 **Metro** | *Agenda*

MEETING: METRO COUNCIL
DATE: March 18, 2010
DAY: Thursday
TIME: 2:00 PM
PLACE: Metro Council Chamber

CALL TO ORDER AND ROLL CALL

1. INTRODUCTIONS

2. CITIZEN COMMUNICATIONS

3. CONSENT AGENDA

3.1 Consideration of Minutes for the March 4, 2010 Metro Council Regular Meeting.

4. RESOLUTIONS

4.1 **Resolution No. 10-4133**, For the Purpose of Endorsing a Multi-year Commitment of Regional Flexible Transportation Funds for the Portland to Milwaukie Light Rail Transit Project and Supplemental Commitment to the Beaverton to Wilsonville Commuter Rail Project. Collette

4.2 **Resolution No. 10-4135**, For the Purpose of Adopting the Hearings Officer's Proposed Order Regarding Metro's Notice of Violation NOV-193A-09 Issued to Kemper Drywall, Inc. and Authorizing the Chief Operating Officer to Issue a Final Order.

4.3 **NATURAL AREAS OVERSIGHT COMMITTEE ANNUAL REPORT** Staff

4.4 **Resolution No. 10-4134**, For the Purpose of Approving Third Round Funding for Nature in Neighborhoods Capital Grants. Hosticka

5. CHIEF OPERATING OFFICER COMMUNICATION

6. COUNCILOR COMMUNICATION

ADJOURN

Television schedule for March 18, 2010 Metro Council meeting

<p>Clackamas, Multnomah and Washington counties, and Vancouver, Wash. Channel 11 – Community Access Network www.tvctv.org – (503) 629-8534 2 p.m. Thursday, March 18 (Live)</p>	<p>Portland Channel 30 (CityNet 30) – Portland Community Media www.pcmtv.org – (503) 288-1515 8:30 p.m. Sunday, March 21 2 p.m. Monday, March 22</p>
<p>Gresham Channel 30 – MCTV www.mctv.org – (503) 491-7636 2 p.m. Monday, March 22</p>	<p>Washington County Channel 30 – TVC-TV www.tvctv.org – (503) 629-8534 11 p.m. Saturday, March 20 11 p.m. Sunday, March 21 6 a.m. Tuesday, March 23 4 p.m. Wednesday, March 24</p>
<p>Oregon City, Gladstone Channel 28 – Willamette Falls Television www.wftvaccess.com – (503) 650-0275 Call or visit website for program times.</p>	<p>West Linn Channel 30 – Willamette Falls Television www.wftvaccess.com – (503) 650-0275 Call or visit website for program times.</p>

PLEASE NOTE: Show times are tentative and in some cases the entire meeting may not be shown due to length. Call or check your community access station web site to confirm program times.

Agenda items may not be considered in the exact order. For questions about the agenda, call the Metro Council Office @ (503) 797-1540. Public hearings are held on all ordinances second read and on resolutions upon request of the public. Documents for the record must be submitted to the Clerk of the Council to be included in the decision record. Documents can be submitted by e-mail, fax or mail or in person to the Clerk of the Council. For additional information about testifying before the Metro Council please go to the Metro website www.oregonmetro.gov and click on public comment opportunities. For assistance per the American Disabilities Act (ADA), dial TDD 797-1804 or 797-1540 (Council Office).

Agenda Item Number 3.1

Consideration of Minutes for the March 4, 2010 Metro Council Regular Meeting

Consent Agenda

Metro Council Meeting
Thursday, March 18, 2010
Metro Council Chamber

MINUTES OF THE METRO COUNCIL MEETING

Thursday, March 4, 2010
Metro Council Chamber

Councilors Present: Kathryn Harrington, Rex Burkholder, Carl Hosticka, Carlotta Collette, Rod Park, Robert Liberty

Councilors Absent: Council President David Bragdon (excused)

Deputy Council President Collette convened the Regular Council Meeting at 2:00 p.m.

1. INTRODUCTIONS

Kim Smith, new Oregon Zoo Director, was introduced by Councilor Collette. Her biography was presented and Councilors introduced themselves. Councilor Collette discussed projects Ms. Smith had worked on. Ms. Smith discussed goals and visions for the future.

2. CITIZEN COMMUNICATIONS

There were none.

3. CONSENT AGENDA

3.1 Consideration of minutes for the February 25, 2010, Regular Council Meeting.

Motion:

Councilor Hosticka moved to adopt the meeting minutes of the February 25, 2010 Regular Metro Council meeting.

Vote:

Councilors Burkholder, Park, Harrington, Collette, Hosticka, and Liberty voted in support of the motion. The vote was 6 aye, the motion passed.

4. ORDINANCES - SECOND READING

4.1 **Ordinance No. 10-1236**, For the Purpose of Amending the FY 2009-10 Budget and Appropriations Schedule Recognizing New Donations, Transferring Appropriation Authority, Amending the FY 2009-10 through FY 2013-14 Capital Improvement Plan and Declaring an Emergency.

Motion:	Councilor Park moved to adopt Ordinance No. 10-1236.
Seconded:	Councilor Hosticka seconded the motion

Councilor Park introduced the ordinance and discussed budget specifics. He said staff was available to answer questions. He discussed revenue streams and capital issues.

Deputy Council President Collette opened a public hearing on Ordinance No. 10-1236.

Deputy Council President Collette closed the public hearing.

Vote:

Councilors Burkholder, Park, Collette, Harrington, Hosticka, and Liberty voted in support of the motion. The vote was 6 aye, the motion passed.

5. RESOLUTIONS

5.1 **Resolution No. 10-4130**, For the Purpose of Amending the 2008-11 Metropolitan Transportation Improvement Program (MTIP) to Add Projects Funded through the State Jobs and Transportation Act (HB 2001).

Motion:	Councilor Harrington moved to adopt Resolution No. 10-4130.
Seconded:	Councilor Liberty seconded the motion

Councilor Harrington introduced discussion on the resolution. She discussed funding specifics, prioritization, and different projects. She closed discussion on the resolution.

Vote:

Councilors Burkholder, Park, Collette, Harrington, Hosticka, and Liberty voted in support of the motion. The vote was 6 aye, the motion passed.

5.2 **Resolution No. 10-4131**, For the Purpose of Supporting the City of Tualatin's Increase in the Maximum Indebtedness for the Central Urban Renewal District (CURD).

Motion:	Councilor Hosticka moved to adopt Resolution No. 10-4131.
Seconded:	Councilor Harrington seconded the motion

Councilor Hosticka introduced the resolution and legislative specifics. He discussed specific actions of the resolution. Councilor Hosticka introduced Doug Rux, Tualatin Community Development Director, and Andy Cotugno, Metro Policy Advisor, to explain planning specifics related to the resolution. Mr. Rux discussed Tualatin issues and encouraged support of the resolution. Mr. Cotugno updated Councilors on the Tualatin Road Extension Project and its inclusion in the Regional Transportation Plan (RTP). Councilor Liberty asked about maximum indebtedness. Mr. Rux clarified. Councilor Hosticka asked about tax systems and revenue sharing.

Deputy Council President Collette opened a public hearing on Resolution No. 10-4131.

Delores Hurtado, Tualatin, requested the Council not approve Resolution No. 10-4131. She said the proposed Tualatin Road extension would defeat Metro's goals. She said there was little community awareness.

Callie Loser, Tualatin, provided testimony in opposition to Resolution No. 10-4131 and Tualatin's Central Urban Renewal District (CURD). Councilor Harrington discussed the role of the "Known Opposition" section of Metro staff reports. She clarified opposition was related to Metro's role and not CURD.

Ed Bartlett, Tualatin, provided testimony in opposition to CURD and Resolution No. 10-4131. He said he echoed Ms. Loser and restated there was opposition to the plan.

Councilor Liberty discussed the spectrum of issues. Mr. Barlett noted the impact to the community. Ms. Hurtado said there were a range of issues, but few knew about the scope of the proposal and subsequent impacts and issues. Councilor Park clarified Metro action, and the scope of Metro's role that was seemingly small and insignificant. Councilor Hosticka asked about the Tualatin Road extension plan and how long it had been a part of Tualatin's transportation plan. Mr. Rux said since June 2001. Councilor Harrington discussed public involvement opportunities and newsletter distribution. Mr. Rux outlined various opportunities. Councilor Park discussed his support of the resolution. Councilor Hosticka closed discussion on the resolution.

Vote:

Councilors Burkholder, Park, Collette, Harrington, Hosticka, and Liberty voted in support of the motion. The vote was 6 aye, the motion passed.

5.3 **Resolution No. 10-4132**, For the Purpose of Submitting to the Metro Council a Proposal for the Investment of \$465,982 from the Metro Tourism Opportunity and Competitiveness Account (MTOCA) For Capital Projects at the Oregon Convention Center.

Motion:	Councilor Park moved to adopt Resolution No. 10-4132.
Seconded:	Councilor Liberty seconded the motion

Councilor Park introduced the resolution and discussed specific budget items. He discussed funding specifics and allocations. He said he hoped to maintain Oregon Convention Center (OCC) business competitiveness. Councilor Hosticka asked for clarity on capital spending. Jeff Blosser, OCC Director, clarified spending on projects and subsequent reasons.

Vote:

Councilors Burkholder, Park, Collette, Harrington, Hosticka, and Liberty voted in support of the motion. The vote was 6 aye, the motion passed.

6. CHIEF OPERATING OFFICER COMMUNICATION

Michael Jordan, COO, thanked Mr. Blosser for his flexibility regarding budget work. Mr. Jordan discussed previous Metropolitan Exposition Recreation Commission (MERC) meetings. Mr. Jordan discussed the Sustainable Communities Grant program and regional comment.

7. COUNCILOR COMMUNICATION

Councilors discussed meetings and events they had attended. They also discussed various projects and programs.

8. ADJOURN

There being no further business to come before the Metro Council, Deputy Council President Collette adjourned the meeting at 3:20 p.m.

Prepared by

A handwritten signature in black ink, appearing to read 'Tony Andersen', written in a cursive style.

Tony Andersen
Clerk of the Council

**ATTACHMENTS TO THE PUBLIC RECORD FOR THE MEETING OF
MARCH 4, 2010**

Item	Topic	Doc. Date	Document Description	Doc. Number
5.2	Graph	3/4/10	Assessed value in the central urban renewal area has grown less than comparable property	030410c-1
5.2	Testimony	3/4/10	Metro Testimony, To: Metro Councilors From: Dolores Hurtado Re: City of Tualatin's Central Urban Renewal District Date: March 4, 2010	030410c-2
5.2	Newspaper	2/2010	Tualatin Life, Urban Renewal	030410c-3

Agenda Item Number 4.1

Resolution No. 10-4133, For the Purpose of Endorsing a Multi-year Commitment of Regional Flexible Transportation Funds for the Portland to Milwaukie Light Rail Transit Project and Supplemental Commitment to the Beaverton to Wilsonville Commuter Rail Project.

RESOLUTIONS
COUNCILOR COLLETTE

Metro Council Meeting
Thursday, March 18, 2010
Metro Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ENDORSING A MULTI-)	RESOLUTION NO. 10-4133
YEAR COMMITMENT OF REGIONAL)	
FLEXIBLE TRANSPORTATION FUNDS FOR)	Introduced by Councilor Carlotta Collette
THE PORTLAND TO MILWAUKIE LIGHT RAIL)	
TRANSIT PROJECT AND SUPPLEMENTAL)	
COMMITMENT TO THE BEAVERTON TO)	
WILSONVILLE COMMUTER RAIL PROJECT)	

WHEREAS, Metro is the Metropolitan Planning Organization (MPO) for the Portland metropolitan region, and as such is authorized by the U.S. Department of Transportation to program federal transportation funds allocated by federal law to the Portland region in the Metropolitan Transportation Improvement Program (MTIP); and

WHEREAS, Metro is authorized by the Oregon Department of Transportation (ODOT) to program Congestion Management/Air Quality (CMAQ) funds allocated to the Portland metropolitan region by ODOT in the MTIP; and

WHEREAS, TriMet is the duly authorized public transportation provider for the Portland metropolitan region and as such is an eligible recipient of federal transportation funds through the MTIP; and

WHEREAS, at the recommendation of the Joint Policy Advisory Committee on Transportation (JPACT), the Metro Council adopted Resolution No. 08-3942 “For the Purpose of Proposing Allocation of Regional Flexible Funding to Regional Transportation Programs for the Years 2012 and 2013, and to Bond Payments for Contributions to the Milwaukie Light Rail Transit and Wilsonville to Beaverton Commuter Rail Projects for the Years 2012-2025 Pending Public Comment Period and Air Quality Conformity; and

WHEREAS, at the recommendation of the Joint Policy Advisory Committee on Transportation (JPACT), the Metro Council adopted Resolution No. 09-4017 “For the Purpose of Allocating \$67.8 million of Regional Flexible Funding for the Years 2012 and 2013, Pending Air Quality Conformity Determination” which documented the public comment process for the allocation of regional flexible funds to the projects; and

WHEREAS, these actions establish a multi-year commitment by Metro, as the MPO, to provide a sum of regional flexible funds to TriMet totaling \$144.8 million over the course of years 2012 through 2025 for the purpose of providing a net present value contribution of \$72.5 million to the Milwaukie Light Rail Transit Project and a \$13.3 million supplemental contribution to the Beaverton to Wilsonville Commuter Rail Project; and

WHEREAS, consistent with provisions of Resolution No. 08-3942 TriMet has provided \$13.3 million to the Commuter Rail Project and has agreed to provide \$72.5 million to the Milwaukie Light Rail Transit Project; and

WHEREAS, TriMet anticipates issuing revenue bonds secured by the commitment of regional flexible transportation funds set forth in Resolution No. 08-3942 and Resolution No, 09-4017 to fulfill all or part of its funding commitments; and

WHEREAS, an agreement between Metro and TriMet regarding the regional flexible funds funds committed in Resolution No. 08-3942 and Resolution No. 09-4017 will facilitate borrowings that pledge these funds; and

WHEREAS, these agencies have negotiated such an agreement as shown in Exhibit A; now therefore

BE IT RESOLVED that the Metro Council hereby adopts the recommendation of JPACT to approve the Intergovernmental Agreement to Provide and Utilize Regional Flexible Funds to Implement the Milwaukie light rail transit and Commuter Rail Funding Plan, as shown in Exhibit A, and authorizes the Chief Administrative Officer to execute the agreement.

ADOPTED by the Metro Council this ___ day of March 2010.

David Bragdon, Council President

Approved as to Form:

Daniel B. Cooper, Metro Attorney

EXHIBIT A

Intergovernmental Agreement to Provide and Utilize MTIP Funds to Implement the Milwaukie LRT and Commuter Rail Funding Plan

This **Intergovernmental Agreement to Provide and Utilize Regional Flexible Funds to Implement the Milwaukie Light Rail (“LRT”) and Commuter Rail Funding Plan** (the “Agreement”) is made and entered into by and between Metro and the Tri-County Metropolitan Transportation District of Oregon (“TriMet”). This Agreement is effective as of the last date of signature below.

RECITALS

1. On January 23, 1997 the Metro Council adopted Resolution No. 96-2422 “*For the Purpose of Endorsing a Regional Position on Resolution of the Intermodal Surface Transportation Efficiency Act (ISTEA)*” that established a multi-year commitment of Metropolitan Transportation Improvement Program (MTIP) funds totaling \$55 million over the period of FY 1999-2009 for the South-North LRT Project; and
2. On June 24, 1999 the Metro Council adopted Resolution No. 99-2804A “*For the Purpose of Endorsing the Interstate Max Light Rail (LRT) Project and South Corridor Financing Strategy and Amending MTIP*” that added \$12.5 million to the multi-year commitment of MTIP Funds making a total allocation of MTIP funds of \$67.5 million available for the “North LRT/South Corridor Financing Strategy;” and
3. On March 20, 2003 the Metro Council adopted Resolution No. 03-3290 “*For the Purpose of Endorsing a Multi-Year Commitment of MTIP Funds for a Regional Funding Plan*” and added \$50.0 million over the period of Fiscal Year (FY) 2006-2014 to the multi-year commitment of MTIP Funds; making a total allocation of MTIP Funds of \$117.5 million available for a regional funding plan consisting of Interstate MAX, South Corridor, Commuter Rail, and North Macadam projects; and
4. On July 15, 2004 the Metro Council adopted Resolution No. 04-3468 “*For the Purpose of Endorsing a Supplemental Multi-Year Funding Commitment of Metropolitan Transportation Improvement Program Funds for the I-205/Mall LRT Project and Endorsing a Refined Regional Funding Plan.*” This resolution supplemented the multi-year commitment of funds made in Resolution No. 03-3290 with an additional commitment of \$10.4 million in MTIP Funds between FY 2008-2015, making a total of \$127.9 million of MTIP Funds available to the Interstate MAX, South Corridor (I-205/Mall LRT), Commuter Rail, and North Macadam projects, of which \$41.5 million was applied to the Interstate MAX Project; and
5. Resolution No. 04-3468 also provided that in exchange for the funds remaining in the multi-year commitment of MTIP Funds after the \$41.5 million commitment to Interstate MAX was fulfilled, TriMet would provide a net contribution of \$48.5 million to the South Corridor

(I-205/Mall) LRT Project, \$10.0 million to the Commuter Rail Project, and \$10.0 million to the North Macadam Project; and

6. On March 24, 2005 the Metro Council adopted Resolution No. 05-3559, which authorized execution of the “Intergovernmental Agreement to Provide and Utilize MTIP Funds for the Regional Funding Plan for the South Corridor, Commuter Rail, and North Macadam Projects” between Metro and TriMet. The execution of this intergovernmental agreement was completed on April 4, 2005; and

7. On May 15, 2008, the Metro Council adopted Resolution No. 08-3942 “*For the Purpose of Proposing Allocation of Regional Flexible Funding to Regional Transportation Programs for the Years 2012 and 2013, and to Bond Payments for Contributions to the Milwaukie Light Rail Transit and Wilsonville to Beaverton Commuter Rail Projects for the Years 2013 - 2025 Pending Public Comment Period and Air Quality Conformity Determination,*” which provided an additional multi-year commitment of MTIP Funds to TriMet in the amount \$3.7 million per year between 2012 and 2015 and \$13.0 million per year from 2016 through 2025 to provide an additional net contribution to the Beaverton-Wilsonville Commuter Rail Project of \$13.3 million and to provide a net contribution to the Milwaukie LRT Project of \$72.5 million, which is the net present value of the yearly installments through 2025 totaling \$144,800,000 as set forth in Table 1 Column B, assuming a 5% interest rate; and

8. The parties have determined that a formal agreement regarding the commitment, schedule, and utilization of MTIP Funds set forth in Resolution No. 08-3942 is required to successfully and effectively implement the funding commitments to be made to the Commuter Rail Project and Milwaukie LRT Project. This Agreement will be separate from but coordinated with the formal agreement executed on April 4, 2005 in support of the MTIP funding commitment made under Resolution No. 04-3468; and

9. TriMet intends to issue revenue bonds that are secured in whole or part by a pledge of Regional Flexible Funds committed under this Agreement. These initial bonds, together with any bonds that are issued to refund the initial bonds and any obligations of TriMet to providers of credit enhancements or derivative products in connection with the initial bonds or any refunding bonds (and any renewals or replacements thereof) are referred to collectively in this Agreement as “TriMet MTIP Bonds.” Timely receipt of the amounts of Regional Flexible Funds described in Section 2.1, below, is essential to permit TriMet to issue the TriMet MTIP Bonds and to preserve the ability of TriMet to borrow for and fund other regional transportation priorities. The proceeds of TriMet MTIP Bonds are referred to herein as “Bond Proceeds.”

NOW THEREFORE, the premises being in general as set forth in the foregoing recitals, it is agreed by and between the parties as follows:

TERMS OF AGREEMENT

1. Purpose and Term

- 1.1 This Agreement sets forth a commitment by Metro and TriMet to provide and utilize certain funds for the Milwaukie LRT Project and the Commuter Rail Project as set forth in Resolution No. 08-3942; herein referred to as “Regional Flexible Funds.” Funds allocated by Metro through the MTIP process which were previously committed to TriMet by Resolution No. 04-3468 and the intergovernmental agreement between Metro and TriMet dated April 4, 2005 are herein referred to as MTIP Funds. As used throughout this Agreement, “Regional Flexible Funds” shall mean Surface Transportation Program (STP) funds, Congestion Mitigation/Air Quality (CMAQ) funds, and funds provided under any successor or comparable federal urban transportation funding programs that are authorized for distribution by Metro as the Portland Metropolitan Planning Organization (MPO) to projects in the Portland MPO area. For purposes of this Agreement, Regional Flexible Funds shall only include funds from the federal funding programs described in the previous sentence and do not include any other funds allocated to Metro as the MPO that may be reported on in the MTIP process.
- 1.2 This Agreement shall be effective on the date of last signature below and shall terminate when the total multi-year commitment of Regional Flexible Funds provided herein is fulfilled and expended or as otherwise provided in accordance with and for the purposes set forth herein.

2. Metro Rights and Obligations.

- 2.1 As the Portland region’s MPO and regional government, Metro shall take all actions under its control to facilitate TriMet’s receipt of the full aggregate annual amounts of MTIP Funds and Regional Flexible Funds shown in Column C of Table 1 by the dates shown below, together with any additional amounts described in Section 2.4, subject only to the terms and conditions set forth herein.

**Table 1
Multi-Year Commitment of MTIP Funds and Regional Flexible Funds to TriMet (1)**

Column:	A	B	C
Federal Fiscal Year (3)	Schedule of MTIP Funds Committed to TriMet for Interstate MAX, South Corridor, Commuter Rail, North Macadam Projects under Res. No. 04-3468	Schedule of Regional Flexible Funds Committed to TriMet for Milwaukie LRT, Commuter Rail, Projects under Res. No. 08-3942	Total Amount of MTIP Funds and Regional Flexible Funds Committed to TriMet (2)
1999	\$1,500,000		\$1,500,000
2000	\$6,000,000		\$6,000,000
2001	\$6,000,000		\$6,000,000
2002	\$6,000,000		\$6,000,000
2003	\$6,000,000		\$6,000,000
2004	\$6,000,000		\$6,000,000
2005	\$6,000,000		\$6,000,000

2006	\$8,000,000		\$8,000,000
2007	\$8,000,000		\$8,000,000
2008	\$9,300,000		\$9,300,000
2009	\$9,300,000		\$9,300,000
2010	\$9,300,000		\$9,300,000
2011	\$9,300,000		\$9,300,000
2012	\$9,300,000	\$3,700,000	\$13,000,000
2013	\$9,300,000	\$3,700,000	\$13,000,000
2014	\$9,300,000	\$3,700,000	\$13,000,000
2015	\$9,300,000	\$3,700,000	\$13,000,000
2016		\$13,000,000	\$13,000,000
2017		\$13,000,000	\$13,000,000
2018		\$13,000,000	\$13,000,000
2019		\$13,000,000	\$13,000,000
2020		\$13,000,000	\$13,000,000
2021		\$13,000,000	\$13,000,000
2022		\$13,000,000	\$13,000,000
2023		\$13,000,000	\$13,000,000
2024		\$13,000,000	\$13,000,000
2025		\$13,000,000	\$13,000,000
\$127,900,000			\$272,700,000
\$144,800,000			

(1) The rights and obligations of Metro and TriMet regarding the multi-year commitment of MTIP Funds shown in Column A are set forth in the intergovernmental agreement executed April 4, 2005. This Agreement sets forth the rights and obligations of Metro and TriMet regarding the multi-year commitment of Regional Flexible Funds shown in Column B. Column C shows the sum of Columns A and B, which represents the total amount of MTIP Funds and Regional Flexible Funds to be programmed each year by Metro and allocated to TriMet based on both the April 4, 2005 intergovernmental agreement and this Agreement.

(2) Amounts shown are prior to any additional amounts allocated to TriMet pursuant to Section 2.4.

(3) The MTIP Funds shown for fiscal years 1999 through 2009, inclusive, have already been received by TriMet.

- 2.2 Each year during the term of this Agreement, the allocation to TriMet of the Regional Flexible Funds due TriMet under this Agreement shall have precedence over all other allocations of Regional Flexible Funds by Metro to other projects in the Metropolitan Transportation Improvement Program (MTIP). Each year Metro shall program, prioritize in project selection, and prioritize for allocation of Regional Flexible Funds and obligational authority the full amount of MTIP Funds and Regional Flexible Funds committed to TriMet in such year under this Agreement, as shown in Table 1, Column C in Section 2.1, plus any additional amounts pursuant to Section 2.4, subject to the conditions set forth in Section 2.3.
- 2.3 In any year in which either the (a) federal authorization of Regional Flexible Funds to the Portland MPO, (b) annual appropriation of Regional Flexible Funds to the Portland MPO, or (c) annual allocation of obligational authority for Regional Flexible Funds to the Portland MPO is insufficient to provide TriMet the full amount of Regional Flexible Funds due in such year under this Agreement, Metro shall provide TriMet the maximum amount of Regional Flexible Funds permitted by the amounts of

federal authorization, appropriation, and obligational authority provided to the Portland MPO in such year, and an additional amount of Regional Flexible Funds shall be allocated to TriMet in the subsequent year as set forth in Section 2.4 of this Agreement

2.4 If the full amount due TriMet in any Federal Fiscal Year is not paid to TriMet, the following provisions shall apply:

2.4.1 If for any reason (except in cases caused by the acts or omissions of TriMet) the full amount of Regional Flexible Funds provided under this Agreement in any Federal Fiscal Year to TriMet is less than the amount shown in Table 1, Column C in Section 2.1, including any additional amounts to be provided TriMet pursuant to this Section 2.4, the amount of Regional Flexible Funds due TriMet under Table 1, Column C in Section 2.1 for the Federal Fiscal Year first following the year in which a Difference occurs shall be increased by 105% of that Difference. "Difference" shall mean (i) the annual amount of committed Regional Flexible Funds for a Federal Fiscal Year shown in Table 1, Column C, including any additional amounts pursuant to this Section 2.4, minus (ii) the annual amount actually provided to TriMet by the Portland MPO under this Agreement for such Federal Fiscal Year.

