of Milwaukie Participation**

1. City will offer the City Parking Lot at 10721 SE Main Street in a joint offering with the Olson Property, at an equivalent value per square foot as Metro offers the Olson Property. By writing down the land value of the City Parking Lot Property, the City will share in the financial burden of ensuring the construction of a mixed use project. However, it is understood that because Metro is purchasing land supporting a service station and converting it to commercial-residential use, Metro's total land value write down for the Olson Property will likely exceed the City's, despite equivalent sale values.

Exhibit B to IGA - Signed Letter of Intent Between Metro & City of Milwaukee

2. City will complete the necessary process to have the right-of-way parcels at SE Harrison Street and SE Jackson Street ("ROW Parcels"), depicted on Exhibit B, become part of the TOD/Centers Joint Offering.
3. City will use its best efforts to modify its planning and development regulations to permit a project composed of a minimum of five stories with a floor area ratio ("FAR") of 1 to 1, housing/parking ratio not to exceed one space per housing unit and a building type that is economically feasible
4. City will execute an environmental indemnity prior to Metro's acquisition of the Olson Property, agreeing to indemnify, defend and hold harmless Metro against all liability relating to the environmental condition of the Olson Property.

**Joint Participation**

1. Metro and the City will establish a project management committee to manage parcel consolidation including the ROW Parcels, craft and market a public offering document, solicit proposals and select a developer. The City and Metro will share decision-making equally for the project.
2. The Joint Offering may be offered through either an open competitive process or an unsolicited proposal process. The initial development concept is for a landmark mixed-use development of four to five stories, with the building footprint covering most of the parcel.

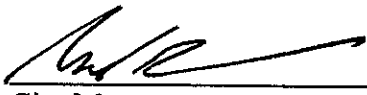
**Schedule**

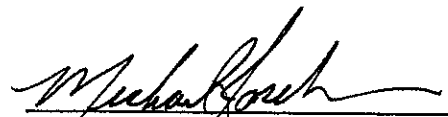
The parties' intent is that the Joint Offering will issue within 18 months or less from the date of this Agreement.

Neither Metro nor City shall have any obligation to the other with respect to transactions and matters discussed above until a definitive written agreement encompassing said transactions and matters has been approved by the respective governing bodies of Metro and the City and executed by the parties. Unless and until such a written agreement has been so executed, neither party shall have any obligation to the other with respect to any costs incurred, including but not limited to, legal and consulting fees incurred in connection with the proposed transactions and actions described herein.

**City of Milwaukee**

**Metro**

  
\_\_\_\_\_  
City Manager

  
\_\_\_\_\_  
Chief Operating Officer



**EXHIBIT B TO RESO. 05-3621  
IGA Between Metro & City of Milwaukie**

**Exhibit A - Signed Letter of Intent Between Metro & City of Milwaukie  
City's Legal Description and Depiction of City Parking Lot**

**City Property:**

**Lots 1, 2, 3 and 4, Block 14, MILWAUKIE, according to the duly recorded plat thereof, said western boundary of said lots to be a line described particularly as follows:**

**Beginning at a brass screw set in the South sidewalk of Harrison Street in the Town of Milwaukie, at a point which is South 80° West 5 feet and North 9° 20' West 4 feet from the Northeast corner of said Lot 5, Block 14, MILWAUKIE; thence South 9° 20' East, along the center line of the vacated alley in said Block 14, as vacated by Milwaukie City Ordinance 35, recorded in Book 516, page 124 Deed Records, a distance of 204 feet to an iron pipe set in the South line of said Block 14; said iron pipe being the point of terminus of said boundary, as shown by Survey 2615 in the Office of the Clackamas County Surveyor.**

EXHIBIT B TO RESO. 05-3621  
IGA Between Metro & City of Milwaukee

Exhibit A to Signed Letter of Intent Between Metro & City of Milwaukee  
Depiction of City Parking Lot



Olson Property

City Parking Lot

200 Ft

Harrison St.

