

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AUTHORIZING THE ) RESOLUTION NO. 10-4155  
CHIEF OPERATING OFFICER TO PURCHASE )  
CERTAIN PROPERTY IN THE ROCK CREEK ) Introduced by Chief Operating Officer  
HEADWATERS AND GREENWAY TARGET ) Michael J. Jordan, with the concurrence  
AREA UNDER THE 2006 NATURAL AREAS ) of Council President David Bragdon  
BOND MEASURE AND SUBJECT TO )  
UNUSUAL CIRCUMSTANCES )

WHEREAS, at the general election held on November 7, 2006, the voters of the Metro region approved Measure 26-80, the 2006 Natural Areas Bond Measure submitted to the voters to preserve natural areas and clean water and protect fish and wildlife (the “Measure”); and

WHEREAS, on March 1, 2007, the Council approved Resolution No. 07-3766A “Authorizing the Chief Operating Officer to Purchase Property with Accepted Acquisition Guidelines as Outlined in the Natural Areas Implementation Work Plan,” (the “Acquisition Parameters and Due Diligence Guidelines”); and

WHEREAS, on September 6, 2007, the Council approved Resolution No. 07-3834, “Approving the Natural Areas Acquisition Refinement Plan for the Rock Creek Headwaters and Greenway Target Area,” establishing a target area goal to “protect the upper watershed to meet water quality protection goals in the lower watershed;” and

WHEREAS, Resolution No. 07-3834 established as a Tier I objective the acquisition and protection of “the riparian corridors and important upland habitat in the Abbey Creek Headwaters;” and

WHEREAS, staff have entered into a purchase and sale agreement with the current property owner (the “Seller”) to purchase 40 acres of property straddling Alder Creek, also known as North Abbey Creek, identified as a Tier I objective in the target area, as more particularly identified and described on Exhibit A to this resolution (hereinafter, the “Property”); and

WHEREAS, in the course of its normal due diligence, Metro has commissioned Phase I and Phase II Environmental Site Assessments by a qualified environmental consultant and followed the consultant’s recommendations to do further analysis and cleanup work involving decommissioning an oil storage tank, removal of containers of liquid, and subsurface investigation for possible contaminants; and

WHEREAS, further soil contamination and debris were found, leading to a cleanup plan involving removal of soil and debris found in old dump piles; and

WHEREAS, it has been determined by the Metro natural resources staff that to undertake the recommended actions at this time would not be prudent due to soil moisture conditions and that it is better to wait until mid-summer; and

WHEREAS, Metro and the Seller have reached a tentative agreement to hold back funds from the Seller’s closing proceeds to pay for the estimated cost of the soil and debris removal and that Metro will not close on the Property without such a firm agreement in place, constituting an unusual circumstance; and

WHEREAS, Metro staff is satisfied that if the proposed cleanup plan is implemented the property will be in an acceptable condition and the clean up plan will, in the language of the Acquisition Parameters and Due Diligence Guidelines, "substantially eliminate the probability of future environmental liability to Metro, based on information provided in the Phase II Environmental Assessment;" and

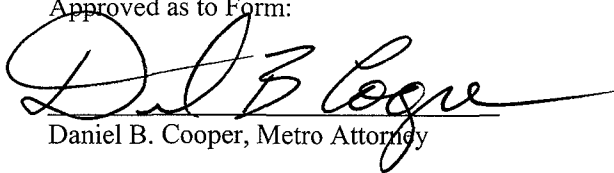
WHEREAS, because the environmental consultant has performed extensive analysis and both they and Metro believe the risk is quantifiable and the proposed clean up will be covered by the holdback funds from the Seller, the closing of the property at this time ensures that this opportunity to protect and restore 40 acres of valuable upland and stream habitat is not lost to the citizens of the region; now, therefore

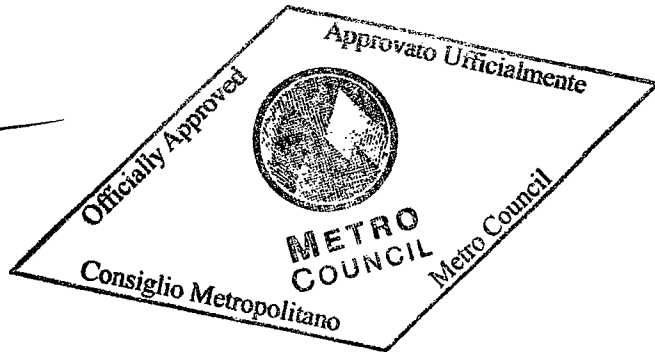
BE IT RESOLVED that the Metro Council hereby authorizes the Chief Operating Officer to acquire the Property, as identified in Exhibit A, by holding back funds from the closing proceeds to pay for the proposed soil and debris removal, notwithstanding the unusual circumstances related to the environmental condition of the Property, provided that the acquisition is otherwise in accord with all of the other Acquisition Parameters and Due Diligence Guidelines of the Natural Areas Implementation Work Plan.

ADOPTED by the Metro Council this 3<sup>RD</sup> day of JUNE 2010.

  
David Bragdon, Council President

Approved as to Form:

  
Daniel B. Cooper, Metro Attorney



## Exhibit A to Resolution No. 10-4155

**Target Area:** Rock Creek Headwaters and Greenway

**Description:** Staff has identified an opportunity to protect a 40-acre property (the “Property”) that is adjacent to 40 acres previously acquired with 2006 Bond Measure funds. Alder Creek, an important headwater of Abbey and Rock Creeks, runs through the properties before joining Abbey Creek approximately one mile to the south.