2.4.2 The intent of this Section 2.4 is to ensure that (i) TriMet receives a total amount of Regional Flexible Funds under this Agreement that has a present value equal (as of the effective date of this Agreement) to the initial schedule of Regional Flexible Funds shown in Table 1, Column C in Section 2.1, based on a five (5) percent discount rate and (ii) the full amount of Regional Flexible Funds committed to TriMet under this Agreement are accounted for separately from the MTIP Funds committed to TriMet by Resolution No. 04-3468 and the agreement between the parties dated April 4, 2005. In the event TriMet does not receive the full amount of Regional Flexible Funds committed under this Agreement from Metro, as the Portland MPO, Metro shall take all necessary actions, including but not limited to the reprogramming of Regional Flexible Funds as set forth in this Agreement, to facilitate TriMet's receipt of the amounts described in Table 1 in Section 2.1, including any additional amounts owed TriMet pursuant to this Section 2.4.

2.4.3 The parties recognize and agree that any additional amounts required by this Section 2.4 may cause Metro's payment schedule to TriMet to extend beyond the dates shown in Section 2.1. This Agreement shall terminate when TriMet receives all monies due to TriMet under this Agreement, or on the date Metro is no longer designated the Portland MPO. In the event an entity other than Metro is designated the Portland MPO prior to the termination of this Agreement, Metro shall take all reasonable steps to assign this Agreement to the successor Portland MPO.

- 2.4.4 Metro shall not be liable in any way for funding the amounts described in Column B, Table 1 in Section 2.1, except from Regional Flexible Funds as set forth above. In the event the federal government permanently ceases to authorize, appropriate, or allocate Regional Flexible Funds to Metro as the Portland MPO, Metro shall have no obligation whatsoever to provide any funding to TriMet under this Agreement after the last fiscal year in which Regional Flexible Funds are authorized, appropriated, and allocated to Metro.
- 2.5 Each year throughout the term of this Agreement, Metro's funding commitment set forth in this Agreement shall be fulfilled solely by (i) prioritizing the funding commitments hereunder for allocation of authorization, appropriation, and obligational authority for Regional Flexible Funds, (ii) programming the Regional Flexible Funds committed hereunder, and (iii) taking such other actions as may be necessary or desirable under federal and regional rules and procedures to facilitate TriMet's receipt from FHWA and/or FTA of the annual amounts of Regional Flexible Funds due to TriMet under this Agreement. As used hereunder, "programming" means each year (i) taking all actions required of a MPO by FHWA and FTA statutes and rules, including without limitation 23 CFR 450 and 49 CFR 613, as they may be amended from time to time, and (ii) providing all documentation in a timely manner to FHWA Oregon Division office, FTA Region X office, and ODOT that are required by FHWA, FTA, and ODOT protocols and procedures to facilitate TriMet's receipt of a grant award and obligation of the Regional Flexible Funds from FHWA and/or FTA for the amounts and in the years shown in Table 1 in Section 2.1 of this Agreement, including any additional amounts pursuant to Section 2.4.
- 2.6 Metro shall diligently fulfill the duties assigned to it under this Agreement, including executing and delivering all such documents and instruments as shall be required to enable the Parties to perform their respective obligations under, and to give effect to the transactions contemplated by, this Agreement.

3. TriMet Rights and Obligations

- 3.1 TriMet shall take all actions in a timely manner that are required of grantees by the Federal Highway Administration (FHWA) and/or Federal Transit Administration (FTA) for TriMet's receipt of Regional Flexible Funds provided under this Agreement.
- 3.2 TriMet shall prepare and implement a financing program to use, through direct grants to projects and/or bonds, the Regional Flexible Funds committed to TriMet under this Agreement to provide \$72.5 million in net project funding to the Milwaukie LRT Project, and to repay itself for the \$13.3 million in net project funding it has already provided to the Commuter Rail Project in anticipation of this Agreement.
- 3.2.1 TriMet may employ the Regional Flexible Funds provided under this Agreement to provide the amounts shown in this Section 3.2 in any manner that facilitates the funding and borrowing program. TriMet may pledge all or

any portion of the Regional Flexible Funds committed to it under this Agreement to any TriMet MTIP Bonds it deems necessary or desirable to provide the funding amounts shown in this Section 3.2. In addition, TriMet may, in its sole discretion, employ any portion of the Regional Flexible Funds provided under this Agreement for preventative maintenance, capital improvements, or procurements that make TriMet general funds available to provide all or a portion of the funding amounts shown in this Section 3.2, provided that TriMet shall through one or more of these funding options provide the full amounts shown in Section 3.2 to the respective uses.

- 3.2.2 TriMet shall provide the amounts shown in this Section 3.2 to the Milwaukie LRT Project and to reimburse itself for its previous contribution to the Commuter Rail Project regardless of the borrowing costs it incurs in providing the funds. TriMet will neither be provided additional Regional Flexible Funds to fulfill its obligations under this Section 3.2 nor be required to reimburse the MTIP program if the borrowing costs differ from those assumed in determining the annual amounts of Regional Flexible Funds set forth in Column B, Table 1 in Section 2.1. In the event that interest rates do not permit the borrowings backed by a pledge of Regional Flexible Funds to provide the full amount of funding described in Section 3.2 from the Regional Flexible Funds committed in Section 2.1, TriMet will provide the difference between its funding obligation described in Section 3.2 and the amounts attributable to the Regional Flexible Funds described in Section 3.2 with other TriMet revenues or borrowings. Notwithstanding the previous sentences, if the TriMet MTIP Bonds require materially higher interest rates than anticipated due to unexpected conditions in the municipal bond market, TriMet may seek approval from JPACT and the Metro Council to amend this Agreement to (i) reduce the amount of net project funds TriMet is obligated to provide to the Milwaukie LRT Project and/or (ii) increase the amount of Regional Flexible Funds committed to TriMet under this Agreement.
- 3.2.3 The parties acknowledge and agree that the Commuter Rail Project has been completed and TriMet has, prior to the execution of this Agreement, provided the \$13.3 million for the Commuter Rail Project, thereby fulfilling its obligation to provide funding for the Commuter Rail Project as required by Section 3.2 of this Agreement. The portion Regional Flexible Funds or TriMet MTIP Bonds attributable to the funding commitment for the Commuter Rail Project in Section 3.2 shall be reimbursement to TriMet for its provision of funds for the Commuter Rail Project and TriMet may in its sole discretion use such portion of Regional Flexible Funds or TriMet MTIP Bonds for other capital improvements or procurements. In the event the Milwaukie LRT Project is terminated prior to completion, the portion of the Regional Flexible Funds attributable to principal and interest associated with the contribution to the Commuter Rail Project under Section 3.2 shall not be subject to reallocation under Section 3.2.4.

3.2.4 If the Milwaukie LRT Project is terminated prior to completion of construction, the amount of Bond Proceeds repayable from the Regional Flexible Funds provided under this Agreement that are associated with the Milwaukie LRT Project that (i) have not been expended to pay Milwaukie LRT Project costs prior to the date of termination (“unexpended”), and (ii) are not required to pay Milwaukie LRT Project costs that become due after the date of termination or as a result of the termination or pledge to interim borrowing (“unobligated”), if any, shall be made available by TriMet for reallocation to other regional projects through an allocation process recommended jointly by the JPACT Chair and the TriMet General Manager to JPACT, and approved by JPACT and the Metro Council. In the event of early termination of the Milwaukie LRT Project, Metro, as the Portland MPO, shall continue to provide to TriMet the revenue stream from Regional Flexible Funds as set forth in Sections 3.2.4.1 and 3.2.4.2 of this Agreement, with TriMet providing the unexpended and unobligated bond proceeds from the terminated project to the regional process for reallocation as set forth above. If the project is terminated prior to completion of construction, all Regional Flexible Funds pledged by TriMet to holders of TriMet MTIP Bonds at the time the project is terminated shall be considered to be obligated to project costs and such pledged Regional Flexible Funds shall not be subject to reallocation to other projects under this Section 3.2.4.

3.2.4.1 If at the time of Milwaukie LRT Project termination: (i) TriMet has issued the full amount of TriMet MTIP Bonds required to provide \$72.5 million in net Bond Proceeds for the Milwaukie LRT Project (i.e. the total amount of Bond Proceeds issued for the Milwaukie LRT Project excluding any amounts required to pay issuance costs, reserves, capitalized interest, discounts, or other similar expenses that reduce the amount of bond proceeds available to pay direct project costs) and (ii) a portion of the \$72.5 million in net Bond Proceeds issued for the Milwaukie LRT Project is unexpended and unobligated at the time of termination, then:

(a) The amount of net Bond Proceeds that would be made available for reallocation under this Section 3.2.4 shall be calculated as \$72.5 million minus the amount of net Bond Proceeds that have been expended or obligated to be expended on the Milwaukie LRT Project as of the date on which the Milwaukie LRT Project is terminated by TriMet; and

(b) Metro shall throughout the entire term of this Agreement provide to TriMet the full annual amounts of Regional Flexible Funds set forth in Table 1.

3.2.4.2 If at the time of Milwaukie LRT Project termination TriMet has not issued and will not need to issue the full amount of TriMet MTIP

Bonds required to provide \$72.5 million in net Bond Proceeds for the Milwaukie LRT Project, then:

(a) The amount of Bond Proceeds that shall be made available for reallocation under this Section 3.2.4 shall be calculated as the amount of net Bond Proceeds issued or to be issued for the Milwaukie LRT Project minus the amount of net Bond Proceeds that have been expended or are obligated to be expended on the Milwaukie LRT Project as of the date on which the Milwaukie LRT Project is terminated by TriMet; and

(b) In lieu of the amounts of Regional Flexible Funds shown in Table 1, Metro shall each year provide an amount of Regional Flexible Funds to TriMet equal to (i) the amount that TriMet certifies is or will be pledged in each year to holders of TriMet MTIP Bonds plus (ii) the amount needed to pay for any direct (non-bonded) expenditures of Regional Flexible Funds to be made in each year for the Milwaukie LRT Project or the reimbursement of the \$13.3 million previously expended on the Commuter Rail Project; provided that TriMet may not request more Regional Flexible Funds in any year than the amount set forth for that year in Table 1. Any amounts of Regional Flexible Funds retained by Metro pursuant to this paragraph shall be allocated to projects in such manner as JPACT and Metro may determine.

- 3.2.5 The parties acknowledge and agree that the finance plan for the Milwaukie LRT Project relies on interim borrowing to address the likelihood that federal New Start Funds will not be available to the project in accordance with needs of the construction schedule. All or a portion of the Regional Flexible Funds provided by this Agreement may, in TriMet's discretion, be pledged as security for interim borrowing for the project, to the extent permitted by other borrowing agreements, if any, in which TriMet pledges to bondholders or lenders the Regional Flexible Funds provided under this Agreement.
- 3.2.6 To expedite the project construction schedule, the Regional Flexible Funds or TriMet MTIP Bonds backed by Regional Flexible Funds provided by this Agreement may, in TriMet's discretion, be obligated or used to pay project costs for the Milwaukie LRT Project prior to receipt of a FFGA for the project. The parties acknowledge and agree that TriMet shall not be required to repay or reimburse the MTIP for such funds disbursed or obligated to pay project costs prior or subsequent to receipt of a FFGA for the Milwaukie LRT Project in the event the project terminates for any reason.
- 3.2.7. Within thirty (30) days of Project termination, Tri Met shall send written notice to Metro and the JPACT chair of said termination; the written notice shall

describe any additional obligations TriMet must make to pay Milwaukie LRT Project costs after the termination date. TriMet shall make no further obligations of any Regional Flexible Funds beyond those described in the notice of termination.

- 3.3 Each year TriMet and Metro shall work cooperatively to determine the appropriate annual mix of STP, CMAQ, and/or any successor or comparable federal urban transportation funding programs that comprise Regional Flexible Funds that will be utilized to provide TriMet the amounts of Regional Flexible Funds committed to TriMet under this Agreement.

4. General Provisions

- 4.1 The parties acknowledge and agree that:

4.1.1 Metro shall not be considered to have failed to comply with its obligations under this Agreement if the amounts received by TriMet are less than those required by Section 2.1, including any additional amounts pursuant to Section 2.4, if the shortfall is due to (i) an insufficient amount of federal authorization or appropriation of Regional Flexible Funds to Metro as the Portland MPO or (ii) an insufficient state allocation of Regional Flexible Funds obligation authority to Metro as the Portland MPO or (iii) the fact that Metro is no longer the regional MPO.

4.1.2 TriMet will rely on the commitment of Regional Flexible Funds made hereunder if and when it issues the TriMet MTIP Bonds to provide the project funding set forth in Section 3.2 of this Agreement.

4.1.3 TriMet will have sole responsibility for determining the validity and security of any TriMet MTIP Bonds it issues or causes to be issued related to this Agreement.

- 4.2 The parties agree that if any term or provision of this Agreement is declared by a court of competent jurisdiction to be invalid, unenforceable, illegal, or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the agreement did not contain the particulate term r provision held to be invalid.

- 4.3 That parties agree that neither party may assign any of the responsibilities under this Agreement without the written consent of the other party, that Metro and TriMet are the only parties entitled to enforce the terms of this Agreement, and that nothing in this Agreement gives, is intended to give, or shall be construed to give or provide any benefit or right to any third party, except as provided in Section 4.4 of this Agreement.

- 4.4 Notwithstanding Section 4.3 of this Agreement, the parties acknowledge that the owners of the TriMet MTIP Bonds and their representatives (including any TriMet

bond trustees) and any providers of credit enhancements for the TriMet MTIP Bonds shall be third party beneficiaries to the representations and agreements set forth in this Agreement.

- 4.5 If a dispute arises between the parties, Metro agrees that so long as TriMet MTIP Bonds are outstanding it shall not take any action that would reduce the amounts that are to be paid to TriMet under this Agreement as a set-off for damages Metro may claim it is owed. To the extent Metro is entitled to any damages for any breach by TriMet of the terms of this Agreement, Metro shall seek payment of those damages solely from funds of TriMet that are not pledged to pay TriMet MTIP Bonds.
- 4.6 This Agreement constitutes the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties and all necessary approvals have been obtained. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given.

IN WITNESS WHEREOF, the parties hereby acknowledge that they have the authority granted by their respective governing body to execute this Agreement and hereto have set their hands and affixed their seals as of the day and year hereinafter written.

APPROVED BY METRO

APPROVED BY TRIMET

By _____
Michael Jordan, Chief Operating Officer

By _____
Fred Hansen, General Manager

Date _____

Date _____

APPROVED AS TO FORM BY METRO

APPROVED AS TO FORM BY TRIMET

By _____
Alison Kean Campbell, Deputy Metro
Attorney

By _____
M. Brian Playfair, TriMet General Counsel

Date _____

Date _____

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 10-4133, FOR THE PURPOSE OF
ENDORING A MULTI-YEAR COMMITMENT OF REGIONAL FLEXIBLE
TRANSPORTATION FUNDS FOR THE PORTLAND TO MILWAUKIE LIGHT RAIL
TRANSIT PROJECT AND SUPPLEMENTAL COMMITMENT TO THE BEAVERTON TO
WILSONVILLE COMMUTER RAIL PROJECT

Date: March 18 , 2010

Prepared by: Ted Leybold and Ross Roberts

BACKGROUND

The Metro area has constructed a series of regional rail transit capital improvements over the course of the last 25 years. The last several projects, beginning with the Interstate Avenue MAX project, has utilized revenue bond financing of regional flexible transportation funds to contribute to the development and construction of the projects. This allows anticipated federal transportation revenues that come to Metropolitan Planning Organizations (MPOs) to be bonded to allow an immediate contribution to the project as costs are incurred. The Metro Council, advised by the Joint Policy Advisory Committee on Transportation (“JPACT”) serve as the decision-making bodies of the Portland Metropolitan area MPO. Agreements between Metro and the bonding agency are established to execute the bonding of the funds.

The decision to commit regional flexible transportation funds to the Milwaukie light rail and Beaverton to Wilsonville commuter rail transit projects was adopted through Resolutions 08-3942 and 09-4017.

TriMet, the lead agency for final design and construction of the rail transit projects, has agreed to serve as the agency that issues the revenue bond on behalf of the region. In order to administer the bonding of these funds, an intergovernmental agreement must be entered into between Metro, acting in the capacity of the Metropolitan Planning Organization of the Portland metropolitan area designated by the United States Department of Transportation to allocate Urban Surface Transportation Funds and as authorized by the Oregon Department of Transportation to sub-allocate Congestion Management / Air Quality federal funding programs, and TriMet as a public transportation provider in the Portland metropolitan region.

The Intergovernmental Agreement to Provide and Utilize MTIP Funds to Implement the Milwaukie LRT and Commuter Rail Funding Plan (“IGA”), shown in Exhibit A to Resolution No. 10-xxxx, sets forth the rights and obligations of Metro and TriMet regarding the multi-year commitment of regional flexible transportation funds established in Resolutions 08-3942 and 09-4017.

Consistent with previous intergovernmental agreements committing a stream of regional flexible transportation fund contributions to regional rail projects, the Metro-TriMet Intergovernmental Agreement, attached hereto as Exhibit A, does the following:

- The IGA commits Metro, as the MPO, to provide a specific stream of annual amounts of regional flexible funds that must be provided to TriMet, in the amounts set forth in Table 1, Column B of the IGA, totaling One Hundred Forty Four Million, Eight Hundred Thousand Dollars (\$144,800,000.00) from 2012 to 2025;

- The IGA commits TriMet to provide \$13.3 million to the Commuter Rail Project, (which TriMet has already done), and \$72.5 million to the Milwaukie LRT Project,;
- The IGA provides that in the event that there is insufficient federal authorization or annual appropriation in any year in which TriMet is scheduled to receive the regional flexible funds as set forth in the IGA, Table 1, Column C, that priority shall be given to providing the regional flexible funds to TriMet over all other projects or programs that are scheduled to receive an allocation of regional flexible funds;
- The IGA provides that in the event that there is insufficient federal authorization or annual appropriation to provide TriMet the full amount of regional flexible funds due in a year, that Metro shall fulfill the funding commitment by supplementing future year allocations to TriMet of regional flexible funds by a five percent (5%) fixed interest rate.
- The IGA provides that in the event that the Milwaukie LRT Project is terminated prior to completion, unexpended and unobligated funds remaining after project termination, if any, shall be reallocated to other projects in the region through JPACT and the Metro Council; regional flexible funds pledged by TriMet to bondholders shall continue to be provided to TriMet in the event of an early termination.

ANALYSIS/INFORMATION

1. **Known Opposition** None known at this time.
2. **Legal Antecedents** Implements the decision to dedicate funds to the Milwaukie light rail and Beaverton to Wilsonville Commuter Rail projects as adopted through Resolution 08-3942 “For the Purpose of Proposing Allocation of Regional Flexible Funding toe Regional Transportation Programs for the Years 2012 and 2013, and to Bond Payments for Contributions to the Milwaukie Light Rail Transit and Wilsonville to Beaverton Commuter Rail Projects for the Years 2012-2025 Pending Public Comment Period and Air Quality Conformity” and Resolution 09-4017 “For the Purpose of Allocating \$67.8 million of Regional Flexible Funding for the Years 2012 and 2013, Pending Air Quality Conformity Determination”. Supplements an existing agreement on the multi-year commitment of regional flexible funds to the I-205/Mall light rail project as adopted by Resolution No. 04-3468 “For the Purpose of Endorsing a Supplemental Multi-Year Funding Commitment of Metropolitan Transportation Improvement Program Funds for the I-205/Mall LRT Project and Endorsing a Refined Regional Funding Plan”.
3. **Anticipated Effects** Adoption of this resolution would allow TriMet to proceed with issuing revenue bonds based on the commitment of \$144.8 million of future regional flexible transportation funds for an immediate contribution to the Milwaukie light rail and Beaverton-Wilsonville commuter rail projects.
4. **Budget Impacts** Funding for this agreement is solely dependent on the award of flexible federal funds. Any shortfall in funds in one year must be made up, with interest, in a subsequent year. No Metro funds are obligated by this agreement.

RECOMMENDED ACTION

Metro staff recommends the approval of Resolution No. 10-4133.

Agenda Item Number 4.2

Resolution No. 10-4135, For the Purpose of Adopting the Hearings Officer's Proposed Order Regarding Metro's Notice of Violation NOV-193A-09 Issued to Kemper Drywall, Inc. and Authorizing the Chief Operating Officer to Issue a Final Order.

RESOLUTIONS
UNASSIGNED

Metro Council Meeting
Thursday, March 18, 2010
Metro Council Chamber

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF ADOPTING THE) RESOLUTION NO. 10-4135
HEARINGS OFFICER’S PROPOSED ORDER)
REGARDING METRO’S NOTICE OF VIOLATION)
NOV-193A-09 ISSUED TO KEMPER DRYWALL,) Introduced by Chief Operating Officer
INC., AND AUTHORIZING THE CHIEF) Michael J. Jordan, with the concurrence of
OPERATING OFFICER TO ISSUE A FINAL) Council President David Bragdon
ORDER)

WHEREAS, on September 30, 2009, the Deputy Chief Operating Officer (“DCOO”) issued the attached Notice of Violation Nov-193A-09 (Exhibit A) to Kemper Drywall, Inc. (“KDI”), and

WHEREAS, NOV-193A-09 stated that the DCOO had found that from April 15, 2009 to June 23, 2009, KDI violated Metro Code Sections 5.02.045(b), 5.05.025 and 7.01.020 which required KDI to pay fees, taxes, and penalties owed to Metro; and

WHEREAS, included with NOV-193A-09 was a contested case notice providing KDI with an opportunity to have a hearing regarding the NOV; and

WHEREAS, KDI submitted a timely request for a contested case hearing; and

WHEREAS, a hearing on the matter was held on January 6, 2010, before Metro Hearings Officer Carl D. Cox (the record submitted to Hearings Officer Cox is attached as Exhibit B); and

WHEREAS, pursuant to Metro Code 2.05.035(a), on January 27, 2010, the Hearings Officer issued a proposed order (attached as Exhibit C) upholding Metro’s action imposing a civil penalty against KDI in the amount of \$44,369.46 for violation of Metro Code as listed in NOV-193-08; upholding Metro’s action imposing a civil penalty of \$3,177.95 for violation of Metro Code as listed in NOV-193A-09; and ruling that KDI did not meet its burden of proof with respect to its assertion of economic and financial hardship as a basis for reducing the civil penalties assessed by Metro; and

WHEREAS, in accordance with Metro Code Section 2.05.035(b), the Chief Operating Officer mailed a copy of the proposed order to KDI and informed Metro and KDI of the deadline for filing written exceptions to the proposed order; and

WHEREAS, KDI filed written exceptions to the Hearings Officer’s proposed order (attached as Exhibit D);

WHEREAS, Metro did not file written exceptions to the Hearings Officer’s proposed order;

WHEREAS, Metro Code 2.05.045(b) provides that the Metro Council shall (1) adopt the Hearings Officer’s proposed order; (2) revise or replace the findings of fact or conclusions of law in the order; or (3) remand the matter to the Hearings Officer; and

WHEREAS, the Metro Council has considered the proposed order and the exceptions of KDI as required by the Metro Code, now therefore

BE IT RESOLVED that the Metro Council adopts the proposed order from Hearing issued by Hearings Officer Carl D. Cox in the Metro Contested Case: Notice of Violation 193A-09 issued to Kemper Drywall, Inc., and directs Chief Operating Officer to issue a final order substantially similar to Exhibit E to this resolution.

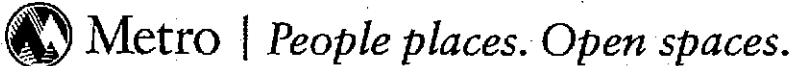
ADOPTED by the Metro Council this _____ day of _____, 2010.

David Bragdon, Council President

Approved as to Form:

Daniel B. Cooper, Metro Attorney

M:\attorney\confidential\09 Solid Waste\16 Code Enforcement\51kempdrywall(KDI)\Resolutions No\Resolution 10-4135 030810.doc



September 30, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

RE: Notice of Violation and Imposition of Civil Penalties (NOV-193A-09)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

This letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to pay fees, taxes, interest, and penalties owed to Metro. KDI was cited for violations of these same Code sections on March 7, 2008 (Notice of Violation No. NOV-193-08). At that time, Metro determined that KDI had avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro boundary and delivered to the North Marion County Disposal Facility ("NMCDF") during 2007. The 2007 violation was a first offense and an investigation indicated that KDI was unaware of Metro's regulations concerning flow control. Metro's decision regarding the case was that:

Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

In April, May, and June of 2009, KDI was found to be violating the same sections of Code in the same manner as before.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

From April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. A summary of these loads is presented in Appendix 1 to this Notice. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax ... The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Circumstances of the Violations

Detectives assigned to Metro investigated this matter by surveilling KDI trucks as they collected drywall scrap and delivered it to disposal sites, analyzing transaction data provided by NMCDF, conducting interviews of KDI's owners and production manager, and analyzing GPS data on KDI trucks provided by KDI. Robert and Kemper Harden, the owners of KDI, fully cooperated with the Metro investigation of this matter. These were the key findings of the investigation:

1. KDI's owners stated that, after receiving the first NOV (No. NOV-193-08), they verbally directed their crews to henceforth deliver all drywall scrap either to Knez¹ for recycling, or to a Metro transfer station. The owners maintain that all loads subsequently delivered to NMCDF were delivered there without their knowledge and contrary to their instructions. However, between March 7, 2008, the date that NOV-193-08 was issued, and the end of June 2009, KDI delivered 92 loads to NMCDF. KDI's drivers charging that many loads to KDI's account should not have escaped management's notice. KDI has now closed its account with NMCDF and terminated a driver (name unknown) responsible for many of the deliveries to NMCDF.
2. KDI tracks its trucks using GPS. The GPS information identifies numerous truck trips to NMCDF by address (17899 Whitney Lane, Woodburn) and should not have escaped management's notice.
3. Jose Hernandez, KDI's production manager, directs KDI's drywall scrapping crews. Though Mr. Hernandez was employed by KDI at the time the first NOV was issued and would have been the key person informed by management about any changes in procedures regarding the disposal of drywall scrap, he told the investigators that he had no knowledge of Metro, its boundaries, or any regulations regarding flow control and claimed to be unaware of any directive by the owners not to use NMCDF.
4. NMCDF's rate for KDI waste was \$75.45 per ton as compared with the Metro rate of \$75.75 plus a transaction fee of \$8.50 per load (approximately \$3 per ton for a typical KDI load).
5. NMCDF is located close to KDI's yard and drivers may have used it as a matter of convenience in order to avoid the traffic and waiting lines they would have encountered in using authorized facilities.
6. The number of loads that KDI delivered to NMCDF increased dramatically from January through June, 2009 (see Appendix 2 to this Notice). The increase coincides with KDI's work on the 30-building Creekview Crossing apartment subdivision. Creekview Crossing is located in Sherwood, within the Metro boundary. In a letter delivered to Metro by e-mail on July 21, 2009, Robert Harden stated that KDI's manager and drivers thought that Creekview Crossing was located outside Metro and that the debris could be taken to any disposal facility. However, as stated above, the manager claimed not to know that the location of a job with respect to the Metro boundary was even a factor to be considered in choosing a disposal site.
7. In addition to the 22 loads identified as originating from within Metro between April and July 2009, it is likely that other in-Metro loads were among the loads KDI delivered to

¹ Knez is a drywall supply company that takes back and recycles drywall scrap for a fee.