Main Street

McLaughlin Blvd.

Existing Downtown Core

N

## STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 05-3621, FOR THE PURPOSE OF AMENDING THE TERMS OF THE TRANSACTION SET FORTH IN RESOLUTION NO. 05-3555A TO ACQUIRE PROPERTY IN MILWAUKIE TOWN CENTER FOR A TRANSIT-ORIENTED DEVELOPMENT/CENTERS PROJECT

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Date: September 8, 2005

Prepared by: Andy Cotugno  
Phil Whitmore

### BACKGROUND

#### *Milwaukie Main Street Mixed Use Project – Site Acquisition*

Metro Council Resolution No. 05-3555A (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project) authorizes the Chief Operating Officer to purchase the Texaco Station at 10700 SE McLoughlin Blvd (the “Property”), located between Harrison and Jackson Streets at the entrance to downtown Milwaukie, as a Metro TOD/Centers Implementation Program “opportunity site.” This 1/2 block parcel is judged to be a strategically important location within downtown Milwaukie. The parcel will be jointly offered with an adjacent 1/2 block City Hall parking lot and the entire parcel will link the existing downtown, which is south of this parcel, to the N. Main TOD/Centers project currently breaking ground (the old Safeway site). The development concept would be for a 4-5 story structure with 80-100 housing units above approximately 9,000 square feet of retail.

The terms of sale originally approved via Resolution 05-3555A have been revised due to the unforeseen results of Metro’s due diligence and the consequent renegotiation of the transaction with the Seller. Attachment 1 to this staff report lists the final terms of sale that have been tentatively agreed to by Metro, the Seller and the City of Milwaukie.

The total purchase price for the property has been reduced from \$775,000 to \$750,000, reflecting a credit to Metro because Seller will no longer be demolishing the service station and decommissioning the underground fuel storage tanks prior to closing.

The down payment at closing has increased from \$175,000 to \$250,000, and the balance of \$500,000 will be paid over a two-year term at 6.5% interest, rather than a five-year term. The TOD/Centers program can accommodate this shorter term utilizing funding approved in the last MTIP allocation.

The purchase price has been verified by an independent fair market appraisal, reviewed and approved by an MAI appraiser.

Metro’s due diligence revealed a plume of petroleum contaminated soil and groundwater on the Property. The contamination is acceptable to the Oregon Department of Environmental Quality (“DEQ”) for purposes of commercial development, but the DEQ will not allow residential development on the Property unless further protective actions are taken. As a result, pending Metro Council approval, Metro has agreed to enter into a Prospective Purchaser Agreement (“PPA”) with DEQ prior to closing, on the terms set forth in Exhibit A to the Resolution. The PPA will protect Metro from liability to DEQ for the petroleum plume, as long as Metro and Milwaukie require the incorporation of certain protective features into the proposed mixed-use development. If housing is placed on the Property, as Metro anticipates,

separate HVAC systems will be required by DEQ to provide ventilation to housing units, and the housing units are not to be constructed on the ground floor, to prevent vapor intrusion. The TOD/Centers Program anticipates no difficulty in meeting these conditions, as Metro intends to offer the Property for a vertical mixed-use project with housing over retail. Commercial development is currently allowed on the site without remediation or other measures.

If the Metro TOD/Centers Program and the City of Milwaukie decide to surpass the DEQ's requirements and remove the contaminated soil, the selected developer will be required to perform this task, which we currently estimate at a maximum cost of \$59,000. The Metro TOD/Centers Program anticipates that the condition of the Property and the PPA encumbrance will have no adverse impact on the feasibility, marketability or potential financing of the proposed mixed use project by developers.

The terms of sale originally outlined in the Staff Report required that the Seller provide Metro's standard representations and warranties in regard to the condition of the Property and required that the members of the LLC that is selling the property to Metro indemnify Metro against all future environmental liability. The Seller is no longer willing to do so, and now will only sell the Property to Metro "AS-IS." However, the combination of the PPA set forth above, Metro's conveyance of partial ownership in the Property to Milwaukie, and the indemnity by Milwaukie set forth below provides Metro with equivalent or better environmental liability protection.