NMCDF. However, Metro has not been able to substantiate this as KDI's GPS records do not go back farther than April 21, 2009.

8. KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF. Often they gave "Hubbard," KDI's office location as the origin. Many of the loads contained waste from multiple locations yet the drivers always gave a single location, often an inaccurate one. Though a substantial number of loads were generated from the Creekview Crossing project in Sherwood, Sherwood was given as the point of origin of only one load.

KDI has not treated compliance with Metro regulations as an important matter. What emerges from the investigation is that KDI at one time gave verbal instructions to its drivers to take their loads of scrap to Knez or to Metro transfer stations but did little to ensure that such instructions were followed. Management did not reinforce the message with written instructions, reminders, or other follow-up. KDI kept its NMCDF account open and available for drivers to use until the account was closed on July 14, 2009. The lead worker that directs KDI's scrapping crews told investigators he was not aware of Metro regulations or of any KDI management directive not to deliver loads to NMCDF. KDI drivers routinely gave erroneous information when asked the origins of their loads by NMCDF scalehouse staff. The investigation did not prove that drivers were deceptive for the purpose of evading Metro fees and taxes, but clearly this is further evidence of a lack of control over the drivers' actions and negligence on the part of KDI's management. Billings from NMCDF appear not to have alerted KDI management to the fact that its drivers were still using NMCDF.

Civil Penalties

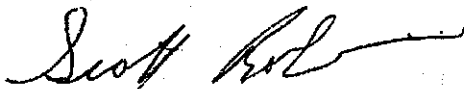
Regional system fees, excise tax, cost recovery, interest, and penalties for the violations that occurred from April 15 to June 23, 2009 amount to \$3,177.95 (see attached Penalty Worksheet for NOV-193A-09). As a result of KDI's continuing failure to comply with the above-cited provisions of the Metro Code, Metro is also seeking to recover fees, taxes, and appropriate penalties for the 2007 violations from Notice of Violation No. NOV-193-08 for an additional \$44,369.46 (see attached Penalty Worksheet for NOV-193A-08). A total of \$47,547.41 for past and current violations is being sought by Metro. An invoice for this amount is enclosed.

Contested Case Notice

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter 268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Scott Robinson
Deputy Chief Operating Officer

SK/SR:bj

Attachments

Enclosure

cc: Margo Norton, Finance and Administrative Services Director
Roy Brower, Solid Waste Compliance & Cleanup Manager
Steve Kraten, Solid Waste Enforcement Coordinator
Warren Johnson, Solid Waste Compliance Supervisor

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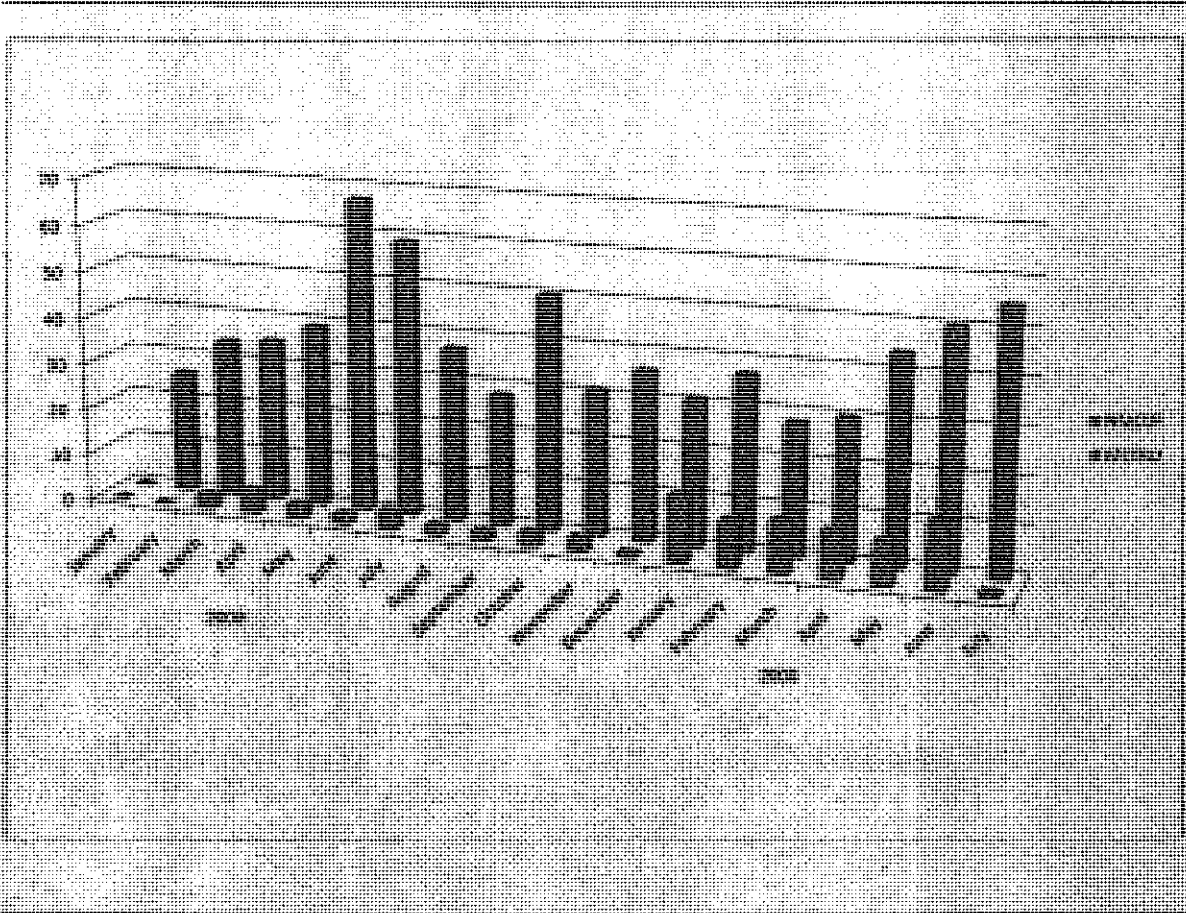
Queue

**KDI LOADS WHOLLEY OR PARTLY FROM WITHIN METRO
 DELIVERED TO NMCDF FROM
 APRIL 15, 2009 TO JULY 14, 2009**

Date	Number of Loads	Followed by Metro detectives	KDI GPS data	Zip Code given by driver at NMCDF	Pounds (from weight tickets)	Tons
7/14/09	1		Yes		3,720	1.86
6/29/09	2		Yes		11,240	5.62
6/27/09	2		Yes		15,460	7.73
6/23/09	1	Yes	See note		4,460	2.23
6/16/09	2	Yes	Yes		13,060	6.53
6/4/09	2		Yes		8,060	4.03
6/2/09	1		Yes		5,240	2.62
5/29/09	1		Yes		4,620	2.31
5/21/09	1		Yes		6,060	3.03
5/13/09	1		Yes		8,800	4.40
5/11/09	1		Yes		6,500	3.25
5/5/09	1		Yes		2,420	1.21
5/1/09	1		Yes		3,900	1.95
4/28/09	2		Yes		12,580	6.29
4/21/09	2		Yes		10,160	5.08
4/15/09	1			Yes	7,060	3.53
TOTAL	22				123,340	61.67

Note: Metro detectives followed this load from Creekview Crossing to NMCDF but, for reasons unknown, there was a gap in the KDI's GPS records for the day and the trip to NMCDF was omitted from the records.

**KWH LOADS DELIVERED TO NMCDF and METRO TRANSFER STATIONS
2007 AND JANUARY - JULY, 2009**



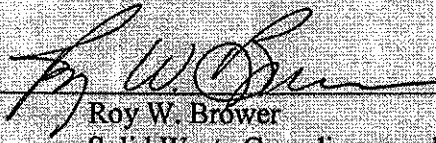
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing **CONTESTED CASE NOTICE**, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

On Sept 30, 2009, said individuals were served with a complete and correct copy thereof via regular mail and certified mail, return receipt requested, contained in a sealed envelope, with postage prepaid, and deposited in the U.S. Post Office at Portland, Oregon.



Roy W. Brower
Solid Waste Compliance and Cleanup Manager



Metro

Penalty Worksheet

Licensee/Hauler Name

License Number

Kemper Drywall, Inc.

None

Brief Description

In 2009, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. The violations appear to be the result of negligence rather than a deliberate attempt to evade fees and taxes. This is the second incident of such violations.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units involved
NOV-193A-09	4/15/09 to 6/23/09	62	2	tons

Direct Cost/Revenue Loss

1 Administrative cost		\$500.00
2 Unpaid Regional System Fees:	61.67 tons at \$16.04	\$989.19
3 Unpaid Excise Taxes:	61.67 tons at \$8.97	\$553.18
4 Metro disposal costs (disposal contract)		\$0.00
5 Std <500 tons) Non-System License fee		\$500.00
6 Specify other direct cost/revenue loss		
7 Add lines 1 through 6.....	Equals Direct Recovery	\$2,542.37

Indirect Cost/Revenue Loss

1 Interest on RSF, ET, & penalty from April 2009 (1.5%/mo.)		\$65.13
2 Specify other indirect cost/revenue loss		
3 Specify other indirect cost/revenue loss		
4 Specify other indirect cost/revenue loss		
5 Add lines 1 through 4.....	Equals Indirect Recovery	\$65.13

Compliance Component

1 Base penalty per unit		\$1.00
2 Additional penalty at \$1 per incident		\$2.00
3 Add lines 1 and 2		\$3.00
4 25% penalty on unpaid Regional System Fees		\$4.01
5 25% penalty on unpaid Excise Taxes		\$2.24
6 Specify other aggravating/mitigating compliance factors		
7 Specify other aggravating/mitigating compliance factors		
8 Sum lines 3 through 7		\$9.25
9 Total tons involved in current incident		61.67
10 Multiply lines 8 and 9.....	Equals Compliance Component	\$570.45

Total Penalty \$3,177.95

Worksheet prepared by

Date

Steven Kraten

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$51.26.



Metro

Penalty Worksheet

Licensee Name	License Number
Kemper Drywall, Inc.	None

Brief Description

Through most of 2007, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. At the time, Metro agreed not to recover fees, taxes, and penalties subject to KDI not re-offending.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units involved tons
NOV-193-08	1/1/07 to 11/30/07	1,469	1	

Direct Cost/Revenue Loss

1 Administrative cost				
2 Unpaid Regional System Fees (9/1/06 - 8/31/07):	1,104 tons at \$13.57		\$14,975.72	
3 Unpaid Excise Taxes (9/1/06 - 8/31/07):	1,104 tons at \$8.35		\$9,218.40	
2 Unpaid Regional System Fees (9/1/07 - 8/31/08):	365 tons at \$14.08		\$5,139.20	
3 Unpaid Excise Taxes (9/1/07 - 8/31/08):	365 tons at \$8.23		\$3,003.95	
6 Std. (>500 tons) Non-System License fee			1,000.00	
7 Add lines 1 through 6.....				Equals Direct Recovery \$33,337.27

Indirect Cost/Revenue Loss

1 Specify other indirect cost/revenue loss				
2 Specify other indirect cost/revenue loss				
3 Specify other indirect cost/revenue loss				
4 Specify other indirect cost/revenue loss				
5 Add lines 1 through 4.....				Equals Indirect Recovery

Compliance Component

1 Base penalty per unit		\$1.00	
2 Additional penalty at \$1 per incident		\$1.00	
3 Add lines 1 and 2		\$2.00	
4 Penalty on unpaid Regional System Fees (see supplemental table on reverse)		\$3.43	
5 Penalty on unpaid Excise Tax (see supplemental table on reverse)		\$2.08	
6 Specify other aggravating/mitigating compliance factors			
7 Specify other aggravating/mitigating compliance factors			
8 Sum lines 3 through 7		\$7.51	
9 Total tons involved in current incident		1,469.00	
10 Multiply lines 8 and 9.....			Equals Compliance Component \$11,032.19

Total Penalty \$44,369.46

Worksheet prepared by

Steven Kraten

Date

September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$30.2.

Exhibit A - Page 10 of 12



Metro

Penalty Worksheet

Licensee Name

License Number

Kemper Drywall, Inc.

None

Supplemental Table

Unpaid Regional System Fees

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
1/1/07 - 8/31/07	\$13.57	1,103.59	\$14,975.72
9/1/07 - 11/30/07	\$14.08	364.60	\$5,133.57
		1,468.19	\$20,109.29
	Average rate per ton		\$13.70
	25% penalty		\$3.43

Unpaid Excise Tax

<u>Period</u>	<u>Rate</u>	<u>Tons</u>	<u>Total</u>
9/1/06 - 8/31/07	\$8.35	1,103.59	\$9,214.98
9/1/07 - 8/31/08	\$8.23	364.60	\$3,000.66
		1,468.19	\$12,215.64
	Average rate per ton		\$8.32
	25% penalty		\$2.08

INVOICE



Please Remit To:

Metro
Accounts Receivable
600 NE Grand Avenue
Portland OR 97232-2736

Page: 1
Invoice No: REM-01085
Invoice Date: 09/30/2009
Customer Number: REM1442
Payment Terms: Net 30
Due Date: 10/30/2009

Bill To:

Kemper Drywall Inc
Accounts Payable
4084 Pacific Highway 99E
Hubbard OR 97032

AMOUNT DUE: 47,547.41 USD

Amount Remitted

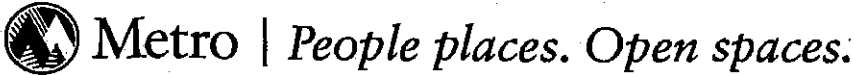


For billing questions, please call 503-797-1620

Line	Adj	Identifier	Description	Quantity	Unit Amt	Net Amount
		Violation #NOV-193-C8				
		Violation #NOV-193A-08				
1		Violation Nov193-C8/193A-08		1.00	47,547.41	47,547.41
SUBTOTAL:						47,547.41
TOTAL AMOUNT DUE :						47,547.41

STANDARD

Original



December 2, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, OR 97201

Dear Messrs. Harden:

You have requested a hearing in order to explain the circumstances behind the alleged violation.

Your hearing is scheduled for January 6, 2010 at 10:00 AM in the Council Chambers at Metro Center, 600 NE Grand Avenue, Portland, Oregon 97232.

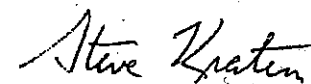
If an emergency prevents you from being present at the scheduled time, please call (503) 797-1835.

Violation #	<u>NOV-193A-09</u>
Hearing Date	<u>January 6, 2010</u>
Hearing Time	10:00 AM
Location:	Metro Center 600 NE Grand Avenue Portland, Oregon 97232 COUNCIL CHAMBERS

Enclosed with this notice are the following documents, which the Agency will rely on in your case and be offered to the Hearings Officer at the Hearing:

- (a) Copy of NOV-193A-09
- (b) Copy of NOV-193-08

Sincerely,


Steve Kraten
Solid Waste Enforcement Coordinator

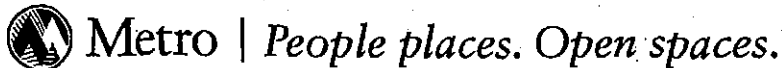
SKW
M:\env\regaff\projects\Regulatory Data\Enforcement\HearingStaff\FlowControl\HearingNotice.doc

5.09.100 Representation at Hearing

(a) A cited person may be represented by a retained attorney provided that written notice of such representation is received by the Metro Attorney five working days in advance of the hearing. The hearings officer may waive this notice requirement in individual cases or reset the hearing for a later date.

(b) When a cited person is not represented by legal counsel at the hearing, then Metro shall not be represented by legal counsel at the hearing. In such case, Metro legal counsel may advise Metro staff in preparation of the case and may be present at the hearing for the purpose of consulting with and advising Metro staff.

(Ordinance No. 94-557. Amended by Ordinance No. 06-1107.)



September 30, 2009

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

RE: Notice of Violation and Imposition of Civil Penalties (NOV-193A-09)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

This letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to pay fees, taxes, interest, and penalties owed to Metro. KDI was cited for violations of these same Code sections on March 7, 2008 (Notice of Violation No. NOV-193-08). At that time, Metro determined that KDI had avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro boundary and delivered to the North Marion County Disposal Facility ("NMCDF") during 2007. The 2007 violation was a first offense and an investigation indicated that KDI was unaware of Metro's regulations concerning flow control. Metro's decision regarding the case was that:

Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

In April, May, and June of 2009, KDI was found to be violating the same sections of Code in the same manner as before.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

From April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. A summary of these loads is presented in Appendix 1 to this Notice. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax ... The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Circumstances of the Violations

Detectives assigned to Metro investigated this matter by surveilling KDI trucks as they collected drywall scrap and delivered it to disposal sites, analyzing transaction data provided by NMCDF, conducting interviews of KDI's owners and production manager, and analyzing GPS data on KDI trucks provided by KDI. Robert and Kemper Harden, the owners of KDI, fully cooperated with the Metro investigation of this matter. These were the key findings of the investigation:

1. KDI's owners stated that, after receiving the first NOV (No. NOV-193-08), they verbally directed their crews to henceforth deliver all drywall scrap either to Knez¹ for recycling, or to a Metro transfer station. The owners maintain that all loads subsequently delivered to NMCDF were delivered there without their knowledge and contrary to their instructions. However, between March 7, 2008, the date that NOV-193-08 was issued, and the end of June 2009, KDI delivered 92 loads to NMCDF. KDI's drivers charging that many loads to KDI's account should not have escaped management's notice. KDI has now closed its account with NMCDF and terminated a driver (name unknown) responsible for many of the deliveries to NMCDF.
2. KDI tracks its trucks using GPS. The GPS information identifies numerous truck trips to NMCDF by address (17899 Whitney Lane, Woodburn) and should not have escaped management's notice.
3. Jose Hernandez, KDI's production manager, directs KDI's drywall scrapping crews. Though Mr. Hernandez was employed by KDI at the time the first NOV was issued and would have been the key person informed by management about any changes in procedures regarding the disposal of drywall scrap, he told the investigators that he had no knowledge of Metro, its boundaries, or any regulations regarding flow control and claimed to be unaware of any directive by the owners not to use NMCDF.
4. NMCDF's rate for KDI waste was \$75.45 per ton as compared with the Metro rate of \$75.75 plus a transaction fee of \$8.50 per load (approximately \$3 per ton for a typical KDI load).
5. NMCDF is located close to KDI's yard and drivers may have used it as a matter of convenience in order to avoid the traffic and waiting lines they would have encountered in using authorized facilities.
6. The number of loads that KDI delivered to NMCDF increased dramatically from January through June, 2009 (see Appendix 2 to this Notice). The increase coincides with KDI's work on the 30-building Creekview Crossing apartment subdivision. Creekview Crossing is located in Sherwood, within the Metro boundary. In a letter delivered to Metro by e-mail on July 21, 2009, Robert Harden stated that KDI's manager and drivers thought that Creekview Crossing was located outside Metro and that the debris could be taken to any disposal facility. However, as stated above, the manager claimed not to know that the location of a job with respect to the Metro boundary was even a factor to be considered in choosing a disposal site.
7. In addition to the 22 loads identified as originating from within Metro between April and July 2009, it is likely that other in-Metro loads were among the loads KDI delivered to

¹ Knez is a drywall supply company that takes back and recycles drywall scrap for a fee.

NMCDF. However, Metro has not been able to substantiate this as KDI's GPS records do not go back farther than April 21, 2009.

8. KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF. Often they gave "Hubbard," KDI's office location as the origin. Many of the loads contained waste from multiple locations yet the drivers always gave a single location, often an inaccurate one. Though a substantial number of loads were generated from the Creekview Crossing project in Sherwood, Sherwood was given as the point of origin of only one load.

KDI has not treated compliance with Metro regulations as an important matter. What emerges from the investigation is that KDI at one time gave verbal instructions to its drivers to take their loads of scrap to Knez or to Metro transfer stations but did little to ensure that such instructions were followed. Management did not reinforce the message with written instructions, reminders, or other follow-up. KDI kept its NMCDF account open and available for drivers to use until the account was closed on July 14, 2009. The lead worker that directs KDI's scrapping crews told investigators he was not aware of Metro regulations or of any KDI management directive not to deliver loads to NMCDF. KDI drivers routinely gave erroneous information when asked the origins of their loads by NMCDF scalehouse staff. The investigation did not prove that drivers were deceptive for the purpose of evading Metro fees and taxes, but clearly this is further evidence of a lack of control over the drivers' actions and negligence on the part of KDI's management. Billings from NMCDF appear not to have alerted KDI management to the fact that its drivers were still using NMCDF.

Civil Penalties

Regional system fees, excise tax, cost recovery, interest, and penalties for the violations that occurred from April 15 to June 23, 2009 amount to \$3,177.95 (see attached Penalty Worksheet for NOV-193A-09). As a result of KDI's continuing failure to comply with the above-cited provisions of the Metro Code, Metro is also seeking to recover fees, taxes, and appropriate penalties for the 2007 violations from Notice of Violation No. NOV-193-08 for an additional \$44,369.46 (see attached Penalty Worksheet for NOV-193A-08). A total of \$47,547.41 for past and current violations is being sought by Metro. An invoice for this amount is enclosed.

Contested Case Notice

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter 268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

NOV-193A-09
September 30, 2009
Page 5

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Scott Robinson
Deputy Chief Operating Officer

SK/RL:bj

Attachments

Enclosure

cc: Margo Norton, Finance and Administrative Services Director
Roy Brower, Solid Waste Compliance & Cleanup Manager
Steve Kraten, Solid Waste Enforcement Coordinator
Warren Johnson, Solid Waste Compliance Supervisor

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Quora

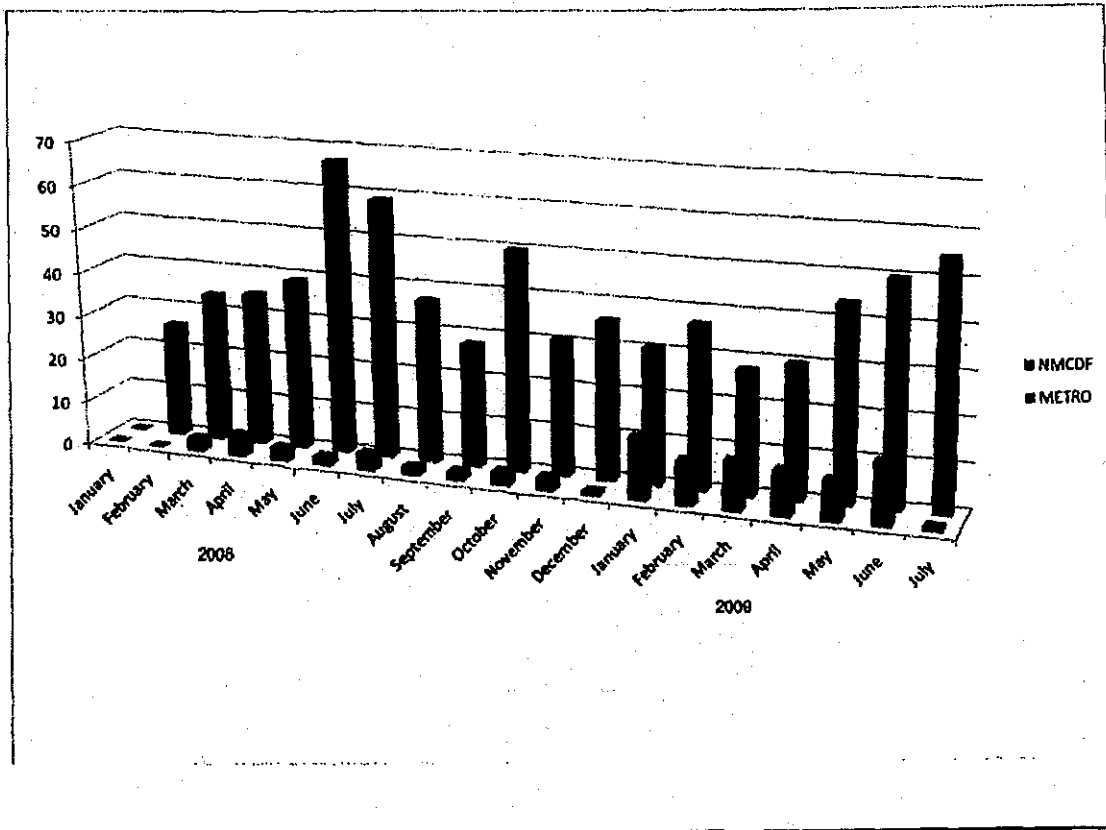
**KDI LOADS WHOLLEY OR PARTLY FROM WITHIN METRO
 DELIVERED TO NMCDF FROM
 APRIL 15, 2009 TO JULY 14, 2009**

Date	Number of Loads	Followed by Metro detectives	KDI GPS data	Zip Code given by driver at NMCDF	Pounds (from weight tickets)	Tons
7/14/09	1		Yes		3,720	1.86
6/29/09	2		Yes		11,240	5.62
6/27/09	2		Yes		15,460	7.73
6/23/09	1	Yes	See note		4,460	2.23
6/16/09	2	Yes	Yes		13,060	6.53
6/4/09	2		Yes		8,060	4.03
6/2/09	1		Yes		5,240	2.62
5/29/09	1		Yes		4,620	2.31
5/21/09	1		Yes		6,060	3.03
5/13/09	1		Yes		8,800	4.40
5/11/09	1		Yes		6,500	3.25
5/5/09	1		Yes		2,420	1.21
5/1/09	1		Yes		3,900	1.95
4/28/09	2		Yes		12,580	6.29
4/21/09	2		Yes		10,160	5.08
4/15/09	1			Yes	7,060	3.53
TOTAL	22				123,340	61.67

Note: Metro detectives followed this load from Creekview Crossing to NMCDF but, for reasons unknown, there was a gap in the KDI's GPS records for the day and the trip to NMCDF was omitted from the records.

Appendix 2

**KDI LOADS DELIVERED TO NMCDF and METRO TRANSFER STATIONS
2009 AND JANUARY - JULY, 2009**



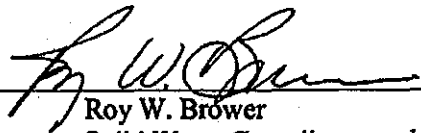
CERTIFICATE OF MAILING

I hereby certify that I served the foregoing CONTESTED CASE NOTICE, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
4084 Pacific Hwy 99E
PO Box 626
Hubbard, OR 97032

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

On Sept 30, 2009, said individuals were served with a complete and correct copy thereof via regular mail and certified mail, return receipt requested, contained in a sealed envelope, with postage prepaid, and deposited in the U.S. Post Office at Portland, Oregon.



Roy W. Brower
Solid Waste Compliance and Cleanup Manager



Metro

Penalty Worksheet

Licensee/Hauler Name	License Number
Kemper Drywall, Inc.	None

Brief Description

In 2009, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. The violations appear to be the result of negligence rather than a deliberate attempt to evade fees and taxes. This is the second incident of such violations.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units Involved tons
NOV-193A-09	4/15/09 to 8/23/09	62	2	

Direct Cost/Revenue Loss

1 Administrative cost		\$500.00
2 Unpaid Regional System Fees:	61.67 tons at \$16.04	\$989.19
3 Unpaid Excise Taxes:	61.67 tons at \$8.97	\$553.18
4 Metro disposal costs (disposal contract)		\$0.00
5 Std <500 tons) Non-System License fee		\$500.00
6 Specify other direct cost/revenue loss		
7 Add lines 1 through 6.....	Equals Direct Recovery	\$2,542.37

Indirect Cost/Revenue Loss

1 Interest on RSF, ET, & penalty from April 2009 (1.5%/mo.)		\$65.13
2 Specify other indirect cost/revenue loss		
3 Specify other indirect cost/revenue loss		
4 Specify other indirect cost/revenue loss		
5 Add lines 1 through 4.....	Equals Indirect Recovery	\$65.13

Compliance Component

1 Base penalty per unit		\$1.00
2 Additional penalty at \$1 per incident		\$2.00
3 Add lines 1 and 2		\$3.00
4 25% penalty on unpaid Regional System Fees		\$4.01
5 25% penalty on unpaid Excise Taxes		\$2.24
6 Specify other aggravating/mitigating compliance factors		
7 Specify other aggravating/mitigating compliance factors		
8 Sum lines 3 through 7		\$9.25
9 Total tons Involved in current incident		61.67
10 Multiply lines 8 and 9.....	Equals Compliance Component	\$570.45

Total Penalty **\$3,177.95**

Worksheet prepared by

Steven Kraten

Date

September 23, 2009

* Incidences within the last three years including current incident.

Code check: total penalty per violation \$51.26.



Metro

Penalty Worksheet

Licensee Name	License Number
Kemper Drywall, Inc.	None

Brief Description

Through most of 2007, KDI delivered waste generated within Metro to the North Marion County Disposal Facility without benefit of an NSL and without paying Metro fees and taxes. At the time, Metro agreed not to recover fees, taxes, and penalties subject to KDI not re-offending.

NOV Number	Date(s) of Violation(s)	Violations	Incidences*	Units involved tons
NOV-193-08	1/1/07 to 11/30/07	1,469	1	

Direct Cost/Revenue Loss

1 Administrative cost				
2 Unpaid Regional System Fees (9/1/06 - 8/31/07):	1,104 tons at \$13.57	\$14,975.72		
3 Unpaid Excise Taxes (9/1/06 - 8/31/07):	1,104 tons at \$8.35	\$9,218.40		
2 Unpaid Regional System Fees (9/1/07 - 8/31/08):	365 tons at \$14.08	\$5,139.20		
3 Unpaid Excise Taxes (9/1/07 - 8/31/08):	365 tons at \$8.23	\$3,003.95		
6 Std. (>500 tons) Non-System License fee		1,000.00		
7 Add lines 1 through 6.....			Equals Direct Recovery	\$33,337.27

Indirect Cost/Revenue Loss

1 Specify other indirect cost/revenue loss				
2 Specify other indirect cost/revenue loss				
3 Specify other indirect cost/revenue loss				
4 Specify other indirect cost/revenue loss				
5 Add lines 1 through 4.....			Equals Indirect Recovery	

Compliance Component

1 Base penalty per unit		\$1.00		
2 Additional penalty at \$1 per incident		\$1.00		
3 Add lines 1 and 2		\$2.00		
4 Penalty on unpaid Regional System Fees (see supplemental table on reverse)		\$3.43		
5 Penalty on unpaid Excise Tax (see supplemental table on reverse)		\$2.08		
6 Specify other aggravating/mitigating compliance factors				
7 Specify other aggravating/mitigating compliance factors				
8 Sum lines 3 through 7		\$7.51		
9 Total tons involved in current incident		1,469.00		
10 Multiply lines 8 and 9.....			Equals Compliance Component	\$11,032.19

Total Penalty \$44,369.46

Worksheet prepared by	Date
Steven Kraten	September 23, 2009

* Incidences within the last three years including current incident

Code check: total penalty per violation \$30.2.



Metro

Penalty Worksheet

Licensee Name

License Number

Kemper Drywall, Inc.

None

Supplemental Table

Unpaid Regional System Fees

Period	Rate	Tons	Total
1/1/07 - 8/31/07	\$13.57	1,103.59	\$14,975.72
9/1/07 - 11/30/07	\$14.08	364.60	\$5,133.57
		1,468.19	\$20,109.29
	Average rate per ton		\$13.70
	25% penalty		\$3.43

Unpaid Excise Tax

Period	Rate	Tons	Total
9/1/06 - 8/31/07	\$8.35	1,103.69	\$9,214.98
9/1/07 - 8/31/08	\$8.23	364.60	\$3,000.66
		1,468.19	\$12,215.64
	Average rate per ton		\$8.32
	25% penalty		\$2.08

INVOICE



Please Remit To:

Metro
 Accounts Receivable
 600 NE Grand Avenue
 Portland OR 97232-2736

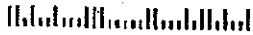
Page: 1
 Invoice No: REM-01085
 Invoice Date: 09/30/2009
 Customer Number: REM1442
 Payment Terms: Net 30
 Due Date: 10/30/2009

Bill To:

Kemper Drywall Inc
 Accounts Payable
 4084 Pacific Highway 99E
 Hubbard OR 97032

AMOUNT DUE: 47,547.41 USD

Amount Remitted



For billing questions, please call 503-797-1620

Line	Adj	Identifier	Description	Quantity	Unit Amt	Net Amount
			Violation #NOV-193-08			
			Violation #NOV-193A-08			
1			Violation Nov193-08/193A-08	1.00	47,547.41	47,547.41
SUBTOTAL:						47,547.41
TOTAL AMOUNT DUE :						47,547.41

STANDARD

Original



METRO

March 7, 2008

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 2235
Tualatin, OR 97062

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Hendricks Law Firm, P.C.
Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

RE: Notice of Violation (NOV-193-08)
Delivery of solid waste to a non-system facility and failure to pay Metro regional system fees and excise taxes

Dear Messrs. Harden:

The purpose of this letter is to notify you of Kemper Drywall, Inc.'s ("KDI's") violations of Sections 5.02.045(b), 5.05.025 and 7.01.020 of the Metro Code and to require KDI to immediately come into compliance with these provisions.

Violations

Metro Code Section 5.02.045(b) stipulates that:

Any waste hauler or other person transporting solid waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste.

Over a period of several years, including all of 2006 and 2007, KDI transported waste drywall scrap generated and collected from its drywall installation projects within the Metro region to the North Marion County Disposal Facility ("NMCDF") for disposal. KDI did not pay Metro regional system fees on this waste. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Metro Code Section 5.05.025(b) stipulates that:

Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the

District, any solid waste facility or disposal site without an appropriate license from Metro.

KDI delivered waste generated within the District to NMCDF, a non-system facility, without having applied for or received the required non-system license. KDI is therefore in violation of Metro Code Section 5.02.025(b).

Metro Code Section 7.01.020(a) stipulates that:

For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax of 7.5 percent of the payment charged by the operator or Metro for such use unless a lower rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro.

KDI did not pay the Metro tax on the in-Metro generated waste it delivered to NMCDF. KDI is therefore in violation of Metro Code Section 5.02.045(b).

Opportunity to Come into Compliance without Penalty or Payment of Back Fees and Taxes

The results of Metro's investigation indicate that KDI was unaware of Metro's flow control ordinance during the time it delivered waste to NMCDF and did not knowingly violate Metro's flow control ordinance. Unlike other flow control violators Metro has prosecuted, KDI does not appear to have committed fraud or made false representations regarding the origin of its waste. Further, KDI paid \$75.63 per ton for disposal at NMCDF. This is more than it would have paid at many system facilities, even with Metro fees and taxes included. Thus, KDI does not appear to have utilized a non-system facility where Metro fees and taxes were not collected, for the purpose of paying a lower disposal rate than competitors utilizing designated disposal facilities. KDI ceased delivering drywall scrap to NMCDF after Kemper and Robert Harden were contacted by Metro detectives regarding this matter. Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations.

Under Metro Code Chapter 2.05, you have the right to request a contested case hearing regarding this Notice. You must make this request in writing and ensure that Metro receives the request within 30 days of the date that the Notice was mailed. Any such request should be directed to the attention of Steven Kraten at Metro. You may retain legal counsel to represent you at the hearing. Article IX, Section 14 of the Oregon Constitution, the Metro Charter, ORS Chapter

Messrs. Harden
March 7, 2008
Page 3

268, and Metro Code Chapter 2.05 and 5.02, 5.05, and 7.01 provide Metro's authority and jurisdiction for the hearing.

If you have any questions regarding this matter, please contact Steve Kraten, Solid Waste Enforcement Coordinator, at (503) 797-1678.

Sincerely,



Michael G. Høglund
Metro Solid Waste and Recycling Department Director

SK:bj

cc: Roy Brower, Regulatory Affairs Manager
Steven Kraten, Solid Waste Enforcement Coordinator
Michelle Bellia, Assistant Metro Attorney

S:\REM\enforcement\Flow Control\KDM-advletter011008.doc
Queaz

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing CONTESTED CASE NOTICE, with the Director's Notice of Violation, on the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 2235
Tualatin, OR 97062

Hendricks Law Firm, P.C., Registered Agent for Kemper Drywall, Inc.
1425 SW 20th Ave., Suite 201
Portland, Oregon 97201

on March 7, 2008 by mailing to said individuals a complete and correct copy thereof via certified mail, return receipt requested and regular mail, contained in a sealed envelopes, with postage prepaid, and deposited in the U.S. post office at Portland, Oregon.



Roy W. Brower
Regulatory Affairs Manager
Metro

Exhibit

Borrowers NOA Letter

Page 1 of 1



JPMorgan Chase Bank
Phone 866-343-4079 Fax
Portfolio Management Center
AZ1-1004
201 North Central Avenue, Floor 17
Phoenix, AZ 85004

November 14, 2009

KEMPER DRYWALL INC
PO BOX 626
HUBBARD, OR 97032-0626

Re: Account Number: XXXXX0814206800
Final Demand Notice \$107,230.64 Plus Fees, Interest, and Attorney Fees

Dear Sir or Madam :

This letter is sent to you by JP Morgan Chase Bank, NA ("Chase"), the owner and holder of the Note for the account referenced above who is attempting to collect indebtedness.

THIS LETTER IS NOTICE OF THE ACCELERATION OF THE NOTE

You have failed to make payments as required under the terms of the Note. This letter is notice that we have accelerated the note and the unpaid principal and lawfully accrued unpaid interest and charge, if any, is now due.

For payoff information, please contact me at the number listed below.

All of the bank's claims, demands and accruals regarding the above described indebtedness, whenever made, and whether for principal, interest or otherwise, are intended to comply in all respects, both independently and collectively, with applicable usury laws, and are accordingly limited so that applicable usury laws are not violated.

Additionally, please be advised that we may report information about your account to credit bureaus. Late payments, missed payments, or other defaults on your account may be reflected in your credit report.

Sincerely,

Katherine Monk

KATHERINE MONK

AVP

Portfolio Management Center

866-343-4079 Ext. 7810

E-Mail:

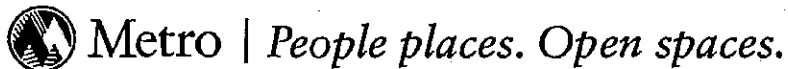
katherine.k.monk@chase.com

cc: file

*Kathy Monk
602-221-7810*

Debt Schedule

Debtor	Amount Due
Ames	\$2,477.00
Amex	\$16,630.00
AmFam	\$10,500.00
Aramark	\$45.00
Employee's	\$57,920.00
Far West	\$1,496.00
HardenHines Ins.	\$516.12
Home Depot	\$4,666.80
Integra- Phone/Internet	\$698.00
Knez	\$645,000.00
Les Schwab	\$488.22
Masco	\$7,062.00
Med. Ins.	\$3,234.02
Metro	\$8,320.87
Multi Fab	\$13,056.00
Northwest Spray	\$99.29
PGE	\$450.00
Prinical Financial	\$352.66
Steeler	\$6,086.00
Subcontractors	\$55,000.00
United Equipment	\$505.91
United Rentals	\$1,064.77
Vehicle Payments and Credit Cards	\$14,500.00
Wave Broadband	\$221.86
Workers Comp.	\$4,316.83
KDI Facility	\$4,342.00
Storage Unit	\$141.00
Bank of America 0% 0290 Rob	\$16,457.37
Capital One- 7.71% 4665 Kemper	\$20,003.62
Chase 13.24% 8177 Robert	\$13,575.91
Capital One-12.4% 1713 Robert	\$5,826.51
T&K- Line of Credit 5%	\$53,000.00
Bank of America 7.99% 9342 Kemper	\$9,505.46
Chase 9.24% 7714 Kemper	\$13,411.35
Coldwater 9.24% 5341 Terry	\$10,433.50
Rob Line of Credit 4.75%	\$106,473.90
Chase 13.24% 4604 Kemper	\$32,093.40
Bank of America 10.99% 4907 Kemper	\$33,521.00
CitiCards 0% for 6 mo. Terry	\$6,770.64
Amazon 12.24% 5573 Rob	\$2,238.57
Chase 13.24% 2284 Rob	\$2,814.52
Chase 9.24% 1620 Rob	\$7,087.83
Chase 8.99% 7022 Rob	\$26,827.02
CitiCards 0% for 6 mo. Terry	\$23,989.17
Sears 17.99% 6075 Terry	\$15,373.40
Washington Mutual 2.5%	\$107,987.13
Key Bank 5.75%	\$17,760.28
Amex- 13.24% 81001 Terry	\$14,091.90
HSBC 19.24% 2589 Robert	\$4,367.08
Chase- 7.24% 1655 Kemper	\$8,395.65
Sears- 23.24% 9690 Robert	\$12,250.56
Amex-27.24% 81006 Robert	\$2,396.69
Citicards- 1761 Robert	\$4,328.52
Discover- Terry	\$13,000.00
Total:	\$1,443,171.33



January 12, 2010

Carl D. Cox, Attorney at Law
PMB #401
14845 SW Murray Scholls Drive, Ste 110
Beaverton, OR 97007

RE: Metro Case No. 09-0109 (Kemper Drywall)

Dear Mr. Cox:

At the January 6, 2010, Kemper Drywall hearing, you decided to hold the record open for an additional ten days in order to provide Metro opportunity to review and comment on two documents introduced into evidence by the Respondents at the hearing. One document is a Final Demand Notice from JP Morgan Chase Bank dated November 14, 2009. The other document appears to be a list of Kemper Drywall's debts. Metro specifically objects to the introduction of this second document into evidence as it is unsubstantiated by any primary sources. Neither document provides contextual value in understanding the company's full financial picture.

Should you disagree with our objection or be inclined to modify Kemper's penalty, Metro would urge you to focus such consideration only on the compliance component of the penalty. It is Metro's practice to recover full payment of regional system fees and excise tax as a primary objective of our enforcement effort. Should you have additional questions or wish to modify the penalty, we suggest that a conference call among the parties be scheduled.

Thank you for the opportunity to comment.

Sincerely,

Steven Kraten
Solid Waste Enforcement Coordinator

SK:bjf
Cc: Kemper Drywall
Margo Norton, Metro
Roy Brower, Metro
Michelle Bellia, Office of Metro Attorney
S:\REM\kraten\Contracts\Cox\Kemper011110.docx
Queue

JAN 28 2010

IN THE MATTER OF THE CONTESTED CASE HEARING OF

Kemper Drywall, Inc.,

Case No:

Appellant

NOV-193A-09

v.

METRO,

PROPOSED FINAL ORDER

Respondent

I. STATEMENT OF THE CASE

Appellant Kemper Drywall, Inc., ("Appellant" or "KDI") requested a hearing to contest a notice of violation issued to KDI by Respondent Metropolitan Service District ("Respondent" or "Metro"). A Hearings Officer held the requested contested case hearing on January 6, 2010 at approximately 10:00 am at Metro's offices located at 600 NE Grand Ave., Portland, Oregon. Kemper Harden and Robert Harden, principal officers of KDI, appeared on behalf of Appellant. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, appeared on behalf of Respondent. The hearings officer did not receive any written or oral ex parte communication on a fact in issue during the pendency of the proceedings, and made a statement to that effect on the record, together with a description of the hearing procedure. All witnesses providing testimony provided an oath or affirmation concerning the truthfulness of their testimony. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

II. EVIDENTIARY MATTERS

Appellant provided witness testimony and oral argument by Kemper Harden and Robert Harden in support of KDI's request to vacate or reduce the civil penalties issued by Metro. Respondent provided witness testimony and oral argument by Mr. Kraten, and Exhibits A-D, in support of its request to uphold the fines assessed by Metro. Appellant brought two documents (Exhibit 1) to the hearing in support of KDI's assertion that financial hardship warrants vacating or reducing the civil penalties issued by Metro. The hearings officer ordered the record kept open until January 19, 2010 in order to permit Metro to review and respond to the documents Appellant brought to the hearing. Metro provided a timely written response, objecting to consideration of the second of the two documents comprising Exhibit 1, as unsubstantiated by any primary sources. Metro also asserted that neither document provided contextual value in understanding KDI's full financial picture. The hearings officer reviewed Appellant's Exhibit 1 in light of Metro's objection, determined that the offered Exhibit 1 is material to Appellant's assertion of financial hardship, and

DECLINED
HEARD BY
RECEIVED
DECLINED TO EXCLUDE THE OFFERED EVIDENCE. THERE WERE NO OTHER OBJECTIONS, AND THE HEARING OFFICER RECEIVED AND CONSIDERED THE OFFERED EVIDENCE.¹

III. ISSUES PRESENTED

1. Whether Metro's action in assessing a \$44,369.46 civil penalty against Appellant KDI for the violations described in NOV-193-08 (assessed in NOV-193A-09) is appropriate.
2. Whether Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI for the violations described in NOV-193A-09 is appropriate.
3. Whether financial hardship alleged by KDI as a basis for reducing the civil penalties assessed by Metro warrants such relief.

IV. STIPULATIONS AND FINDINGS OF FACT

1. Appellant KDI is a construction company that disposes of a significant amount of scrap drywall as part of its business operations. KDI does not have a license to dispose of waste generated within the Metro region to a non-system facility.
2. On March 7, 2008, Metro issued NOV-193-08 to KDI asserting violations of Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste generated within the Metro regional boundary and delivered to the North Marion County Disposal Facility ("NMCDF"). Metro determined that this was a first time offense for KDI, and Metro's investigation found that KDI was unaware of Metro's regulations concerning solid waste flow control. Metro also determined that KDI did not commit fraud, or make any false representations regarding the origin of the waste. Metro further determined that KDI did not receive a financial benefit from the violation because it actually paid more for disposal of its waste on the non-system facility than KDI would have paid at many Metro system facilities. Metro suspended its enforcement action with respect to the violations, stating:

"Metro will not seek back fees and taxes or penalties, provided that KDI henceforth delivers its Metro-generated drywall scrap and all other in-Metro generated solid waste only to recycling facilities or Metro-approved disposal sites. Should Metro again find KDI in violation of the Code sections listed above, subsequent to the issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes, and penalties that may be imposed for any subsequent violations." [Metro Exhibit D]

¹ Metro Code Section 2.05.030(b) provides that: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded." Metro Code Section 2.05.030(c) provides that: "All offered evidence, not objected to, will be received by the hearings officer subject to his/her power to exclude irrelevant, immaterial or unduly repetitious matter."

3. Mr. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, testified that in the spring of 2009 Metro found that KDI again violated the Metro code by delivering waste generated within the Metro region to the NMCDF waste facility. Mr. Kraten testified that Metro used GPS records of the activities of KDI trucks to determine that, from April 15, 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons) generated and collected from within the Metro region, to NMCDF for disposal, without a license from Metro, and without paying the required Metro Regional System Fees and Excise Taxes. Mr. Kraten asserted that KDI likely transported more loads of its waste drywall scrap to NMCDF for disposal before April 15, 2009, but there were no GPS records available to track the earlier loads. [Testimony Mr. Kraten]
4. Mr. Kraten testified that, after the March 2008 NOV, KDI asserted to Metro that it would no longer use the NMCDF waste facility. Mr. Kraten noted, however, that Metro's investigation found that KDI in fact continued to utilize the NMCDF facility. Mr. Kraten further noted that, although KDI's principal operators (Kemper Harden and Robert Harden) utilized GPS to track their trucks and should have been aware of the numerous trips their trucks made to the NMCDF waste facility. Mr. Kraten also noted that KDI's principal operators should have noticed the charges to KDI's account at NMCDF. Further, Mr. Kraten noted that although the drivers interviewed denied knowing about the Metro boundary or its regulations, they gave inaccurate information to the NMCDF waste facility concerning the origin of the drywall scrap. Metro's investigation revealed that KDI paid NMCDF \$75.45 per ton as compared with the Metro rate of \$75.75 per ton with a transaction fee of \$8.50 per load, or approximately \$78.75 per ton. Metro's investigation also revealed that the NMCDF waste facility is located close to KDI's yard and likely more convenient for KDI's drivers. KDI provided Metro a July 21, 2009 letter stating that KDI's manager and drivers thought that the Sherwood construction site was located outside Metro and therefore the solid waste could be delivered to any disposal facility. Mr. Kraten testified that KDI fully cooperated in Metro's investigation, and finally closed its account with NMCDF after Metro's second investigation. [Testimony Mr. Kraten; Metro Exhibit B]
5. On September 30, 2009, Metro issued NOV-193A-09 to KDI, again asserting violations of Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of \$989.19 in Metro Regional System Fees and \$553.18 in Metro Excise Taxes on 61.67 tons of waste generated within the Metro regional boundary and delivered to NMCDF. Metro's investigation found that KDI drivers frequently gave inaccurate information when asked the origin of their loads at NMCDF, often stating Hubbard (the location of KDI's offices) as the origin, and stated Sherwood as the location of only one load, although Metro determined that much of the drywall waste was generated at a KDI construction site in Sherwood. [Metro Exhibit B]
6. Metro assessed a total civil penalty of \$47,547.41 for the two incidents, combined in NOV-193A-09. Metro imposed a civil penalty of \$44,369.46 for the 2007

- violation, seeking recovery of \$32,337.27 in unpaid Metro Regional System Fees and Excise Taxes, a \$1,000 Non-System License fee (required to transport more than 500 tons to a non-system facility). In addition, the civil penalty included a compliance component totaling \$11,032.19, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty of \$1.00 per unit (ton) calculated at \$1.00 per incident (one incident), plus a 25% penalty on unpaid Regional System Fees (\$3.43 per ton for 1,469 tons) and a 25% penalty on unpaid Excise Taxes (\$2.08 per ton for 1,469 tons). [Metro Exhibits B and C; Penalty Worksheet NOV-193A-08]
7. Metro imposed a civil penalty of \$3,177.95 for the 2009 violation, seeking recovery of \$1,542.37 in unpaid Metro Regional System Fees and Excise Taxes, a \$500 administrative cost, a \$500 Non-System License fee (required to transport less than 500 tons to a non-system facility), and \$65.13 in unpaid interest from April 2009 through September 23, 2009. In addition, the civil penalty included a compliance component totaling \$570.45, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty of \$2.00 per unit (ton) calculated at \$1.00 per incident (two incidents), plus a 25% penalty on unpaid Regional System Fees (\$4.01 per ton for 61.67 tons) and a 25% penalty on unpaid Excise Taxes (\$2.24 per ton for 61.67 tons). [Metro Exhibits B and C; Penalty Worksheet NOV-193A-09]
 8. Mr. Kemper Harden, and Mr. Robert Harden, principal operators of KDI, testified that they do not disagree with the assertions of violations by Metro, or Mr. Kraten's testimony concerning the violations. Rather, they agree that KDI did not maintain adequate supervision of its scrappers, reporting that problems started in January 2009 after they moved their offices from Tigard to their current Hubbard location. Messrs. Harden testified that the current economic downturn has negatively affected KDI. Messrs. Harden testified that two years ago their business was debt-free, and now they are not sure if their business will make it. Messrs. Harden request consideration of their current financial circumstances, requesting an order vacating or reducing the civil penalties issued by Metro. [Testimony Kemper Harden; Testimony Robert Harden]
 9. Messrs. Harden introduced two items at the conclusion of the hearing in support of their request to vacate or reduce the civil penalties issued by Metro in this matter. These items include a November 14, 2009 letter from a bank giving KDI a final demand notice of acceleration on a note with principal of \$107,230.64, plus fees, interest, and attorney fees, and an undated debt schedule for \$1,443,171.33 of various debts owed by KDI, and Messrs. Harden. [Exhibit 1]
 10. Mr. Kraten provided a January 12, 2010 response to consideration of Exhibit 1. Mr. Kraten pointed out that the debt schedule submitted by Appellant is unsubstantiated by any primary sources. Mr. Kraten also pointed out that neither document submitted by Appellant provides contextual value in understanding KDI's financial picture. Mr. Kraten further asserted that consideration of vacating

or reducing any of the civil penalties assessed by Metro should focus only on the compliance component of the penalty, and not upon the portion of the civil penalties seeking recovery of unpaid regional system fees and unpaid excise taxes.