Resolution No. 05-3555A stipulated that the acquisition would be contingent upon the execution of a Letter of Intent with the City of Milwaukie for the joint offering of the adjacent parking lot for development. The Letter of Intent has been executed and will be supplanted by an Intergovernmental Agreement with the City of Milwaukie. The City of Milwaukie has agreed to enter into said Intergovernmental Agreement with Metro prior to closing on the terms set forth in Exhibit B as follows: Milwaukie will perform the joint offering with Metro as set forth above, Milwaukie will take over management of the Property, Milwaukie will take a 5% share of the title with Metro as a tenant in common, and Milwaukie will indemnify Metro against environmental liability relating to the Property.

## **ANALYSIS/INFORMATION**

### **1. Known Opposition**

There is no known opposition to this site acquisition although there are groups and individuals who oppose TOD projects and public private partnerships.

### **2. Legal Antecedents**

The Federal Transit Administration (FTA) approved a grant for Metro to start the TOD Program in 1997. Authority to use FTA funds for joint development are included in the Intermodal Surface Transportation Act of 1991 (ISTEA) and codified under 49 USC 5309, 49 USC 5307, 23 USC 133 (STP) and 23 USC 149 (CMAQ). According to these laws, TOD Program activities are defined as transportation projects provided there is (1) a physical or functional relationship to the transit project; and (2) an enhanced effectiveness of the existing transit system.

The TOD Program was originally transferred from TriMet to Metro by Intergovernmental Agreement (IGA) adopted by the Metro Council, Resolution No. 96-2279 (For the Purpose of Authorizing an Intergovernmental Agreement With Tri-Met to Assist in Establishing a Transit-Oriented Development and Implementation Program at Metro), on May 16, 1996. The Metro Council authorized start-up activities on April 9, 1998, by Resolution No. 98-2619 (For the Purpose of Authorizing Start-Up Activities For the Transit-Oriented Development (TOD) Implementation Program at Metro). The Work Plan was amended to include provisions for initiation of an Urban Centers Program on July 15, 2004 by

Resolution No. 04-3479 (For the Purpose of Amending the Transit-Oriented Development (TOD) Program to Expand the TOD Program Area and Initiate an Urban Centers Program).

The Council adopted Resolution 05-3555A on March 17, 2005 (For the Purpose of Authorizing the Chief Operating Officer to Purchase Property in the Milwaukie Town Center for a Transit-Oriented Development/Centers Project), authorizing the Chief Operating Officer to purchase this site for a TOD/Centers Project.

### **3. Anticipated Effects**

Approval of the amended terms of sale will enable Metro to move forward with the site acquisition as planned.

As an Urban Centers Project the proposed project would respond to the Centers Implementation Selection Criteria as follows: 1) The project will be mixed-use higher density development with an FAR exceeding 1:1; 2) project will create a sense of place; 3) site control by Metro and Milwaukie; 4) other public partners including Milwaukie for 1/2 block, possible tax abatement and possibly Oregon Housing & Community Services at a later date; 5) reduction in VMT work trip length by locating housing in an urban center; 6) increase in walk, bike and transit trips and 7) floor area ratio of 1 to 1 or higher.

### **4. Budget Impacts**

There are no budget impacts to the Metro General Fund as a result of the acquisition or the amended terms of purchase, since federal transportation funds, which are part of the IGA with TriMet are used for the program.

### **RECOMMENDED ACTION**

It is recommended that the Metro Council approve Resolution No. 05-3621 to allow for the acquisition of the Olson Bros Texaco at 10700 SE McLaughlin Blvd at \$750,000 with \$250,000 down and the balance of \$500,000 paid at 6.5% annually with interest only for a term of 2 years.