V. CONCLUSIONS OF LAW

The evidence presented is reliable, probative, and substantial evidence upon which to base a determination in this matter. The burden of presenting evidence to support a fact or position rests on the proponent of the fact or position. Respondent Metro must prove the validity of the civil penalties imposed on Appellant by a preponderance of the substantial evidence in the whole record.² Appellant KDI bears the burden of proof and the burden of coming forward with evidence regarding economic and financial hardship, or any other factor urged in mitigation, as a basis for vacating or reducing the civil penalties issued by Respondent Metro in this matter.

A. Metro Code Violations

Metro Code Section 5.02.045(b) provides that: "Any waste hauler or other person transporting waste generated, originating, or collected from inside the Metro region shall pay Regional System Fees to Metro for the disposal of such solid waste." Metro Code Section 5.05.025(b) provides that: "Except as otherwise provided in this chapter, it shall be unlawful for any waste hauler or other person to transport solid waste generated within Metro to, or to utilize or cause to be utilized for the disposal or other processing of any solid waste generated within the District, any solid waste facility or disposal site without an appropriate license from Metro." Metro Code Section 7.01.020(a) provides that: "For the privilege of the use of the facilities, equipment, systems, functions, services, or improvements owned, operated, certified, licensed, franchised, or provided by Metro, each user except users of solid waste system facilities shall pay a tax of 7.5% of the payment charged by the operator or Metro for such use unless a lower rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the operator to Metro."

The facts in this matter with respect to the violations by KDI identified in NOV-193-08 and NOV-193A-09 are not actually in dispute. As stated in NOV-193-08, Appellant KDI delivered 1,469 tons of solid waste generated within the Metro boundary to NMCDF, a non-system facility, without a non-system license from Metro, and without paying \$32,324.99 in Metro Regional System Fees and Excise Taxes. As stated in NOV-193-09, Appellant delivered 61.67 tons of solid waste generated within the Metro boundary to NMCDF, without a non-system license from Metro, and without paying \$1,542.37 in Metro Regional System Fees and Excise Taxes. I conclude based on the preponderance of the substantial evidence presented that KDI violated Metro Code Section 5.02.045(b), Metro Code Section 5.05.025(b), and Section 7.01.020(a), as stated by Respondent Metro in NOV-193-08 and NOV-193A-09.

² Metro Code Section 2.05.030.

B. Economic and Financial Condition as Factor

Appellant KDI asserts that its current economic and financial condition warrants vacating or reducing the civil penalties issued by Metro in this matter. Metro Code Section 2.03.050 provides for consideration of mitigating and aggravating factors in assessing a civil penalty. Metro Code Section 2.03.050 (a) provides that: "In establishing the amount of a civil penalty to be assessed, the Director of the Council shall consider the following factors:

- (1) Whether the respondent has committed any prior violation, regardless of whether or not any administrative, civil, or criminal proceeding was commenced therefore;
- (2) The history of the respondent in taking all feasible steps or procedures necessary or appropriate to correct any violation;
- (3) The economic and financial conditions of the respondent."

Metro Code Section 2.03.050(b) provides for consideration of various mitigating factors warranting a remitted or reduced civil penalty, stating: "In establishing whether a civil penalty should be remitted or mitigated, the Director or the Council may consider the following factors:

- (1) The gravity and magnitude of the violation;
- (2) Whether the violation was repeated or continuous;
- (3) Whether a cause of the violation was an unavoidable accident, or negligence, or an intentional act of the respondent;
- (4) The opportunity and degree of difficulty to correct the violation;
- (5) The Respondent's cooperativeness and efforts to correct the violation for which the penalty is to be assessed;
- (6) The cost to Metro of investigation and correction of the cited violation prior to the time Metro receives respondent's answer to the written notice of assessment of civil penalty; or
- (7) Any other relevant factor."

Metro Code Section 2.03.050(c) provides further that: "Unless the issue is raised in respondent's answer to the written notice of assessment of civil penalty, the Council may presume that the economic and financial conditions of respondent would allow imposition of the penalty assessed by the Director. At the hearing, the burden of proof and the burden of coming forward with evidence regarding the respondent's economic and financial condition or regarding any factor urged in mitigation shall be upon the respondent."

Appellant KDI provided testimony by Messrs. Harden their business has suffered financially due to the current economic downturn, and that they now have substantial debt and are not sure whether their business will make it, whereas two years ago they were debt-free. Messrs. Harden provided copies of two documents at the hearing in support of their assertion that the financial condition of KDI warrants reducing the civil penalties assessed by Metro. Respondent Metro points out that the November 14, 2009 demand letter for \$107,230.64 and the debt schedule for \$1,443,171.33, do not provide evidence concerning KDI's actual financial picture or ability to pay the civil penalties assessed here. I found the testimony by Messrs.

Harden credible regarding their concern for the future of their business, and concluded from their demeanor that Messrs. Harden consider the civil penalties assessed by Metro in this matter a significant burden. Upon careful review of the record in this matter, I conclude that Appellant KDI failed to provide any substantial evidence of financial hardship warranting waiving or reducing civil penalties in this matter. A civil penalty is, by its nature, a financial burden upon the party who has to pay it. I find that the letters provided by Appellant KDI only provide a report of other financial burdens KDI and Messrs. Harden face, without providing evidence of specific undue economic or financial hardship. Therefore, I conclude that Appellant KDI failed to meet its burden of persuasion on this issue.

Further, I note in reviewing the civil penalties assessed by Metro in NOV-193-08 and NOV-193A-09 that the substantial majority is actually related to the unpaid Metro Regional System Fees and Excise Taxes (\$32,324.99 and \$1,542.37, respectively). I also note that \$1,500 of the civil penalties were related to the fees for non-system licenses KDI should have paid for the privilege of using non-system facilities, \$500 was an administrative fee for the cost imposed on Metro, and \$65.13 was for interest. The actual civil penalties from the compliance component assessed by Metro in NOV-193-08 and NOV-193A-09 were \$11,032.19 and \$570.45, respectively.

Here, Metro considered direct costs and revenue loss imposed on Metro ratepayers by the violations, with the majority of the civil penalties directly related to obtaining reimbursement to Metro for unpaid fees and taxes. I also find consideration of the administrative cost imposed on Metro by the violation a relevant factor, and find the estimated cost of \$500 reasonable. Metro's also provided a compliance component to the civil penalties, assessing a base penalty of \$1 per ton of solid waste delivered in violation of the regulations, together with an additional \$1 per ton for the tons involved in the second incident. I find consideration of prior violations a relevant factor to consider in assessing an appropriate fine. I note that while the civil penalty assessed by Metro's did not reduce the civil penalty for mitigating factors present in this matter (cooperation by Messrs. Harden in Metro's investigations), Metro also did not increase the civil penalties it assessed based upon the several aggravating factors present in this matter (inaccurate information provided to NMCDF by KDI drivers, prior statement by KDI that it would cease using the NMCDF facility, and the relative ease for KDI to track its drivers through its GPS system and account charges to prevent the violations). The civil penalty structure is reasonably designed to recover the costs of the violation and achieve compliance, and is within the range of fines permitted under the ordinance. Therefore, the hearings officer concludes that the assessed fines are within the ordinance, are reasonable, and should not be vacated or reduced.

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∥

VI. PROPOSED ORDER

1. Metro's action in assessing a \$44,369.46 civil penalty against Appellant KDI for the violations described in NOV-193-08, imposed by Metro in NOV-193A-09, is appropriate and is upheld.
2. Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI for the violations described in NOV-193A-09 is appropriate and is upheld.
3. Appellant KDI did not meet its burden of proof with respect to its assertion that economic and financial hardship alleged by KDI as a basis for reducing the civil penalties assessed by Metro warrants such relief

Respectfully Submitted:



Carl D. Cox, Esq.
Hearings Officer

DATED: 01/27/10

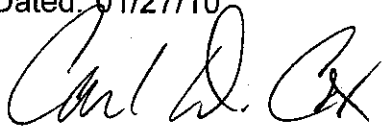
CERTIFICATE OF SERVICE

I, Carl D. Cox, certify that on this day I submitted the original PROPOSED FINAL ORDER, together with the record compiled in the hearing, to the Metro Council, Attn: Michelle Bellia at 600 Northeast Grand Avenue, Portland, Oregon 97232-2736, and sent an original copy of the foregoing PROPOSED FINAL ORDER by US Mail, first class postage pre-paid, in a properly addressed and sealed envelope, to the following person(s) at the address shown, and via electronic transmission to the following person(s) at the address shown:

Metro
Michelle Bellia, Esq.
600 Northeast Grand Avenue
Portland, Oregon 97232-2736
michelle.bellia@oregonmetro.gov

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032

Dated: 01/27/10



Carl D. Cox, Esq.



Kemper Drywall Inc.
4084 Pacific Hwy 99E
PO BOX 626
Hubbard, OR 97032

Ph. 503.692.2838
Fax. 1-800-414-4553
CCB# 110440
UBI# 601948242
WA# KEMPEDI016JR
www.kemperdrywall.com

Metro
600 NE Grand Avenue
Portland, OR 97232

RE: Kemper Drywall Inc.

Attention: Chief Operating Officer

As per Metro Code we are submitting a written exception.

Kemper Drywall Inc. (KDI) was not sure of what evidence was needed to prove our financial hardship. We offered two documents at the hearing. We thought that the documents, with our testimony would be enough evidence to meet the requirements. Based upon the proposed final order, we did not provide enough information regarding our evidence to prove our financial hardship.

We are offering the following evidence:

P&L 2009: See attachment: In 2009, Kemper Drywall Inc. lost \$22,845.93.

Knez Building Materials: Trust Deed & Promissory Note in the amount of \$625,041.00. See attachment.

Debt Schedule: See attachment.

Knez Building Materials Statement dated 1/31/10.

Conclusion

In 2009, KDI lost \$22,845.93. KDI owes their material supplier, Knez Building Materials over \$600,000.00. KDI has steadily gotten behind with Knez over the course of 2009. If KDI was current with Knez in 2009, we would have lost over \$400,000 in 2009. In addition to the debt KDI owes Knez, KDI has multiple revolving credit/credit card accounts. See attached Debt Schedule.

KDI is struggling to service the debt that it has incurred. Currently in 2010, the market is very slow and prices are still depressed. The forecast for 2010 does not look good. At best, we'll break even this year. More than likely we will have a small loss.

If KDI stays in business, it will take many years to repay the debt it owes. KDI is requesting a substantial reduction in the penalty assessed. KDI is struggling to service the current debt. If KDI is unable to service the current debt, we will be forced to close the business. If KDI closes its doors, Metro will not be able to collect any fees.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Harden", is written over a horizontal line.

Robert Harden

1
2/24/2010

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
Ordinary Income/Expense	
Income	
Lien Fee's	26,203.53
Construction	3,129,789.01
Late Fee	50.00
NSF Checks	-31,798.84
Remodel	3,130,752.76
Repair	409,545.45
Bad Debt Recovery	5,160.00
Refunds and Adjustments	46,495.94
Total Income	<u>6,716,197.85</u>
Cost of Goods Sold	
Subcontractor Framing	-3,625.00
Cost of Goods Sold	0.00
Dump Fees	95,162.76
Equipment Rental	44,332.86
Job Labor	
Crew Wages	939,526.65
Payroll Tax Expense	155,609.72
Workman's Compensation	63,227.32
Job Labor - Other	0.00
Total Job Labor	<u>1,158,363.69</u>
Material Jobs	2,491,496.99
Nailing	648,664.73
Paint/ Primer	62.84
Scrap	1,328.00
Subcontractors Jobs	80,197.41
Taping	666,135.87
Total COGS	<u>5,182,120.15</u>
Gross Profit	1,534,077.70
Expense	
Angie's List Coupon	100.00
Fines/Fees	100.00
Reconveyance Services	-252.00
Recording Charges	-188.00
Escrow Charges	-350.00
Cleaning Service	3,394.98
Ask Accountant	195,640.17
Hubbard Property	
Trim	1,694.00
Architectural Services	360.00
Office Furniture Hubbard	437.80
Portable Toilets	153.00
Engineering	469.68
Constriction Testing	0.00
Pavement	1,250.00

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
heating & Cooling	403.00
Electrical	8,512.50
Hubbard Property - Other	17,466.50
Total Hubbard Property	<u>30,746.48</u>
Internet Web Address	103.65
Lien Fee	310.00
Title Fee	-562.00
Safety Supplies	0.00
Intent to Lien	23,686.00
Membership Fee's	3,299.26
Software	1,300.00
Collection Company	0.00
Property Taxes	5,521.35
Corporation Filing Fee	10.00
Late Fee's	156.00
Parking Pass	848.06
Parking Violation	1,331.00
Loan Fees	-4,900.00
Advertising	11,454.52
Automobile Expense	27,368.59
Back Charge	14,149.99
Bank Service Charges	4,305.96
Computer Expense	2,535.44
discount	125,445.11
Fuel	133,219.94
Gift	1,720.62
Insurance	
Automobile	28,143.74
Health & Dental	4,243.26
Liability Insurance	152,835.35
Total Insurance	<u>185,222.35</u>
Licenses and Permits	15,405.15
Meetings	2,399.75
Office Supplies	11,466.29
Payroll Expenses	
Administrative Wages	120,310.49
Officer Salaries	59,973.88
Payroll Expenses - Other	458,293.50
Total Payroll Expenses	<u>638,577.87</u>
Pension Contributions	1,860.00
Postage and Delivery	4,867.65
Professional Fees	
Accounting	4,184.00
Legal Fees	24,755.22
Total Professional Fees	<u>28,939.22</u>
Recording for Liens	735.25

Kemper Drywall Inc.
Profit & Loss
January through December 2009

	<u>Jan - Dec 09</u>
Rent	5,350.00
Repairs and Maintenance	
Building Repairs	4,108.50
Equipment Repairs	4,182.50
Total Repairs and Maintenance	<u>8,291.00</u>
Small Tools	2,291.90
Telephone	
Internet	2,102.71
Cell Phone	30,104.49
Telephone - Other	10,182.84
Total Telephone	<u>42,390.04</u>
Travel	
Lodging	336.77
Meals	471.74
Total Travel	<u>808.51</u>
Uniforms	210.44
Utilities	
Gas and Electric	9,932.99
Water	1,298.70
Utilities - Other	92.00
Total Utilities	<u>11,323.69</u>
Total Expense	<u>1,540,634.23</u>
Net Ordinary Income	-6,556.53
Other Income/Expense	
Other Income	
Finance Charge	7,517.04
Total Other Income	<u>7,517.04</u>
Other Expense	
Donation	100.00
Interest Expense	23,706.44
Total Other Expense	<u>23,806.44</u>
Net Other Income	<u>-16,289.40</u>
Net Income	<u><u>-22,845.93</u></u>

Grantor

Robert Harden & Kemper Harden
4034 Pacific Hwy 99e
Hubbard, OR 97032

Beneficiary

Knez Building Materials Co.
12301 SE Hwy 212
Clackamas, OR 97015
After Recording Return to:
Mark O. Cottle
PO Box 1124
Sherwood, OR 97140

TRUST DEED

THIS TRUST DEED, made this 16TH day of FEBRUARY, 2010, between Robert Harden and Kemper Harden as Grantors, Mark O. Cottle as Trustee, and Knez Building Materials Co. as Beneficiary.

WITNESSETH:

Grantor irrevocably grants, bargains, sells, and conveys to trustee in trust, with power of sale, the property in Marion County, Oregon, described fully on Exhibit A and also known as:

Parcel Number R11698, R11695, R11697, in Marion County, State of Oregon,

together with all and singular the tenements, hereditaments and appurtenances and all other rights thereunto belonging or in anywise now or hereafter appertaining, and the rents, issues and profits thereof and all fixtures now or hereafter attached to or used in connection with the property.

The purpose of this Trust Deed is to secure performance of the promissory note in the amount of \$625,041.00 and due and payable on September 1, 2011 together with interest from January 28, 2010 at the rate of 12% per annum and for purposes of securing a promissory note dated the same as this deed of trust. A breach of the promissory note or the Kemper Agreement shall be deemed a breach of this Trust Deed.

The date of maturity of the debt secured by this instrument is the date on which the final installment of the Judgment becomes due and payable.

To protect the security of this trust deed, grantor agrees:

1. To protect, preserve and maintain the property in good condition and repair; not to remove or demolish any building or improvement thereon; not to commit or permit any waste of the property.
2. To complete or restore promptly and in good and habitable condition any building or improvement which may be constructed, damaged or destroyed thereon, and pay when due all costs incurred therefore.

NOTE: The Trust Deed Act provides that the trustee hereunder must be either an attorney, who is an active member of the Oregon State Bar, a bank, trust company or savings and loan association authorized to do business under the laws of Oregon or the United States, a title insurance company authorized to insure title to real property of this state, its subsidiaries, affiliates, agents or branches, the United States or any agency thereof, or an escrow agent licensed under ORS 696.505 to 696.585.

3. To provide and continuously maintain insurance on the buildings now or hereafter erected on the property against loss or damage by fire and such other hazards as the beneficiary may from time to time require, in an amount not less than full replacement value, with loss payable to the beneficiary. The amount collected under any fire or other insurance policy may be applied by beneficiary upon any indebtedness secured hereby and in such order as beneficiary may determine, or at option of beneficiary the entire amount so collected, or any part thereof, may be released to grantor. Such application or release shall not cure or waive any default or notice of default hereunder to invalidate any act done pursuant to such notice. The following disclaimer is made pursuant to ORS 746.201: WARNING: Unless Grantor provides Beneficiary with evidence of the insurance coverage as required by the Note or Trust Deed, Beneficiary may purchase insurance at Grantor=s expense to protect Beneficiary=s interest. This insurance may, but need not, also protect Grantor=s interest. If the collateral becomes damaged, the coverage Beneficiary purchases may not pay any claim Grantor make or any claim made against Grantor. Grantor may later cancel this coverage by providing evidence that Grantor has obtained property coverage elsewhere. Grantor is responsible for the costs of any insurance purchased by Beneficiary. The cost of this insurance may be added to Grantor=s loan balance. If the cost is added to Grantor=s loan balance, the interest rate on the underlying loan will apply to this added amount. The effective date of coverage may be the date Grantor=s prior coverage lapsed or the date Grantor failed to provide proof of coverage. The coverage Beneficiary purchases may be considerably more expensive than insurance Grantor can obtain on its own and may not satisfy any need for property damage coverage or any mandatory liability insurance requirement imposed by applicable law.

4. To keep the property free from construction liens and to pay all taxes, assessments and other charges that may be levied or assessed upon or against the property before any part of such taxes, assessments and other charges become past due or delinquent and promptly deliver receipts therefore to beneficiary; should the grantor fail to make payment of any taxes, assessments, insurance premiums, liens or other charges payable by grantor, either by direct payment or by providing beneficiary with funds with which to make such payment beneficiary may, at its option, make payment thereof, and the amount so paid, with interest at the rate set forth in the note secured hereby, together with the obligations described in paragraphs 5 and 6 of this trust deed, shall be added to and become a part of the debt secured by this trust deed, without waiver of any rights arising from breach of any of the covenants hereof and for such payments, with interest as aforesaid, the property hereinbefore described, as well as the grantor, shall be bound to the same extent that they are bound for the payment of the obligation herein described, and all such payments shall be immediately due and payable without notice, and the nonpayment thereof shall, at the option of the beneficiary, render all sums secured by this trust deed immediately due and payable and constitute a breach of this trust deed.

5. To pay all costs, fees and expenses of this trust including the cost of title search as well as the other costs and expenses of the trustee incurred in enforcing this obligation and trustee's and attorney's fees actually incurred.

6. To appear in and defend any action or proceeding purporting to affect the security rights or powers of beneficiary or trustee; and in any suit, action or proceeding in which the beneficiary or trustee may appear, including any suit for the foreclosure of this deed, to pay all costs and expenses, including evidence of title and the beneficiary's or trustee's attorney's fees; the amount of attorney's fees mentioned in this paragraph 6 in all cases shall be fixed by the trial court and in the event of an appeal from any judgment or decree of the trial court, grantor further agrees to pay such sum as the appellate court shall adjudge reasonable as the beneficiary's or trustee's attorney's fees on such appeal.

It is mutually agreed that:

7. At any time upon written request of beneficiary, payment of its fees and presentation of this deed and the note for endorsement (in case of full reconveyances, for cancellation), without affecting the liability of any person for the payment of the indebtedness, trustee may (a) consent to the making of any map or plat of the property; (b) join in granting any easement or creating any restriction thereon; (c) join in any subordination or other agreement

Page 2 Trust Deed

affecting this deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of the property. The grantee in any reconveyance may be described as the "person or persons legally entitled thereto," and the recitals therein shall be conclusive proof of the truthfulness thereof. Trustee's fees for any of the services mentioned in this paragraph shall be not less than \$50.

8. Grantor shall not be deemed in default for failure to perform any covenant or condition of this agreement until notice of said default has been given by beneficiary to grantor and grantor shall have failed to remedy said default within 10 days after the giving of the notice. Upon default by grantor in payment of any indebtedness secured hereby or in grantor's performance of any agreement hereunder, time being of the essence with respect to such payment and/or performance, the beneficiary may declare all sums secured hereby immediately due and payable. In such an event the beneficiary may elect to proceed to foreclose this trust deed in equity as a mortgage or direct the trustee to foreclose this trust deed by advertisement and sale, or may direct the trustee to pursue any other right or remedy, either at law or in equity, which the beneficiary may have. In the event the beneficiary elects to foreclose by advertisement and sale, the beneficiary or the trustee shall execute and cause to be recorded a written notice of default and election to sell the property to satisfy the obligation secured hereby whereupon the trustee shall fix the time and place of sale, give notice thereof as then required by law and proceed to foreclose this trust deed in the manner provided in ORS 86.735 to 86.795.

9. After the trustee has commenced foreclosure by advertisement and sale, and at any time prior to 5 days before the date the trustee conducts the sale, the grantor or any other person so privileged by ORS 86.753, may cure the default or defaults. If the default consists of a failure to pay, when due, sums secured by the trust deed, the default may be cured by paying the entire amount due at the time of the cure other than such portion as would not then be due had no default occurred. Any other default that is capable of being cured may be cured by tendering the performance required under the obligation or trust deed. In any case, in addition to curing the default or defaults, the person effecting the cure shall pay to the beneficiary all costs and expenses actually incurred in enforcing the obligation of the trust deed together with trustee's and attorney's fees not exceeding the amounts provided by law.

10. Otherwise, the sale shall be held on the date and at the time and place designated in the notice of sale or the time to which the sale may be postponed as provided by law. The trustee may sell the property either in one parcel or in separate parcels and shall sell the parcel or parcels at auction to the highest bidder for cash, payable at the time of sale. Trustee shall deliver to the purchaser its deed in form as required by law conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the deed of any matters of fact shall be conclusive proof of the truthfulness thereof. Any person, excluding the trustee, but including the grantor and beneficiary, may purchase at the sale.

11. When trustee sells pursuant to the powers provided herein, trustee shall apply the proceeds of sale to payment of (1) the expenses of sale, including the compensation of the trustee and a reasonable charge by trustee's attorney, (2) to the obligation secured by the trust deed, (3) to all persons having recorded liens subsequent to the interest of the trustee in the trust deed as their interests may appear in the order of their priority and (4) the surplus, if any, to the grantor or to any successor in interest entitled to such surplus.

12. Beneficiary may from time to time appoint a successor or successors to any trustee named herein or to any successor trustee appointed hereunder. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all title, powers and duties conferred upon any trustee herein named or appointed. Each such appointment and substitution shall be made by written instrument executed by beneficiary, which, when recorded in the mortgage records of the county in which the property is situated, shall be conclusive proof of proper appointment.

13. Trustee accepts this trust when this deed is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other deed of trust or of any action or proceeding in which grantor, beneficiary or trustee shall be a party unless such action or proceeding is brought by trustee.

The grantor covenants and agrees to and with the beneficiary and the beneficiary's successor in interest that the grantor is lawfully seized in fee simple of the real property and has a valid, unencumbered title thereto and that the grantor will warrant and forever defend the same against all persons whomsoever.

The grantor warrants that the proceeds of the loan represented by the above described note and this trust deed are:

(a)*primarily for grantor's personal, family or household purposes

This deed applies to, inures to the benefit of and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, personal representatives, successors and assigns. The term beneficiary shall mean the holder and owner, including pledgee, of the contract secured hereby, whether or not named as a beneficiary herein.

IN WITNESS WHEREOF, the grantor has executed this instrument the day and year first above written.

***Important Notice:** If (a) is applicable and the beneficiary is a creditor as such word is defined in the Truth-in-Lending Act and Regulation Z, the beneficiary must comply with the Act and the regulation by making required disclosures. If compliance with the Act is not required, disregard this notice.



Robert Harden



Kemper Harden

STATE OF OREGON)

County of Washington ss.

Robert Harden and Kemper Harden did appear before me and signed their names and this instrument was acknowledged before me on this 16th day of FEBRUARY, 2000 2010


NOTARY PUBLIC FOR OREGON

PAYMENT AGREEMENT

Kemper Drywall Inc, the debtor, owes to Knez Building Materials Co., the creditor, the sum of \$816,986.02. The parties do hereby enter into this payment agreement.

1. Kemper executed a promissory note and trust deed in the favor of Knez in the amount of \$300,000.00 which secured a portion of the money owed to Knez by Kemper.

2. Kemper on the "Woodhaven" crossing project, a project the Knez also filed a lien upon is to be paid approximately \$200,000.00.

3. Knez also filed a lien and commenced foreclosure upon said lien, there is due and owing \$84,199.55 in principal and \$8,055.17 in attorney fees. The parties hereto agree that all the money Kemper is paid on the Woodhaven project will be paid over to Knez. The money shall be apportioned as follows:


a. \$191,944.83 shall be applied against Kemper's debt to Knez. After the payment of said money, Kemper's debt will stand at \$625,041. (This does not include any purchases which occurred after January 24, 2010.)

b. The remaining \$8,055.17 is paid to Knez to cover attorney fees relating to its lien and its foreclosure proceedings related to the Woodhaven project and all agreements contemplated herein.

4. Knez agrees to dismiss with prejudice, its complaint relating to the Woodhaven project. Kemper agrees to sign a new promissory note that will be secured by the same property as is currently secured by the current trust deed, reflecting the total amount owed, \$625,041. The now existing promissory note shall be marked "null and void" once the new promissory note is signed. The now existing trust deed and the "Kemper Agreement" shall all be marked "null and void" and replace with new agreements.

Dated: Feb 16th 2010.

Joann Knez for Knez Building Materials Co.



Name Robert Harder for Kemper Drywall Inc.

KEMPER AGREEMENT

PARTIES:

KNEZ BUILDING MATERIALS CO., ("Knez")

KEMPER DRYWALL INC.

ROBERT HARDEN

KEMPER HARDEN Collectively Kemper Drywall Inc., Robert Harden and
Kemper Harden shall be known as ("Kemper")

PREMISE:

WHEREAS: Knez Building Material Co., operates a building material wholesale and retail distribution outlets in which they deliver, for its customers, to building sites building material. Its customers sign credit applications from time to time obligating itself to pay for the supplies Knez delivers.

WHEREAS: Kemper has, from time to time, ordered had delivered to sites it was performing work upon building materials by Knez. Currently, it owes Knez over \$816,986.02 for building materials. The amount changes regularly.


NOW THEREFORE, FOR AND IN CONSIDERATION, the sufficiency of which has been negotiated and deemed sufficient, the parties agree as follows:

1. Knez will forego the right to sue, in Circuit Court in the State of Oregon, Kemper for all sums due provided that Kemper duly executes this Agreement, a trust deed and promissory note in Knez's favor.
2. The amount of the promissory note shall be for \$625,041.00 plus interest at 12% per annum and the real property which shall secure the promissory note are commonly known as 4084, 4024, and 4074 Pacific Highway, 99E, Hubbard, Oregon
3. Kemper shall keep all other sums due and owing Knez, as stated by Knez via its billing each month to Kemper, current. The term Current shall be defined as all sums due and owing shall be paid within sixty (60) days from the date they are delivered to a site as specified by Kemper or removed by Kemper or its employees, agents or authorized representatives from a Knez facility. Kemper keeping its obligations Current is a material part of this agreement and any violation by Kemper shall be deemed a material breach of this agreement and the identified companion agreements.
4. Nothing herein shall prevent Knez from filing liens and/or foreclosing said liens to protect its interest on any real property that it delivers its product for and in


behalf of Kemper.

- 5. Nothing herein shall prevent Kemper from pay all sums due and owing to Knez early.
- 6. Knez is not obligated to continue to supply Kemper or sell product to Kemper in the event Kemper fails to fulfill all terms and conditions of this Agreement. Additionally, Knez, using its reasonable business judgment believes Kemper lacks the ability to pay for any building materials shall not be obligated to continue to supply Kemper.
- 7. This agreement has companion agreements which are incorporated herein specifically a Deed of Trust and a Promissory Note from Kemper to Knez. Other than those agreements, all terms and conditions of the parties agreement are integrated into this Agreement, the Trust Deed and Promissory note and there are no other oral or written terms and conditions between the parties as to the money currently owed.
- 8. Any modification of this Agreement or its companion agreements must be made in writing signed by the parties.
- 9. If a party breaches this Agreement or its companion agreements the breaching party shall pay all reasonable attorney fees and costs associated with any legal action, collection effort whether in equity or at law of the other party.


Dated: Feb 16th, 2010



 Robert Harden



 Kemper Harden



 Kemper Drywall Inc., by Robert Harden
 its Officer

 Knez Drywall Co. By Joann Knez
 Its Officer

PROMISSORY NOTE

\$625,041.00

Clackamas, Oregon
_____, 2010

FOR VALUE RECEIVED, the undersigned promises to pay, on or before the sooner of when the undersigned are paid on the Keys Sherwood "99W" project or September 1, 2011 in lawful money of the United States to the order of Knez Building Materials Co., the principal sum of Six Hundred twenty-five Thousand forty-one Dollars (\$625,041.00) together with interest in the amount of twelve percent per year.

If any payment due pursuant to this note is not made when due, then at the option of the holder of this note the entire indebtedness represented by this note becomes due and owing. Failure or delay of the holder to exercise this option shall not constitute a waiver of the right to exercise the option in the event of a subsequent default or a continuance of any existing default.


This note may be paid in full without penalty at any time. This Promissory Note is a companion agreement to a Trust Deed and the Kemper Agreement, a breach of this Promissory Note shall be deemed a breach of the Trust Deed and Kemper Agreement.

The undersigned shall pay upon demand any and all expenses, including reasonable attorney fees, incurred or paid by the holder of this note without suit or action in attempting to collect funds due under this note. In the event an action is instituted for the collection of this note, the prevailing party shall be entitled to recover, at trial or on appeal, such sums as the court may adjudge reasonable as attorney fees, in addition to costs and necessary disbursements.

The undersigned and its successors and assigns hereby waives presentment for payment, notice of dishonor, protest, notice of protest, and diligence in collection, and consent that the time of payment on any part of this note may be extended by the holder without otherwise modifying, altering, releasing, affecting, or limiting their liability.



Robert Harden



Kemper Harden



Kemper Drywall Inc.
By: Robert Harden

Knez

Building Materials Co., Inc.

12301 SE HWY. 212
CLACKAMAS, OR 97015
(503) 655-5690

STATEMENT DATE: 01/31/2010
TERMS: NET 10TH

KEMPER DRYWALL
PO BOX 626
HUBBARD, OR 97032

CUSTOMER #: 01-KEM

Date	Reference	Description	Charge	Credit	Balance
01/29/2010	062705T-IN		1,111.92		1,111.92
01/29/2010	062706T-IN		993.84		993.84
01/29/2010	062707T-IN		36.80		36.80
01/29/2010	062708T-IN		69.12		69.12
01/29/2010	062714T-IN		1,011.50		484.50

Total: 623,293.82

Current	December	November	October	120 Days	Balance Due
107,146.66	135,094.46	101,052.80	0.00	279,999.90	623,293.82

**** REMIT TO: KNEZ BUILDING MATERIALS CO. *****

***** 12301 SE HWY 212 - CLACKAMAS, OR 97015 *****

YOUR ACCOUNT WITH US IS SERIOUSLY PAST DUE.

REMIT TODAY SO THAT WE MAY CONTINUE TO SERVE YOU.

Debt Schedule

Debtor	Amount Due
Ames	\$2,477.00
Amex	\$16,630.00
AmFam	\$10,500.00
Aramark	\$45.00
Employee's	\$57,920.00
Far West	\$1,496.00
HardenHines Ins.	\$516.12
Home Depot	\$4,666.80
Integra- Phone/Internet	\$698.00
Knez	\$645,000.00
Les Schwab	\$488.22
Masco	\$7,062.00
Med. Ins.	\$3,234.02
Metro	\$8,320.87
Multi Fab	\$13,056.00
Northwest Spray	\$99.29
PGE	\$450.00
Prinical Financial	\$352.66
Steeler	\$6,086.00
Subcontractors	\$55,000.00
United Equipment	\$505.91
United Rentals	\$1,064.77
Vehicle Payments and Credit Cards	\$14,500.00
Wave Broadband	\$221.86
Workers Comp.	\$4,316.83
KDI Facility	\$4,342.00
Storage Unit	\$141.00
Bank of America 0% 0290 Rob	\$16,457.37
Capital One- 7.71% 4665 Kemper	\$20,003.62
Chase 13.24% 8177 Robert	\$13,575.91
Capital One-12.4% 1713 Robert	\$5,826.51
T&K- Line of Credit 5%	\$53,000.00
Bank of America 7.99% 9342 Kemper	\$9,505.46
Chase 9.24% 7714 Kemper	\$13,411.35
Coldwater 9.24% 5341 Terry	\$10,433.50
Rob Line of Credit 4.75%	\$106,473.90
Chase 13.24% 4604 Kemper	\$32,093.40
Bank of America 10.99% 4907 Kemper	\$33,521.00
CitiCards 0% for 6 mo. Terry	\$6,770.64
Amazon 12.24% 5573 Rob	\$2,238.57
Chase 13.24% 2284 Rob	\$2,814.52
Chase 9.24% 1620 Rob	\$7,087.83
Chase 8.99% 7022 Rob	\$26,827.02
CitiCards 0% for 6 mo. Terry	\$23,989.17
Sears 17.99% 6075 Terry	\$15,373.40
Washington Mutual 2.5%	\$107,987.13
Key Bank 5.75%	\$17,760.28
Amex- 13.24% 81001 Terry	\$14,091.90
HSBC 19.24% 2589 Robert	\$4,367.08
Chase- 7.24% 1655 Kemper	\$8,395.65
Sears- 23.24% 9690 Robert	\$12,250.56
Amex-27.24% 81006 Robert	\$2,396.69
Citicards- 1761 Robert	\$4,328.52
Discover- Terry	\$13,000.00
Total:	\$1,443,171.33



BEFORE THE METRO REGIONAL GOVERNMENT

In The Matter of Notice of Violations and
Imposition of Civil Penalty NOV-193A-09

Issued to

KEMPER DRYWALL, INC.,

Respondent

FINAL ORDER

Appellant Kemper Drywall, Inc., (“Appellant” or “KDI”) requested a hearing to contest a notice of violation issued to KDI by Respondent Metropolitan Service District (“Respondent” or “Metro”). A Hearings Officer held the requested contested case hearing on January 6, 2010 at approximately 10:00 am at Metro’s offices located at 600 NE Grand Ave., Portland, Oregon. Kemper Harden and Robert Harden, principal officers of KDI, appeared on behalf of Appellant. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, appeared on behalf of Respondent. The hearings officer did not receive any written or oral ex parte communication on a fact in issue during the pendency of the proceedings, and made a statement to that effect on the record, together with a description of the hearing procedure. All witnesses providing testimony provided an oath or affirmation concerning the truthfulness of their testimony. Metro made an audio recording of the hearing. Metro maintains the record of the proceedings.

EVIDENTIARY MATTERS

Appellant provided witness testimony and oral argument by Kemper Harden and Robert Harden in support of KDI’s request to vacate or reduce the civil penalties issued by Metro.

1 Respondent provided witness testimony and oral argument by Mr. Kraten, and Exhibits A-D, in
2 support of its request to uphold the fines assessed by Metro. Appellant brought two documents
3 (Exhibit 1) to the hearing in support of KDI's assertion that financial hardship warrants vacating
4 or reducing the civil penalties issued by Metro. The hearings officer ordered the record kept
5 open until January 19, 2010 in order to permit Metro to review and respond to the documents
6 Appellant brought to the hearing. Metro provided a timely written response, objecting to
7 consideration of the second of the two documents comprising Exhibit 1, as unsubstantiated by
8 any primary sources. Metro also asserted that neither document provided contextual value in
9 understanding KDI's full financial picture. The hearings officer reviewed Appellant's Exhibit 1
10 in light of Metro's objection, determined that the offered Exhibit 1 is material to Appellant's
11 assertion of financial hardship, and declined to exclude the offered evidence. There were no
12 other objections, and the hearing officer received and considered the offered evidence.¹
13
14

15 ISSUES PRESENTED

- 16 1. Whether Metro's action in assessing a \$44,369.46 civil penalty against Appellant
17 KDI for the violations described in NOV-193-08 (assessed in NOV-193A-09) is
18 appropriate.
- 19 2. Whether Metro's action in assessing a \$3,177.95 civil penalty against Appellant KDI
20 for the violations described in NOV-193A-09 is appropriate.
- 21 3. Whether financial hardship alleged by KDI as a basis for reducing the civil penalties
22 assessed by Metro warrants such relief.
23
24

25
26 ¹ Metro Code Section 2.05.030(b) provides that: "Irrelevant, immaterial or unduly repetitious evidence shall be excluded." Metro Code Section 2.05.030(c) provides that: "All offered evidence, not objected to, will be received by the hearings officer subject to his/her power to exclude irrelevant, immaterial or unduly repetitious matter."

STIPULATIONS AND FINDINGS OF FACT

1
2 1. Appellant KDI is a construction company that disposes of a significant amount of scrap
3 drywall as part of its business operations. KDI does not have a license to dispose of waste
4 generated within the Metro region to a non-system facility.

5 2. On March 7, 2008, Metro issued NOV-193-08 to KDI asserting violations of Metro Code
6 Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided payment of
7 \$32,324.99 in Metro Regional System Fees and Excise Taxes on 1,469 tons of waste
8 generated within the Metro regional boundary and delivered to the North Marion County
9 Disposal Facility (“NMCDF”). Metro determined that this was a first time offense for
10 KDI, and Metro’s investigation found that KDI was unaware of Metro’s regulations
11 concerning solid waste flow control. Metro also determined that KDI did not commit
12 fraud, or make any false representations regarding the origin of the waste. Metro further
13 determined that KDI did not receive a financial benefit from the violation because it
14 actually paid more for disposal of its waste on the non-system facility than KDI would have
15 paid at many Metro system facilities. Metro suspended its enforcement action with respect
16 to the violations, stating:

17
18
19 “Metro will not seek back fees and taxes or penalties, provided that KDI henceforth
20 delivers its Metro-generated drywall scrap and all other in-Metro generated solid
21 waste only to recycling facilities or Metro-approved disposal sites. Should Metro
22 again find KDI in violation of the Code sections listed above, subsequent to the
23 issuance date of this NOV, Metro will seek to recover fees, taxes, and appropriate
24 penalties for violations that occurred in 2006 and 2007, in addition to fees, taxes,
25 and penalties that may be imposed for any subsequent violations.” [Metro Exhibit
26 D]

27 3. Mr. Steve Kraten, Solid Waste Enforcement Coordinator for Metro, testified that in the
28 spring of 2009 Metro found that KDI again violated the Metro code by delivering waste

1 generated within the Metro region to the NMCDF waste facility. Mr. Kraten testified that
2 Metro used GPS records of the activities of KDI trucks to determine that, from April 15,
3 2009 to July 14, 2009, KDI transported 22 loads of waste drywall scrap (61.67 tons)
4 generated and collected from within the Metro region, to NMCDF for disposal, without a
5 license from Metro, and without paying the required Metro Regional System Fees and
6 Excise Taxes. Mr. Kraten asserted that KDI likely transported more loads of its waste
7 drywall scrap to NMCDF for disposal before April 15, 2009, but there were no GPS
8 records available to track the earlier loads. [Testimony Mr. Kraten]
9

- 10 4. Mr. Kraten testified that, after the March 2008 NOV, KDI asserted to Metro that it would
11 no longer use the NMCDF waste facility. Mr. Kraten noted, however, that Metro's
12 investigation found that KDI in fact continued to utilize to NMCDF facility. Mr. Kraten
13 further noted that, although KDI's principal operators (Kemper Harden and Robert Harden)
14 utilized GPS to track their trucks and should have been aware of the numerous trips their
15 trucks made to the NMCDF waste facility. Mr. Kraten also noted that KDI's principal
16 operators should have noticed the charges to KDI's account at NMCDF. Further, Mr.
17 Kraten noted that although the drivers interviewed denied knowing about the Metro
18 boundary or its regulations, they gave inaccurate information to the NMCDF waste facility
19 concerning the origin of the drywall scrap. Metro's investigation revealed that KDI paid
20 NMCDF \$75.45 per ton as compared with the Metro rate of \$75.75 per ton with a
21 transaction fee of \$8.50 per load, or approximately \$78.75 per ton. Metro's investigation
22 also revealed that the NMCDF waste facility is located close to KDI's yard and likely more
23 convenient for KDI's drivers. KDI provided Metro a July 21, 2009 letter stating that KDI's
24 manager and drivers thought that the Sherwood construction site was located outside Metro
25
26

1 and therefore the solid waste could be delivered to any disposal facility. Mr. Kraten
2 testified that KDI fully cooperated in Metro's investigation, and finally closed its account
3 with NMCDF after Metro's second investigation. [Testimony Mr. Kraten; Metro Exhibit
4 B]

5 5. On September 30, 2009, Metro issued NOV-193A-09 to KDI, again asserting violations of
6 Metro Code Sections 5.02.045(b), 5.05.025, and 7.01.020, determining that KDI avoided
7 payment of \$989.19 in Metro Regional System Fees and \$553.18 in Metro Excise Taxes on
8 61.67 tons of waste generated within the Metro regional boundary and delivered to
9 NMCDF. Metro's investigation found that KDI drivers frequently gave inaccurate
10 information when asked the origin of their loads at NMCDF, often stating Hubbard (the
11 location of KDI's offices) as the origin, and stated Sherwood as the location of only one
12 load, although Metro determined that much of the drywall waste was generated at a KDI
13 construction site in Sherwood. [Metro Exhibit B]

14
15
16 6. Metro assessed a total civil penalty of \$47,547.41 for the two incidents, combined in NOV-
17 193A-09. Metro imposed a civil penalty of \$44,369.46 for the 2007 violation, seeking
18 recovery of \$32,337.27 in unpaid Metro Regional System Fees and Excise Taxes, a \$1,000
19 Non-System License fee (required to transport more than 500 tons to a non-system
20 facility). In addition, the civil penalty included a compliance component totaling
21 \$11,032.19, calculating the penalty portion as follows: \$1.00 per unit (ton), plus an
22 additional penalty of \$1.00 per unit (ton) calculated at \$1.00 per incident (one incident),
23 plus a 25% penalty on unpaid Regional System Fees (\$3.43 per ton for 1,469 tons) and a
24 25% penalty on unpaid Excise Taxes (\$2.08 per ton for 1,469 tons). [Metro Exhibits B
25 and C; Penalty Worksheet NOV-193A-08]
26

- 1 7. Metro imposed a civil penalty of \$3,177.95 for the 2009 violation, seeking recovery of
2 \$1,542.37 in unpaid Metro Regional System Fees and Excise Taxes, a \$500 administrative
3 cost, a \$500 Non-System License fee (required to transport less than 500 tons to a non-
4 system facility), and \$65.13 in unpaid interest from April 2009 through September 23,
5 2009. In addition, the civil penalty included a compliance component totaling \$570.45,
6 calculating the penalty portion as follows: \$1.00 per unit (ton), plus an additional penalty
7 of \$2.00 per unit (ton) calculated at \$1.00 per incident (two incidents), plus a 25% penalty
8 on unpaid Regional System Fees (\$4.01 per ton for 61.67 tons) and a 25% penalty on
9 unpaid Excise Taxes (\$2.24 per ton for 61.67 tons). [Metro Exhibits B and C; Penalty
10 Worksheet NOV-193A-09]
11
- 12 8. Mr. Kemper Harden, and Mr. Robert Harden, principal operators of KDI, testified that they
13 do not disagree with the assertions of violations by Metro, or Mr. Kraten's testimony
14 concerning the violations. Rather, they agree that KDI did not maintain adequate
15 supervision of its scrappers, reporting that problems started in January 2009 after they
16 moved their offices from Tigard to their current Hubbard location. Messrs. Harden
17 testified that the current economic downturn has negatively affected KDI. Messrs. Harden
18 testified that two years ago their business was debt-free, and now they are not sure if their
19 business will make it. Messrs. Harden request consideration of their current financial
20 circumstances, requesting an order vacating or reducing the civil penalties issued by Metro.
21 [Testimony Kemper Harden; Testimony Robert Harden]
22
23
- 24 9. Messrs. Harden introduced two items at the conclusion of the hearing in support of their
25 request to vacate or reduce the civil penalties issued by Metro in this matter. These items
26 include a November 14, 2009 letter from a bank giving KDI a final demand notice of

1 acceleration on a note with principal of \$107,230.64, plus fees, interest, and attorney fees,
2 and an undated debt schedule for \$1,443,171.33 of various debts owed by KDI, and
3 Messrs. Harden. [Exhibit 1]

4 10. Mr. Kraten provided a January 12, 2010 response to consideration of Exhibit 1. Mr. Kraten
5 pointed out that the debt schedule submitted by Appellant is unsubstantiated by any
6 primary sources. Mr. Kraten also pointed out that neither document submitted by
7 Appellant provides contextual value in understanding KDI's financial picture. Mr. Kraten
8 further asserted that consideration of vacating or reducing any of the civil penalties
9 assessed by Metro should focus only on the compliance component of the penalty, and not
10 upon the portion of the civil penalties seeking recovery of unpaid regional system fees and
11 unpaid excise taxes.
12

13 CONCLUSIONS OF LAW

14 The evidence presented is reliable, probative, and substantial evidence upon which to
15 base a determination in this matter. The burden of presenting evidence to support a fact or
16 position rests on the proponent of the fact or position. Respondent Metro must prove the validity
17 of the civil penalties imposed on Appellant by a preponderance of the substantial evidence in the
18 whole record.² Appellant KDI bears the burden of proof and the burden of coming forward with
19 evidence regarding economic and financial hardship, or any other factor urged in mitigation, as a
20 basis for vacating or reducing the civil penalties issued by Respondent Metro in this matter.
21

22 A. Metro Code Violations

23 Metro Code Section 5.02.045(b) provides that: ""Any waste hauler or other person
24 transporting waste generated, originating, or collected form inside the Metro region shall pay
25

26 _____
² Metro Code Section 2.05.030.

1 Regional System Fees to Metro for the disposal of such solid waste.” Metro Code Section
2 5.05.025(b) provides that: “Except as otherwise provided in this chapter, it shall be unlawful for
3 any waste hauler or other person to transport solid waste generated within Metro to, or to utilize
4 or cause to be utilized for the disposal or other processing of any solid waste generated within
5 the District, any solid waste facility or disposal site without an appropriate license from Metro.”
6 Metro Code Section 7.01.020(a) provides that: “For the privilege of the use of the facilities,
7 equipment, systems, functions, services, or improvements owned, operated, certified, licensed,
8 franchised, or provided by Metro, each user except users of solid waste system facilities shall
9 pay a tax of 7.5% of the payment charged by the operator or Metro for such use unless a lower
10 rate has been established as provided in subsection 7.01.020(b). The tax constitutes a debt owed
11 by the user to Metro which is extinguished only by payment of the tax directly to Metro or by the
12 operator to Metro.”
13

14
15 The facts in this matter with respect to the violations by KDI identified in NOV-193-08
16 and NOV-193A-09 are not actually in dispute. As stated in NOV-193-08, Appellant KDI
17 delivered 1,469 tons of solid waste generated within the Metro boundary to NMCDF, a non-
18 system facility, without a non-system license from Metro, and without paying \$32,324.99 in
19 Metro Regional System Fees and Excise Taxes. As stated in NOV-193-09, Appellant delivered
20 61.67 tons of solid waste generated within the Metro boundary to NMCDF, without a non-
21 system license from Metro, and without paying \$1,542.37 in Metro Regional System Fees and
22 Excise Taxes. I conclude based on the preponderance of the substantial evidence presented that
23 KDI violated Metro Code Section 5.02.045(b), Metro Code Section 5.05.025(b), and Section
24 7.01.020(a), as stated by Respondent Metro in NOV-193-08 and NOV-193A-09.
25
26

1 B. Economic and Financial Condition as Factor

2 Appellant KDI asserts that its current economic and financial condition warrants vacating
3 or reducing the civil penalties issued by Metro in this matter. Metro Code Section 2.03.050
4 provides for consideration of mitigating and aggravating factors in assessing a civil penalty.
5 Metro Code Section 2.03.050 (a) provides that: “In establishing the amount of a civil penalty to
6 be assessed, the Director of the Council shall consider the following factors:
7

- 8 (1) Whether the respondent has committed any prior violation, regardless of whether or
not any administrative, civil, or criminal proceeding was commenced therefore;
- 9 (2) The history of the respondent in taking all feasible steps or procedures necessary or
appropriate to correct any violation;
- 10 (3) The economic and financial conditions of the respondent.”

11 Metro Code Section 2.03.050(b) provides for consideration of various mitigating factors
12 warranting a remitted or reduced civil penalty, stating: “In establishing whether a civil penalty
13 should be remitted or mitigated, the Director or the Council may consider the following factors:
14

- 15 (1) The gravity and magnitude of the violation;
- 16 (2) Whether the violation was repeated or continuous;
- 17 (3) Whether a cause of the violation was an unavoidable accident, or negligence, or an
intentional act of the respondent;
- 18 (4) The opportunity and degree of difficult to correct the violation;
- 19 (5) The Respondent’s cooperativeness and efforts to correct the violation for which the
penalty is to be assessed;
- 20 (6) The cost to Metro of investigation and correction of the cited violation prior to the
time Metro receives respondent’s answer to the written notice of assessment of civil
penalty; or
- 21 (7) Any other relevant factor.”

22 Metro Code Section 2.03.050(c) provides further that: “Unless the issue is raised in
23 respondent’s answer to the written notice of assessment of civil penalty, the Council may
24 presume that the economic and financial conditions of respondent would allow imposition of the
25 penalty assessed by the Director. At the hearing, the burden of proof and the burden of coming
26

1 forward with evidence regarding the respondent's economic and financial condition or regarding
2 any factor urged in mitigation shall be upon the respondent."

3 Appellant KDI provided testimony by Messrs. Harden their business has suffered
4 financially due to the current economic downturn, and that they now have substantial debt and
5 are not sure whether their business will make it, whereas two years ago they were debt-free.
6 Messrs. Harden provided copies of two documents at the hearing in support of their assertion that
7 the financial condition of KDI warrants reducing the civil penalties assessed by Metro.
8 Respondent Metro points out that the November 14, 2009 demand letter for \$107,230.64 and the
9 debt schedule for \$1,443,171.33, do not provide evidence concerning KDI's actual financial
10 picture or ability to pay the civil penalties assessed here. I found the testimony by Messrs.
11 Harden credible regarding their concern for the future of their business, and concluded from their
12 demeanor that Messrs. Harden consider the civil penalties assessed by Metro in this matter a
13 significant burden. Upon careful review of the record in this matter, I conclude that Appellant
14 KDI failed to provide any substantial evidence of financial hardship warranting waiving or
15 reducing civil penalties in this matter. A civil penalty is, by its nature, a financial burden upon
16 the party who has to pay it. I find that the letters provided by Appellant KDI only provide a
17 report of other financial burdens KDI and Messrs. Harden face, without providing evidence of
18 specific undue economic or financial hardship. Therefore, I conclude that Appellant KDI failed
19 to meet its burden of persuasion on this issue.
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23 Further, I note in reviewing the civil penalties assessed by Metro in NOV-193-08 and
24 NOV-193A-09 that the substantial majority is actually related to the unpaid Metro Regional
25 System Fees and Excise Taxes (\$32,324.99 and \$1,542.37, respectively). I also note that \$1,500
26 of the civil penalties were related to the fees for non-system licenses KDI should have paid for

1 the privilege of using non-system facilities, \$500 was an administrative fee for the cost imposed
2 on Metro, and \$65.13 was for interest. The actual civil penalties from the compliance
3 component assessed by Metro in NOV-193-08 and NOV-193A-09 were \$11,032.19 and
4 \$570.45, respectively.

5 Here, Metro considered direct costs and revenue loss imposed on Metro ratepayers by the
6 violations, with the majority of the civil penalties directly related to obtaining reimbursement to
7 Metro for unpaid fees and taxes. I also find consideration of the administrative cost imposed on
8 Metro by the violation a relevant factor, and find the estimated cost of \$500 reasonable. Metro's
9 also provided a compliance component to the civil penalties, assessing a base penalty of \$1 per
10 ton of solid waste delivered in violation of the regulations, together with an additional \$1 per ton
11 for the tons involved in the second incident. I find consideration of prior violations a relevant
12 factor to consider in assessing an appropriate fine. I note that while the civil penalty assessed by
13 Metro's did not reduce the civil penalty for mitigating factors present in this matter (cooperation
14 by Messrs. Harden in Metro's investigations), Metro also did not increase the civil penalties it
15 assessed based upon the several aggravating factors present in this matter (inaccurate information
16 provided to NMCDF by KDI drivers, prior statement by KDI that it would cease using the
17 NMCDF facility, and the relative ease for KDI to track its drivers through its GPS system and
18 account charges to prevent the violations). The civil penalty structure is reasonably designed to
19 recover the costs of the violation and achieve compliance, and is within the range of fines
20 permitted under the ordinance. Therefore, the hearings officer concludes that the assessed fines
21 are within the ordinance, are reasonable, and should not be vacated or reduced.

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FINAL ORDER

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- 1. Metro’s action in assessing a \$44,369.46 civil penalty against Appellant KDI for the violations described in NOV-193-08, imposed by Metro in NOV-193A-09, is appropriate and is upheld.
- 2. Metro’s action in assessing a \$3,177.95 civil penalty against Appellant KDI for the violations described in NOV-193A-09 is appropriate and is upheld.
- 3. Appellant KDI did not meet its burden of proof with respect to its assertion that economic and financial hardship alleged by KDI as a basis for reducing the civil penalties assessed by Metro warrants such relief.
- 4. Pursuant to ORS 34.010 to 34.102, appeal of the Final Order may be initiated by filing a petition for writ of review with the Circuit Court of the State of Oregon for Multnomah County within 60 days of the date of this Final Order.

METRO REGIONAL GOVERNMENT

Dated: March 18, 2010

Michael Jordan
Chief Operating Officer

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing RESOLUTION NO. 10-4135 with Exhibits A, B, C,

D and E to the following:

Kemper Harden, President
Robert Harden, Secretary
Kemper Drywall, Inc.
PO Box 626
Hubbard, OR 97032


Carl D. Cox
Attorney at Law
14845 SW Murray Scholls Drive, #110
Beaverton, OR 97007

Hearings Officer
E-Mail Address: cd.cox@verizon.net

Michelle A. Bellia, Senior Attorney
Metro
600 NE Grand Avenue
Portland, OR 97232-2736

Attorney for Respondent Metro
E-Mail Address:
michelle.bellia@oregonmetro.gov

by mailing via first class mail to those persons a true and correct copy thereof, certified by me as such, placed in a sealed envelope addressed to them at the addresses set forth, and deposited in the United States Post Office at Portland, Oregon, on March 8, 2010, with the postage prepaid.


Lisa M. Hefty
Legal Secretary

M:\attorney\confidential\09 Solid Waste\16 Code Enforcement\51kemperdrywall(KDI)\Resolutions No\COS Resolution 10-4135 .doc

Agenda Item Number 4.3

NATURAL AREAS OVERSIGHT COMMITTEE ANNUAL REPORT

PRESENTED BY STAFF

Metro Council Meeting
Thursday, March 18, 2010
Metro Council Chamber

NATURAL AREAS OVERSIGHT COMMITTEE ANNUAL REPORT WILL BE DISTRIBUTED TO COUNCIL
MAILBOXES UNDER SEPARATE COVER BY TUESDAY, MARCH 16, 2010

Agenda Item Number 4.4

Resolution No. 10-4134, For the Purpose of Approving Third Round
Funding for Nature in Neighborhoods Capital Grants.

RESOLUTIONS
COUNCILOR HOSTICKA

Metro Council Meeting
Thursday, March 18, 2010
Metro Council Chamber

BEFORE THE METRO COUNCIL

APPROVING THIRD ROUND FUNDING FOR) RESOLUTION NO. 10-4134
NATURE IN NEIGHBORHOODS CAPITAL)
GRANTS) Introduced Chief Operating Officer Michael
) Jordan, with the concurrence of Council
) President David Bragdon

WHEREAS, Metro Resolution No. 06-3672B, "For the Purpose of Submitting to the Voters of the Metro Area A General Obligation Bond Indebtedness in the Amount of \$227.4 Million to Fund Natural Area Acquisition and Water Quality Protection," was approved by the Metro Council on March 9, 2006.

WHEREAS, at the election held on November 7, 2006, the voters approved Measure 26-80, the Natural Areas Bond Measure; and

WHEREAS, the Measure provided for \$15 million to fund a Nature in Neighborhoods Capital Grants Program (the "Capital Grants Program") to provide opportunities for the community to actively protect fish and wildlife habitat and water quality near where people live and work. The program can provide funds to purchase lands or easements that increase the presence of natural features and their ecological functions in neighborhoods throughout the region. The program can also provide funding for projects that recover or create additional plant and animal habitats to help ensure that every community enjoys clean water and embraces nature as a fundamental element of its character and livability; and

WHEREAS, the Measure provided for the creation of a grant review committee composed of no fewer than seven members to review grant applications and make grant award recommendations to the Metro Council; and

WHEREAS, on January 14, 2010 the Grants Review Committee reviewed proposals for grants and is recommending six projects that best meet the criteria for the grant program to the Metro Council for funding; now therefore,

BE IT RESOLVED that the Metro Council hereby:

1. Awards Nature in Neighborhoods Capital Grants to those recipients and projects, and for the funding amounts, listed in Exhibit A to this resolution;
2. Authorizes the Chief Operating Officer to enter into an intergovernmental agreement ("IGA") with each of the recipients substantially in conformance with the form of IGA attached to this resolution as Exhibit B; and

3. For those projects that are for real property acquisitions, conditions Metro's grant award on the recipient granting a conservation easement to Metro, substantially in the form attached to this resolution as Exhibit C, and authorizes the Chief Operating Officer to accept such conservation easement from each such recipient.

ADOPTED by the Metro Council this _____ day of _____, 2010.

David Bragdon, Council President

Approved as to Form:

Daniel B. Cooper, Metro Attorney

Exhibit A to Resolution No. 10-4134

Nature in Neighborhood Capital Grants Program
Third Round Grant Awards
Grant Review Committee Recommendations to the Metro Council

Project: Re-Greening Park Avenue Park & Ride
Recipient: TriMet
Applicant: Urban Green and TriMet
Grant Amount: \$349,305

Metro’s habitat-friendly design guidelines will be used to create the region’s first sustainable light rail station and park-and-ride. When TriMet’s new orange line zips through Oak Grove in 2015, commuters will experience a re-created riparian forest, a natural stormwater treatment system and many other green features at the Park Avenue stop along Southeast McLoughlin Boulevard. This project is a collaboration among multiple agencies and community groups to showcase Metro’s Integrating Habitat design principles that balance design excellence, ecological stewardship and economic enterprise. Project partners hope to promote low-impact development practices throughout the McLoughlin corridor and improve the water quality within the Courtney and Kellogg creek basins.

Project strengths:

- Community-driven effort, with roots in Metro’s Integrating Habitat Design Competition
- Diverse partners, including TriMet, Urban Green, North Clackamas Parks and Recreation District and the Oak Lodge Sanitary District
- Potential to influence future development close to the station, and along the entire McLoughlin Boulevard corridor
- Water quality benefits for Kellogg Creek and Kellogg Lake

Project: Trillium Creek Restoration
Recipient: City of West Linn
Applicant: Mary S. Young Volunteers
Grant Amount: \$55,330

Students, volunteers and other community members will come together to restore a degraded stream system at Mary S. Young State Park, creating a healthy riparian corridor. Severe bank erosion has compromised the 1,045-foot section of Trillium Creek that will be transformed. The project will restore floodplain connectivity and enhance the rich diversity of native trees, shrubs and other plants along the riparian corridor and adjacent wetlands in this West Linn park.

Project strengths:

- Improved ecological function, opportunity to enhance visitors’ nature experience

- Diverse partners, including the Mary S. Young Volunteers, the Willamette Riverkeepers, the Oregon Department of Fish and Wildlife, the City of West Linn and Harris Stream Service
- Significant investment to date, including site preparation and watershed and restoration assessment

Project: Baltimore Woods Connectivity Corridor
 Recipient: City of Portland Bureau of Environmental Services
 Applicant: Three Rivers Land Conservancy
 Grant Amount: \$158,000

Metro funding will help purchase four parcels, totaling one acre, within the Baltimore Woods corridor in North Portland. This acquisition will protect rare native oak trees and enhance the nature experience for bicyclists, walkers and joggers who will someday use this section of the Willamette River Greenway Trail envisioned on the adjacent street. These parcels are part of a larger natural area corridor connecting Cathedral Park and Pier parks. Active participation from city agencies, land trusts, non-profit organizations and the Friends of Baltimore Woods will involve the community in restoration and long-term stewardship.

Project strengths:

- Friends of Baltimore Woods’ work to raise the visibility of this area and promote the acquisition among agencies, partners and the community
- Scarcity of funding sources for acquisition at a neighborhood scale
- Preservation of Oregon white oak trees
- Threat of development, due to great views of the river and West Hills
- More natural experience for future regional trail users
- Diverse partners, including Three Rivers Land Conservancy, Audubon Society of Portland, Friends of Baltimore Woods, Portland Bureau of Environmental Services, Portland Parks & Recreation, Portland Bureau of Transportation and SOLV

Project: Crystal Springs Partnership
 Recipient: City of Portland Bureau of Environmental Services
 Applicant: City of Portland Bureau of Environmental Services
 Grant Amount: \$311,480

Crystal Springs has all the characteristics of an excellent salmon stream: It’s entirely spring-fed, which eliminates pollutants from urban runoff, and relatively consistent year-round flow and low temperatures attract some of Portland’s most threatened fish species. This project will help realize that potential by removing a culvert that blocks juvenile fish passage and restoring the floodplain and riparian habitat along 350 feet of the creek. Conservation easements or acquisition on three additional properties will allow future floodplain restoration.

Project strengths:

- Part of a larger, basin-wide restoration effort
- Strong partnerships with a track record of past success
- Significant ecological benefits in one of the region’s most important fish-bearing streams

Project: Summer Creek Natural Area Acquisition
Recipient: City of Tigard
Applicant: City of Tigard
Grant Amount: \$1,000,000

Metro will contribute to the acquisition of 43 acres of wetlands and mature forests at the confluences of Summer and Fanno creeks. The property is a natural area and represents the best remaining unprotected land in Tigard. Once acquired by the City it will become Tigard's second largest park. The site has functioned as an outdoor lab for the students at Fowler Middle School. With the help of several community partners, this project will expand environmental education programs to students throughout Washington County.

Project strengths:

- Many engaged partners, including several non-profits and three agencies
- Rare opportunity to protect urban natural area of this size and quality
- City funding committed for long-term maintenance
- Located along Fanno Creek Greenway Trail

Project: Natural Areas Capital Grants Program

Contract No. _____

**INTERGOVERNMENTAL AGREEMENT
Natural Areas Bond Measure
Capital Grant Award**

This Intergovernmental Agreement (this “Agreement”), entered into under the provisions of ORS chapter 190 and effective on the date the Agreement is fully executed (the “Effective Date”), is by and between Metro, a metropolitan service district organized under the laws of the state of Oregon and the Metro Charter, located at 600 N.E. Grand Avenue, Portland, Oregon 97232-2736, and the _____, located at _____ (“Grant Recipient”).

RECITALS

WHEREAS, the electors of Metro approved Ballot Measure 26-80 on November 7, 2006, authorizing Metro to issue \$227.4 million in bonds to preserve natural areas, clean water, and protect fish and wildlife (the “Measure”);

WHEREAS, the Measure allocated \$15 million from bond proceeds to the Nature in Neighborhoods Capital Grants Program to complement the regional and local share portions of the Measure by providing opportunities for the community to actively protect fish and wildlife habitat and water quality in areas where people live and work;

WHEREAS, Metro has determined to make a grant award to Grant Recipient to fund [SPECIFY PROJECT] (the “Project”) as more specifically identified within the Scope of Work attached hereto as Exhibit A (the “Work”);

[IF PROJECT IS PROPERTY ACQUISITION THEN INCLUDE THE FOLLOWING PROVISION:

WHEREAS, the Grant Recipient will become the owner of the property that constitutes the Project, which property is more specifically identified in Exhibit A (the “Property”);]

WHEREAS, this Agreement between Metro and Grant Recipient is now needed to satisfy the terms and conditions of the Nature in Neighborhoods Capital Grants Program as provided for in the Measure; and

WHEREAS, except as specifically provided in this Agreement, including the scope of work attached hereto as Exhibit A, and otherwise notwithstanding any statements or inferences to the contrary, Metro neither intends nor accepts any (1) direct involvement in the Project (2) sponsorship benefits or supervisory responsibility with respect to the Project; or (3) ownership or responsibility for care and custody of the tangible products which result from the Project;

NOW THEREFORE, the parties agree as follows:

1. Purpose; Scope of Work; Limitations

The purpose of this Agreement is to implement the Measure and facilitate the funding of a Nature in Neighborhoods Capital Grants Program project. Grant Recipient shall perform all activities described in the Scope of Work attached hereto as Exhibit A (the “Work”). As a condition precedent to Metro’s agreement to fund the Project, Grant Recipient hereby approves the Project and agrees to comply with the terms and conditions of this Agreement and the applicable provisions of the Measure. At no time will Metro have any supervisory responsibility regarding any aspect of the Work. Any indirect or direct involvement by Metro in the Work shall not be construed or interpreted by Grant Recipient as Metro’s assumption of a supervisory role.

2. Declaration of Capital Project

In accordance with the Measure, Metro may only provide funds to Grant Recipient for the Project so long as such funds are exclusively used for capital expenses. Grant Recipient hereby confirms that the Project will result in the creation of a capital asset to be owned by Grant Recipient. Grant Recipient covenants that it will (a) own and hold all such capital improvements and real property interests acquired pursuant to this Agreement, and (b) record the asset created by the Project as a fixed, capital asset in Grant Recipient’s audited financial statement, consistent with Generally Accepted Accounting Principles (“GAAP”) and with Grant Recipient’s financial bookkeeping of other similar assets.

3. Contract Sum and Terms of Payment

Metro shall compensate Grant Recipient for performance of the Work as described in Exhibit A. Metro shall not be responsible for payment of any materials, expenses or costs other than those that are specifically described in Exhibit A.

4. Limitations on Use of the Capital Asset That Results from the Project

Throughout the term of this Agreement, Grant Recipient shall maintain and operate the capital asset that results from the Project in a manner consistent with one or more of the following intended and stated purposes of the Measure (the “Nature in Neighborhood Approved Purposes”):

- To safeguard water quality in local rivers and streams;
- To protect and enhance fish and wildlife habitats;
- To promote partnerships that protect and enhance nature in neighborhoods; and
- To increase the presence of ecological systems and plant and animal communities in nature deficient and other disadvantaged neighborhoods;

Grant Recipient may not sell, use, or authorize others to use such capital asset in a manner inconsistent with such purposes.

Notwithstanding the foregoing, secondary uses that arise as a result of such capital asset being used primarily in accordance with the Nature in Neighborhood Approved Purposes will be permitted, but only to the extent such secondary uses affect a *de minimis* portion of such capital asset or are necessary in order to facilitate the primary Nature in Neighborhood Approved Purposes. For example, if, as part of a land use review proceeding initiated to obtain the necessary approvals to operate such capital asset consistent with the Nature in Neighborhood Approved Purposes, a portion of such capital asset was required to be dedicated as a road, such road dedication would be a permitted secondary use.

If the Work is the acquisition of real property, then Grant Recipient shall satisfy the requirements in this section of the Agreement by granting to Metro a conservation easement substantially comparable to the form of conservation easement approved by the Metro Council at the time the Metro Council approved the grant award to Grant Recipient.

5. Funding Recognition

Grant Recipient shall recognize in any publications, media presentations, or other presentations referencing the Project produced by or at the direction of Grant Recipient, including, without limitation, any on-site signage, that funding for the Project came from the Metro Natural Areas Bond Measure's Nature in Neighborhoods Capital Grants Program. Such recognition shall comply with the recognition guidelines detailed in the Measure. The Grant Recipient shall place at or near the Project's location signage that communicates that funding for the Project came from the Metro Natural Areas Bond Measure's Nature in Neighborhoods Capital Grants Program.

6. Term

It is the intent of the parties for the Project to have been completed, and for all Metro funding to have been provided to Grant Recipient prior to [INSERT PROJECT DEADLINE]. Notwithstanding the forgoing, all provisions set forth in this Agreement, and the obligations of Grant Recipient hereunder, shall continue in effect after the completion of the Project until June 30, 2027.

7. Termination for Cause

A. Subject to the notice provisions set forth in Section 7.B below, Metro may terminate this Agreement, in full or in part, at any time during the term of the Agreement if Metro reasonably determines that Grant Recipient has failed to comply with any provision of this Agreement and is therefore in default.

B. Prior to terminating this Agreement in accordance with Section 7.A above, Metro shall provide Grant Recipient with written notice that describes the reason(s) that Metro has concluded that Grant Recipient is in default and includes a description of the steps that Grant Recipient shall take to cure the default. From the date that such notice of default is received by Grant Recipient, Grant Recipient shall have 30 days to cure the default. In the event Grant Recipient does not cure the default within the 30-day period, Metro may terminate all or any part of this Agreement, effective on any date that Metro chooses following the 30-day period. Metro shall notify Grant Recipient in writing of the effective date of the termination.

C. Grant Recipient shall be liable to Metro for all reasonable costs and damages incurred by Metro as a result of and in documentation of the default. Following such termination, should Metro later determine or a court find that Grant Recipient was not in default or that the default was excusable (e.g. due to a labor strike, fire, flood, or other event that was not the fault of, or was beyond the control of, Grant Recipient) this Agreement shall be reinstated or the parties may agree to treat the termination as a joint termination for convenience whereby the rights of Grant Recipient shall be as set forth below in Section 8.

8. Joint Termination for Convenience

Metro and Grant Recipient 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 only upon the mutual, written termination agreement signed by both Metro and Grant Recipient.

9. Oregon Constitution and Tax Exempt Bond Covenants

Grant Recipient acknowledges that Metro's source of funds for the Nature in Neighborhoods Capital Grants Program is from the sale of voter-approved general obligation bonds that are to be repaid using ad valorem property taxes exempt from the limitations of Article XI, sections 11, 11b, 11c, 11d, and 11e of the Oregon Constitution, and that the interest paid by Metro to bond holders is currently exempt from federal and Oregon income taxes. Grant Recipient covenants that it will take no actions that would cause Metro not to be able to maintain the current status of the real property taxes imposed to repay these bonds as exempt from Oregon's constitutional property tax limitations or the income tax exempt status of the bond interest under IRS rules. In the event Grant Recipient breaches this covenant, Grant Recipient shall undertake whatever remedies are necessary to cure the default and to compensate Metro for any loss it may suffer as a result thereof, including, without limitation, reimbursing Metro for any Projects funded under this Agreement that resulted in Grant Recipient's breach of its covenant described in this Section.

10. Liability and Indemnification

As between Metro and Grant Recipient, Grant Recipient assumes full responsibility for the performance and content of the Work; provided, however, that this provision is not intended

to, and does not, create any rights by third parties. To the extent permitted by Oregon law, and subject to the limitations and conditions of the Oregon Tort Claims Act, ORS chapter 30, and the Oregon Constitution, Grant Recipient shall indemnify, defend, and hold Metro and Metro's agents, employees, and elected officials harmless from any and all claims, demands, damages, actions, losses, and expenses, including attorney's fees, arising out of or in any way connected with the performance of this Agreement by Grant Recipient or Grant Recipient's officers, agents, or employees. Grant Recipient is solely responsible for paying Grant Recipient's contractors and subcontractors. Nothing in this Agreement shall create any contractual relationship between Metro and any such contractor or subcontractor.

11. Contractors' Insurance

A. Grant Recipient shall require all contractors performing any of the Work to purchase and maintain at each contractor's expense, the following types of insurance covering the contractor, its employees and agents:

1. Commercial general liability insurance covering personal injury, property damage, and bodily injury with automatic coverage for premises and operation and product liability shall be a minimum of \$1,000,000 per occurrence. The policy must be endorsed with contractual liability coverage. Grant Recipient and Metro, and their elected officials, departments, employees and agents, shall be named as additional insureds.

2. Automobile bodily injury and property damage liability insurance. Insurance coverage shall be a minimum of \$1,000,000 per occurrence. Grant Recipient and Metro, and their elected officials, departments, employees, and agents, shall be named as additional insureds. Notice of any material change or policy cancellation shall be provided to Grant Recipient thirty (30) days prior to the change.

B. This insurance required by Grant Recipient, as well as all workers' compensation coverage for compliance with ORS 656.017, must cover all contractors' operations under this Agreement, whether such operations are by a contractor, by any subcontractor, or by anyone directly or indirectly employed by any contractor or subcontractor.

C. Grant Recipient shall require all contractors performing any of the Work to provide Grant Recipient with a certificate of insurance complying with this section and naming Grant Recipient and Metro as additional insureds within fifteen (15) days of execution of a

contract between Grant Recipient and any contractor or twenty-four (24) hours before services such contract commence, whichever date is earlier.

D. In lieu of the insurance requirements in Sections 11.A through 11.D, above, Grant Recipient may accept evidence of a self-insurance program from any contractor. Such contractor shall name Grant Recipient and Metro as additional insureds within fifteen (15) days of execution of a contract between Grant Recipient and any contractor or twenty-four (24) hours before services such contract commence, whichever date is earlier.

12. Safety

Grant Recipient shall take all necessary precautions for the safety of employees, volunteers and others in the vicinity of the Work and the Project, and shall comply with all applicable provisions of federal, state and local safety laws and building codes, including the acquisition of any required permits.

13. Metro's Right to Withhold Payments

Metro shall have the right to withhold from payments due Grant Recipient such sums as necessary, in Metro's sole opinion, to protect Metro against any loss, damage or claim which may result from Grant Recipient's performance or failure to perform under this Agreement or the failure of Grant Recipient to make proper payment to any suppliers, contractors or subcontractors. All sums withheld by Metro under this Section shall become the property of Metro and Grant Recipient shall have no right to such sums to the extent that Grant Recipient has breached this Agreement.

14. Project Records, Audits, and Inspections

A. For the term of this Agreement, Grant Recipient shall maintain comprehensive records and documentation relating to the Project and Grant Recipient's performance of this Agreement (hereinafter "Project Records"). Project Records shall include all records, reports, data, documents, systems, and concepts, whether in the form of writings, figures, graphs, or models, that are prepared or developed in connection with any Project.

B. In accordance with Section 2 above, Grant Recipient shall maintain all fiscal Project Records in accordance with GAAP. In addition, Grant Recipient shall maintain any other records necessary to clearly document:

(i) Grant Recipient's performance of its obligations under this Agreement, its compliance with fair contracting and employment programs, and its compliance with Oregon law on the payment of wages and accelerated payment provisions;

(ii) Any claims arising from or relating to (a) Grant Recipient's performance of this Agreement, or (b) any other contract entered into by Grant Recipient that relates to this Agreement or the Project;

(iii) Any cost and pricing data relating to this Agreement; and

(iv) Payments made to all suppliers, contractors, and subcontractors engaged in any work for Grant Recipient related to this Agreement or the Project.

C. Grant Recipient shall maintain Project Records for the longer period of either (a) six years from the date the Project is completed, or (b) until the conclusion of any audit, controversy, or litigation that arises out of or is related to this Agreement or the Project and that commences within six years from the date the Project is completed.

D. Grant Recipient shall make Project Records available to Metro and its authorized representatives, including, without limitation, the staff of any Metro department and the Metro Auditor, within the boundaries of the Metro region, at reasonable times and places, regardless of whether litigation has been filed on any claims. If the Project Records are not made available within the boundaries of Metro, Grant Recipient agrees to bear all of the costs incurred by Metro to send its employees, agents, or consultants outside the region to examine, audit, inspect, or copy such records, including, without limitation, the expense of travel, per diem sums, and salary. Such costs paid by Grant Recipient to Metro pursuant to this Section shall not be recoverable costs in any legal proceeding.

E. Grant Recipient authorizes and permits Metro and its authorized representatives, including, without limitation, the staff of any Metro department and the Metro Auditor, to inspect, examine, copy, and audit the books and Project Records of Grant Recipient, including tax returns, financial statements, other financial documents relating to this Agreement or the Project. Metro shall keep any such documents confidential to the extent permitted by Oregon law, subject to the provision of Section 12(F) below.

F. Grant Recipient agrees to disclose Project Records requested by Metro and agrees to the admission of such records as evidence in any proceeding between Metro and Grant Recipient, including, but not limited to, a court proceeding, arbitration, mediation or other alternative dispute resolution process.

G. In the event the Project Records establish that Grant Recipient owes Metro any sum of money or that any portion of any claim made by Grant Recipient against Metro is not warranted, Grant Recipient shall pay all costs incurred by Metro in conducting the audit and inspection.

15. Public Records

All Project Records shall be public records subject to the Oregon Public Records Law, ORS 192.410 to 192.505. Nothing in this Section shall be construed as limiting Grant Recipient's ability to consider real property transactions in executive session pursuant to ORS 192.660(1)(e) or as requiring disclosure of records that are otherwise exempt from disclosure pursuant to the Public Records Law (ORS 192.410 to 192.505) or Public Meetings Law (ORS 192.610 to 192.690).

16. Law of Oregon; Public Contracting Provisions

The laws of the state of Oregon shall govern this Agreement and the parties agree to submit to the jurisdiction of the courts of the state of Oregon. All applicable provisions of ORS chapters 187, 279A, 279B, and 279C, 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. Specifically, it is a condition of this Agreement that Grant Recipient and all employers working under this Agreement are subject to and will comply with ORS 656.017 and that, for public works subject to ORS 279C.800 to 279C.870 pertaining to the payment of prevailing wages as regulated by the Oregon Bureau of Labor and Industries, Grant Recipient and every contractor and subcontractor shall comply with all such provisions, including ORS 279C.836 by filing a public works bond with the Construction Contractors Board before starting work on the project, unless exempt under that statute.

17. Notices and Parties' Representatives

Any notices permitted or required by this Agreement shall be addressed to the other party's representative(s) as set forth below and shall be deemed received (a) on the date they are personally delivered, (b) on the date they are sent via facsimile, or (c) on the third day after they are deposited in the United States mail, postage fully prepaid, by certified mail return receipt requested. Either party may change its representative(s) and the contact information for its representative(s) by providing notice in compliance with this Section of this Agreement.

Grant Recipient's Designated Representatives:

Fax _____

Metro's Designated Representatives:

Natural Areas Bond Program Manager
Metro Regional Center
600 N.E. Grand Ave.
Portland, OR 97223
Fax (503)-797-1849

with copy to:

Metro Attorney
600 N.E. Grand Ave.
Portland, OR 97223
Fax (503) 797-1792

18. Assignment

Grant Recipient may not assign any of its responsibilities under this Agreement without prior written consent from Metro, which consent shall not be unreasonably withheld.

19. Severability

If any term or provision in this Agreement shall be adjudged invalid or unenforceable, such adjudication shall not affect the validity or enforceability of the remainder of the

Agreement, which remaining terms and provisions shall be valid and be enforced to the fullest extent permitted by law.

20. No Waiver of Claims; Modifications

Metro’s failure to enforce any provision of this Agreement shall not constitute a waiver by Metro of that or any other provision of this Agreement. This Agreement may be amended only by written instrument signed by both Metro and Grant Recipient and no waiver, consent, or change of terms of this Agreement shall bind either party unless in writing and signed by both parties.

21. Integration of Agreement Documents

All of the provisions of any proposal documents including, but not limited to, Requests for Proposals, Grant Proposals and Scopes of Work that were utilized in conjunction with the award of this Grant are hereby expressly incorporated herein by reference; provided, however, that the terms described in Sections 1 through 21 of this Agreement and in Exhibit A shall control in the event of any conflict between such terms and such other incorporated documents. Otherwise, this Agreement represents the entire and integrated agreement between Metro and Grant Recipient and supersedes all prior negotiations, representations or agreements, either written or oral. The law of the state of Oregon shall govern the construction and interpretation of this Agreement. The Parties, by the signatures below of their authorized representatives, hereby acknowledge that they have read this Agreement, understand it, and agree to be bound by its terms and conditions.

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

[Name of City/County/District]

METRO

Signature

Michael Jordan
Metro Chief Operating Officer

Print Name: _____

Title: _____

Date: _____

Date: _____

APPROVED AS TO FORM BY:

Signature

Paul A. Garrahan
Senior Assistant Metro Attorney

Print Name: _____

Title: _____

Date: _____

Date: _____

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After recording return to:

Office of Metro Attorney
600 NE Grand Avenue
Portland, OR 97232-2736

CONSERVATION EASEMENT

THIS CONSERVATION EASEMENT (the "Easement") is entered into this _____ day of _____, 200____, by and between _____, _____ ("Grantor") and Metro, an Oregon municipal corporation ("Grantee").

RECITALS

A. Grantor is the fee simple owner of that certain real property approximately _____ acres in size located in the County of [County], State of Oregon, commonly known as [address], and more particularly described on the attached Exhibit A (the "Property").

B. On November 7, 2006, the voters approved Ballot Measure 26-80 (the "2006 Natural Areas Bond Measure"), which provided Grantee with funds for the acquisition of natural areas from willing sellers. The 2006 Natural Areas Bond Measure (the "Bond Measure") was designed to provide Grantee with the ability to protect the region's significant natural areas, fish and wildlife habitat, greenways, water quality, and lands near rivers and streams. The Bond Measure allocated \$15 million from bond proceeds to the Nature in Neighborhoods Capital Grants Program (the "Metro Grants Program") to provide opportunities for the community to actively protect fish and wildlife habitat and water quality in areas where people live and work.

C. Grantor was able to acquire the Property in part by using funds provided by the Metro Grants Program. A condition of Grantor's receipt of such funds from Metro was its agreement to grant this conservation easement.

D. In order to preserve the natural features of the Property that provide significant wildlife habitat values and contribute to water quality, Grantor desires to grant to Grantee, and Grantee desires to accept from Grantor, a conservation easement over the Property.

For valuable consideration, the receipt of which is hereby acknowledged by Grantor, and the mutual covenants, terms, conditions, and restrictions contained herein, the parties hereby agree as follows:

AGREEMENT

1. Grant of Conservation Easement. For and in consideration of the sum of _____ (\$_____) and of the mutual promises, terms, conditions, restrictions and undertakings herein set forth, Grantor hereby voluntarily grants to Grantee a perpetual, non-possessory conservation easement, in gross, on, over, under, and across the Property. This Easement is being created and acquired in accordance with ORS 271.715 to 271.795, and the provisions herein shall be construed and applied accordingly.

2. Purpose.

(a) General Purpose. The general purposes of this Easement are to ensure that the Property will be retained forever predominantly in its natural condition for: [INCLUDE ONLY APPROPRIATE AND RELEVANT BULLETS FROM BELOW—AT LEAST ONE FROM FEDERAL CITATIONS AND RELEVANT PART OF STATE CITATION]

- “The protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem” (as that phrase is used in 26 U.S.C. §170(h)(4)(A)(ii));
- “The preservation of land areas for outdoor recreation by, or the education of, the general public” (as that phrase is used in 26 U.S.C. §170(h)(4)(A)(i));
- “The preservation of certain open space (including farmland and forest land) where such preservation is (I) for the scenic enjoyment of the general public, or (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and will yield a significant benefit” (as that phrase is used in 26 U.S.C. §170(h)(4)(A)(iii)); and
- “Protecting natural, scenic, or open space values of real property, ensuring its availability for agricultural, forest, recreational, or open space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property” (as that phrase is used in ORS 271.715(1)).

(b) Specific Purpose; Protection of Conservation Values. The more specific purpose of this Easement is to prevent any use or occupancy of, or activity on, the Property that will impair or interfere with the Conservation Values, as identified in that certain Nature In Neighborhoods Capital Grant Agreement between Grantor and Metro, dated [INSERT DATE] (the “Grant Agreement”), on file at the offices of the Grantee.

3. Prohibited and Permitted Uses. Subject to encumbrances of record on the Property, Grantor shall not engage in any activity on, or use of, the Property that is inconsistent with the terms of this Easement or materially interferes with or impairs the Conservation Values of the Property. Without limiting the generality of the forgoing, the activities and uses described on the attached Exhibit B are expressly prohibited. Grantor reserves all rights accruing from its ownership of the Property, including the right to engage in or permit or invite others to engage in all uses of the Property that are not inconsistent with the terms of this Easement or expressly prohibited herein. Grantor shall provide Grantee with not less than thirty (30) days written notice prior to (a) applying for any grading, tree removal, building, or construction permit, and (b) undertaking any activity that could materially interfere with or impair the Conservation Values of the Property.

4. Baseline Documentation. The current condition of the Property is documented in the Grant Agreement. an inventory of relevant features of the Property, dated _____, 200__, on file at the offices of Grantee (the “Baseline Documentation”). The parties agree that the Baseline Documentation provides an accurate representation and description of the Property at the time of this grant. The Baseline Documentation is intended to serve as an objective, although not exclusive, information baseline for monitoring compliance with the terms of this Easement.

5. Enforcement and Remedies.

(a) Notice of Violation. Grantee shall have the right to prevent any use of, or activity on, the Property that is inconsistent with the purpose and terms of this Easement. If Grantee determines that Grantor, or third parties under Grantor’s authority or permission, are in violation of the terms of this Easement, Grantee shall give written notice to Grantor of such violation and demand corrective action sufficient to cure the violation. In the event that such violation involves injury to the Property resulting from any use or activity inconsistent with the purpose and terms of this Easement, such notice shall demand that Grantor, at Grantor’s sole cost and expense, restore the portion of the Property so injured to its prior condition in accordance with a plan approved by Grantee.

(b) Failure to Cure. If Grantor fails to cure a violation within 30 days after Grantor’s receipt of notice thereof from Grantee, or under circumstances where the violation cannot reasonably be cured within a 30-day period, fails to begin curing the violation within the 30-day period, Grantee may bring an action at law or in

equity to (i) enforce the terms of this Easement, (ii) enjoin the violation by a temporary, preliminary, and/or permanent injunction, (iii) recover any damages to which Grantee may be entitled for such violation of the terms of this Easement, and (iv) require the restoration of the Property to the condition and appearance that existed prior to such violation.

(c) Emergency Enforcement. If Grantee, in its sole discretion, reasonably determines that the circumstances require immediate action to prevent or mitigate significant damage to the Property, Grantee may enter the Property to prevent or mitigate further damage to or alteration of the Property necessary to protect the Conservation Values or otherwise pursue its remedies under this Section 5 without prior notice to Grantor and without waiting for the expiration of the cure period set forth above in subsection 5(b).

(d) Nature of Remedies. Grantee shall have available all legal and equitable remedies to enforce Grantor's obligations hereunder. Grantor agrees that Grantee's remedies at law for any violation of the terms of this Easement are inadequate, and that Grantee shall be entitled to injunctive relief, both prohibitive and mandatory, in addition to such other relief to which Grantee may be entitled, including without limitation specific performance of the terms of this Easement, without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies. Grantee's rights under this Section 5 shall be cumulative, in addition to all remedies now or hereafter existing at law or in equity, and apply equally in the event of either actual or threatened violations of the terms of this Easement.

(e) Costs of Enforcement. Grantor shall reimburse Grantee for any costs or expenses incurred by Grantee in enforcing the terms of this Easement necessitated by Grantor's violation of the terms of this Easement including, without limitation, all reasonable court costs, attorney fees, expert witness fees, and costs of restoration mitigation.

(f) Grantee's Discretion to Enforce. Enforcement of the terms of this Easement is at the discretion of Grantee. Any forbearance by Grantee to exercise its rights under this Easement in the event of any breach of any terms of this Easement by Grantor, its agents, employees, contractors, family members, invitees, or licensees shall not be deemed or construed to be a waiver by Grantee of such term under this Easement. No delay or omission by Grantee in the exercise of any right or remedy upon any breach by Grantor shall impair such right or remedy or be construed as a waiver.

(g) Waiver of Certain Defenses. Grantor acknowledges that it has carefully reviewed this Easement and has had the opportunity to consult with and been advised by legal counsel of its terms and requirements. In full knowledge of the provisions of this Easement, Grantor hereby waives any claim or defense it may have against Grantee or its successors or assigns under or pertaining to this Easement based upon waiver, laches, estoppel, adverse possession, or prescription.

(h) Acts Beyond Grantor's Control. Nothing contained in this Easement shall be construed to entitle Grantee to bring any action against Grantor to abate, correct, or restore any condition on the Property or to recover damages for any injury to, or change in, the Property resulting from (1) causes beyond Grantor's control including, without limitation, natural changes, fire, flood, storm or earth movement, acts of trespassers, or (2) any reasonable and prudent action taken by Grantor under emergency conditions to prevent, abate, or mitigate significant injury to the Property resulting from such causes.

6. Liability and Indemnification.

(a) Liability. The parties acknowledge and agree that because Grantor is the fee owner of the Property, except as specifically provided for under subsection (b) below, the general liability for risks, damages, injuries, claims, or costs arising by virtue of Grantor's ownership and use of the Property shall remain with Grantor as a normal and customary incident of the right of Property ownership. Nothing in this Easement shall be construed

as giving rise to any right or ability of Grantee to become an “owner” or “operator” of the Property within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.

(b) Indemnification. Grantor shall indemnify, defend, and hold harmless Grantee (and Grantee’s officers, employees and agents) from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever resulting from, arising out of, or relating to the activities of Grantor and Grantor’s invitees on the Property. To the extent permitted by Article XI, Section 7 of the Oregon Constitution and the Oregon Tort Claims Act, ORS 30.260 to 30.300, Grantee shall indemnify, defend, and hold harmless Grantor from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature resulting from, arising out of, or relating to the activities of Grantee (or Grantee’s officers, employees and agents) on the Property, except to the extent such damages are due to Grantor’s or Grantor’s invitees’ negligence or willful misconduct, or to any breach of this Easement by Grantor or Grantor’s invitees.

7. Covenants Running With the Land. The parties acknowledge and agree that the covenants and agreements set forth in this Easement are intended to bind Grantor, Grantee, and their respective successors and assigns. The Property and the Property shall be held, conveyed, mortgaged, pledged as security for a debt, leased, used, and occupied subject to the covenants, conditions, restrictions, and other limitations set forth in this Easement (the “Restrictions”). All and each of the Restrictions are imposed as equitable servitudes upon the Property and every part thereof shall run with the land. Furthermore, all and each of the Restrictions shall be binding upon and burden, and shall inure to the benefit of, all persons having or acquiring any right, title, or interest to either the Property or the Property.

8. Amendment. Grantor and Grantee may mutually agree in writing to amend this Easement; provided that no amendment shall be allowed that will affect the qualification of this Easement or the status of Grantee under any applicable laws, including 26 U.S.C. § 170(h), as amended (or any successor provision(s) then applicable), and ORS 271.715-795. In no event shall the "economic hardship" of Grantor constitute a changed circumstance that would allow Grantor to unilaterally amend this Easement.

9. Assignment. This Easement is transferable by Grantee, but Grantee may only assign its rights and obligations hereunder to an organization that is a “qualified organization” at the time of the transfer under 26 U.S.C. § 170(h)(3) (or any successor provision then applicable) and authorized to acquire and hold conservation easements under ORS 271.715 to 271.795 (or any successor provisions then applicable). Grantee shall notify Grantor in writing, at Grantor’s last known address, in advance of such assignment. In the event that an assignee assumes the obligations of Grantee hereunder, then Grantee shall have no further liability with respect to this Easement.

10. Recording. Grantor shall immediately record this instrument, and any amendment agreed to pursuant to Section 8, in the official records of the county within which the Property is located, and in any other appropriate jurisdictions, and Grantee may re-record it at any time as may be required to preserve Grantee’s rights in this Easement.

11. Notice and Addresses. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other shall be in writing and either served personally or sent by mail, postage prepaid, to the address set forth below. Any party may change the address to which its notices are to be sent by duly giving notice pursuant to this Section.

To Grantor: _____

To Grantee: Metro
Land Conservation Program Director
600 NE Grand Avenue
Portland, OR 97232

With a copy to: Office of Metro Attorney
600 NE Grand Avenue
Portland, OR 97232

12. General Provisions.

(a) Governing Law. The interpretation and performance of this Easement shall be governed by the laws of the State of Oregon.

(b) Liberal Construction and Conservation Intent. Any general rule of construction to the contrary notwithstanding, this Easement shall be liberally construed in favor of the grant to effect the Purpose of this Easement and the policy and purpose of ORS Chapter 271. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the Purpose of this Easement that would render the provision valid shall be favored over any interpretation that would render it invalid. Any ambiguities in this Easement shall be construed in a manner which best effectuates the Conservation Values for the Property.

(c) Changed Circumstances. Grantor and Grantee acknowledge that future conditions may change in the areas neighboring the Property and the Property, including without limitation, increased development, land use, and zoning changes. Grantor and Grantee further acknowledge that such future conditions may result in various hardships to Grantor by virtue of the restrictions contained in this Easement, including without limitation, restrictions on the ability to develop the Property and the Property. However, Grantor and Grantee expressly intend that this Easement continue in perpetuity regardless of such changes conditions and circumstances and regardless of hardship, whether such hardship is economic or otherwise. In no event shall the hardship of Grantor constitute a changed circumstance that would allow Grantor to unilaterally terminate this Easement.

(d) Severability. If any provision of this Easement, or its application to any person, entity, or circumstance, is found to be invalid, the remainder of the provisions of this Easement, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected.

(e) Entire Agreement. This instrument sets forth the entire agreement of the parties with respect to the Property and supersedes all prior discussions, negotiations, understandings, or agreements relating to the Property, all of which are merged into this Easement. No alteration or variation of this instrument shall be valid or binding unless contained in an amendment that complies with Section 8.

(f) Termination of Rights and Obligations. A party's rights and obligations under this Easement terminate upon assignment of that party's interest in the Easement or transfer of the Property, except that liability for acts or omissions occurring prior to transfer shall survive assignment or transfer.

IN WITNESS WHEREOF, the parties have executed this Easement as of the date first set forth above.

GRANTEE:
METRO, an Oregon municipal corporation

GRANTOR:

By: _____
Michael Jordan, Chief Operating Officer

[name]

[name]

State of OREGON
County of MULTNOMAH

This instrument was acknowledged before me on _____, 20____ by Michael Jordan as Chief Operating Officer of Metro.

Notary Public - State of Oregon

State of OREGON
County of _____

This instrument was acknowledged before me on _____, 20____ by [name].

Notary Public - State of Oregon

State of OREGON
County of _____

This instrument was acknowledged before me on _____, 20____ by [name].

Notary Public - State of Oregon

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Exhibit A

Property Description

Exhibit B

Grantor's Prohibited Uses and Activities

1. The partition, division, subdivision, or *de facto* division of the Property.
2. Residential, commercial, or industrial use, activities, improvements, or development of any kind.
3. The excavating, draining, dredging, mining, drilling, removing or exploring for or extracting of minerals, oil, gas, coal, and other hydrocarbons, soils, sands, gravel, rocks or any other materials on or below the surface of the Property.
4. The manipulation or alteration, diminution, or drainage of any natural water course, wetland, stream bank, riparian area, shoreline, or body of water on the Property, any activity that causes or is likely to cause significant pollution of any surface of subsurface waters, or any use or activity that causes or is likely to cause significant soil degradation or erosion.
5. Agricultural activities of any kind, including, without limitation, the establishment and maintenance of a livestock corral, personal gardens, row crops, haying, grazing, livestock watering, or other pasture uses.
6. The placing, filling, storing, processing, disposing, dumping, depositing, abandonment, discharging, or release of any gaseous, liquid, solid, or hazardous wastes, substances, materials, trash, or debris of whatever nature on, in, over, or under the ground or into the surface or ground water of the Property.
7. The introduction or planting of any non-native, noxious, or invasive species.

STAFF REPORT

IN CONSIDERATION OF RESOLUTION NO. 10-4134, APPROVING THIRD ROUND FUNDING FOR NATURE IN NEIGHBORHOODS CAPITAL GRANTS

Date: March 18, 2010

Prepared by: Kathleen Brennan-Hunter, 503-797-1948
Mary Rose Navarro, 503-797-1781

BACKGROUND

The Nature in Neighborhoods capital grants program is funded by the 2006 natural areas bond measure, approved by voters to protect the region's water quality, fish and wildlife habitat and provide the public with greater access to nature. The Natural Areas program consists of three elements:

1. Regional natural area and trail corridor acquisition in the amount of \$168.4 million.
2. Local share program providing \$44 million to cities, counties and park districts to acquire natural areas, restore habitat, enhance public access to nature, and design and construct trails.
3. Nature in Neighborhoods capital grants program in the amount of \$15 million. Up to \$2.25 million is available annually through the life of the program.

The Nature in Neighborhoods capital grants program is intended to complement the regional and local share elements of the 2006 natural areas bond measure by funding projects that protect and enhance natural resources on public lands at a neighborhood level.

With a required match of at least \$2 for every \$1 in grant funding, the \$15 million available through this program is expected to provide at least \$45 million of investment in the region's nature-based infrastructure.

Eligibility Requirements

Proposed projects must fulfill the following minimum requirements to be considered:

- The total project cost must be at least \$50,000.
- The project must result in a publicly-owned capital asset within Metro's jurisdictional boundary or the region's urban growth boundary.
- The project must address at least three of the seven key criteria for the grant program.
- The project must demonstrate public and private partners who can and will leverage human and financial resources for the project.
- The project must commit to providing matching resources.

Evaluation Criteria

Project proposals are evaluated and competitively reviewed based on information provided in the application. Applicants must address how the project meets both the key and supplemental criteria as well as project feasibility factors such as the applicant's ability to implement the project. The key criteria are:

- "Re-nature" neighborhoods by increasing the presence and function of ecological processes.
- "Re-green" urban neighborhoods to enrich peoples' experience of nature and help strengthen a physical connection to the region's ecology.
- Demonstrate multiple benefits for people and natural systems.
- Demonstrate cost-efficient ecological design solutions.
- Increase the region's fish and wildlife inventory.

- Restore and/or improve habitats of concern.
- Provide universal access to the public.

Review Process

The nine-member Grant Review Committee, staffed by Metro, reviews all full applications based on the above criteria. The Grant Review Committee engages in a thoughtful and extensive evaluation of each application that included staff assessments, site visits and two Grant Review Committee meetings to arrive at recommendations for funding. The Metro Council decides all final grant awards.

Program Funding to Date

The Capital Grants program was first announced in September of 2007. The Metro Council approved the first round of funding in August 2008 with awards that totaled \$389,500. As with any new grant program, early funding decisions set an important precedent. The first three projects funded actively engaged a wide variety of both public and private partners, had benefits that reached beyond the project itself, and are located in nature-deficient neighborhoods.

In August 2009, the Metro Council approved the second round of funding, with awards to four projects totaling \$1,003,000. These projects provide access to nature in a nature-deficient neighborhood, protect rare habitat, model nature-friendly landscaping practices along highways, and promote conservation education.

Since then ten letters of interest have been reviewed. Of these letters, eight were invited to submit full applications on November 2, 2009. On January 14, 2010, the Grant Review Committee met to review the final slate of applications and to make a recommendation to the Metro Council.

The Recommendation

The Grant Review Committee recommends the following six projects for funding totaling \$1,874,115 from the Nature in Neighborhoods Capital Grants Program.

- A \$349,305 grant for the Re-Greening Park Avenue park & ride
- A \$55,330 grant for the Trillium Creek restoration project
- A \$158,000 grant for Baltimore Woods Connectivity Corridor
- A \$311,480 grant for the Crystal Springs Partnership
- A \$1,000,000 grant for Summer Creek Natural Areas Acquisition

These projects address the goals of the Natural Areas bond measure and meet the intent of the Nature in Neighborhoods Capital Grants Program because they:

- Engage diverse partnerships;
- Were initiated and driven by the community;
- Benefit water quality;
- Have the ability to influence other projects that will improve habitat and water quality; and
- Enhance experiences of nature in places where people live and work.

Conservation Easement

Government agencies taking fee title ownership of property being acquired with grant funds will be required to grant a conservation easement to Metro in order to preserve the natural features of the property that provide significant wildlife habitat values and contribute to water quality. Projects that include this requirement are the Perrin, Thorpe, and Bridgeview properties associated with the Baltimore Woods project and the Summer Creek acquisition. Portland's Bureau of Environmental Services is currently negotiating to acquire three conservation easements from private property owners as part of the Crystal Springs Partnership project. If these negotiations result in a fee simple acquisition using grant

funds, then the City of Portland will also grant a conservation easement to Metro.

ANAYSIS/INFORMATION

1. Known Opposition

None.

2. Legal Antecedents

Resolution No. 06-3672B, "For the Purpose of Submitting to the Voters of the Metro Area A General Obligation Bond Indebtedness in the Amount of \$227.4 Million to Fund Natural Area Acquisition and Water Quality Protection" was adopted March 9, 2006.

Ordinance No. 07-1163, "Amending Metro Code Chapter 2.19 to Establish the Nature in Neighborhoods Capital Grants Review Committee, and Declaring an Emergency" was adopted November 1, 2007

Metro Code Section 2.19.230, "Nature in Neighborhoods Capital Grants Review Committee," establishing the committee and prescribing its authority to review capital grants applications and make grant funding recommendations to the Metro Council.

Resolution No. 07-3874, "Confirming the Appointment of the Chair of the Nature in Neighborhoods Capital Grants Review Committee" was adopted December 6, 2007

Resolution No. 07-3879, "Confirming the Appointment of Members to the Nature in Neighborhoods Capital Grants Review Committee" was adopted November 1, 2007

Resolution No. 08-3965, "Approving First Round Funding for Nature in Neighborhoods Capital Grants" was adopted August 7, 2008

Resolution No. 09-4027, "Confirming the Reappointment of Members to the Nature in Neighborhoods Capital Grants Review Committee, Designating the Chair, and Appointing a New Metro Natural Resources Staff Representative" was adopted February 19, 2009.

Resolution No. 09-4050, "Approving Second Round Funding for Nature in Neighborhoods Capital Grants" was adopted on August 13, 2009.

3. Anticipated Effects

This Resolution awards Nature in Neighborhoods capital grants and begins the individual contract award process for the selected grant applicants. Projects are from one to three years in length.

4. Budget Impacts

The 2006 Natural Areas Bond authorized spending up to \$15 million toward this program, with no more than \$2.25 million spent in any given fiscal year. This is the third round of grants recommended for funding. The adopted FY 2009-10 budget includes the necessary appropriation authority for reimbursement of these grants.

RECOMMENDED ACTION

The Chief Operating Officer recommends adoption of Resolution No. 10-4134