Approximately one-half of the Property is a mix of mature riparian and upland forested habitat, containing red alder, Douglas-fir, western red cedar and bigleaf maple. The confluence of a major tributary to Alder Creek is located on the Property as well as six ephemeral streams. The area is well known as an “elk highway” and acquisition of the Property will contribute to preservation of a significant wildlife corridor. A 100 year old home and some outbuildings remain as evidence of the Property’s history as a former orchard and agricultural property.

A Tier I objective of the Rock Creek Headwaters and Greenway target area is to acquire and protect the riparian corridors and important upland habitat in the Abbey Creek headwaters; acquisition of this property will double the current level of protection and serve as an anchor for future efforts.

### **Bond Criteria**

**Addressed:** Protect the upper watershed to meet water quality protection goals in the lower watershed.

Acquire and protect the riparian corridors and important upland habitat in the Abbey Creek Headwaters.

### **Property**

**Identification:** Tax Parcels 400 and 500 in Section 5C of Township 1 North, Range 1 West of the Willamette Meridian.

**Sellers:** Private Party

**Size:** 40 acres

### **Stream**

**Frontage:** Approximately 3,900 feet of Alder Creek

**Conditions:** Standard due diligence; subject to unusual circumstances regarding the environmental condition of the Property.

## **STAFF REPORT**

### **IN CONSIDERATION OF RESOLUTION NO. 10-4155, FOR THE PURPOSE OF AUTHORIZING THE CHIEF OPERATING OFFICER TO PURCHASE CERTAIN PROPERTY IN THE ROCK CREEK HEADWATERS AND GREENWAY TARGET AREA UNDER THE 2006 NATURAL AREAS BOND MEASURE AND SUBJECT TO UNUSUAL CIRCUMSTANCES**

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Date: June 3, 2010

Prepared by: Hillary Wilton, 503-797-1845

## **BACKGROUND**

Metro has an opportunity to acquire a relatively large parcel of land in Tier I of the Rock Creek Headwaters and Greenway target area. The 40-acre subject Property, which is more specifically identified in Exhibit A attached to the Resolution (the "Property"), is adjacent to 40 acres currently owned by Metro and acquired in two separate transactions in September 2009, and April 2010. The three properties are connected by Alder Creek, also known as North Abbey Creek, an important headwater of Rock Creek. Acquisition of the Property will serve to double the existing habitat protection and restoration work Metro is able to accomplish in an area that borders the edge of the Portland urban environment. Metro staff has entered into a Purchase and Sale agreement with the owners of the Property (the "Seller").

The Metro Council adopted the Refinement Plan for the Rock Creek Headwaters and Greenway in September 2007. The Property is identified on the Council-approved confidential refinement map for the target area and meets the Tier I objective to acquire and protect the riparian corridors and important upland habitat in the Abbey Creek headwaters. Alder Creek drains into Abbey Creek approximately one mile south of the Property.

The rolling terrain Property contains approximately 3,900 feet of stream frontage on Alder Creek. The upland portion of the Property was developed with a 1907-era single family home with a commanding view of the lowlands to the south, and some outbuildings. An unmaintained orchard, open grass fields and forested areas fill the remainder of the Property. The 10-acre closed canopy riparian forest is composed of red alder, Douglas-fir and western red cedar. Ten acres of upland forest repeat those species and include bigleaf maple. The intact forested component of the Property is in very good condition though it lacks snags and large down woody debris. The entire Property is mapped as upland closed conifer forest on the Oregon Natural Heritage Information Center (ONHIC) historic vegetation map. The confluence of a major tributary to Alder Creek is located on the Property as well as at least six ephemeral streams. Evidence of a large elk herd is found in the area, and elk have been sighted on at least two site visits. It is known that a large elk herd inhabits the area and acquisition of the Property, in addition to the existing Metro acreage, will help protect an important wildlife corridor connecting to the lower Tualatin range. The eastern Property line abuts the Urban Growth Boundary, and a 30-acre undeveloped homeowner's association parcel serves as an additional protective buffer. There is potential for increasing the upland forest through reforestation of the 20-acre field. The parcel size of the Property is important because many of the other parcels along Abbey and Rock Creeks in this target area tend to be between 5- and 10-acre sites.

This Resolution requests authorization for the Chief Operating Officer (COO) to purchase the Property at the negotiated purchase price notwithstanding an unusual circumstance related to its environmental condition. As part of Metro's due diligence, our environmental consultant ("Hahn & Assoc.") conducted a Phase I Environmental Site Assessment (the "ESA") which recommended further tests and some

remedial actions. Hahn & Assoc. has been conducting further tests and remedial work, but the entirety of the work needed to regard the Property as clean cannot be completed before the scheduled closing date of the Property due to soil stability issues as detailed below. The Council-approved Acquisition Parameters and Due Diligence Guidelines of the Natural Areas Implementation Work Plan (the "Work Plan") prohibit the COO from closing on an acquisition involving such unusual circumstances without first obtaining the Council's approval.

### **Unusual Circumstance - Environmental Review**

The Phase I ESA documented agricultural use on the Property through the 1980s, including orchard cultivation through at least the 1940s and subsequent use for hay/grass cultivation and pastureland. Numerous small outbuildings (barns, sheds, granary, fuel shed) were also present on the west-central portion of the Property throughout the 1960s and 1970s, suggesting intense usage as a staging/maintenance area for farm equipment, vehicles and supplies during that time. By the late 1980s, many of the small outbuildings had been removed and the pastureland no longer appeared to be actively utilized. There were also approximately eight drums, still partly filled with unknown substances, located in several locations on the Property. The ESA set forth three specific recommendations including:

- a. Decommissioning an above ground oil storage tank ("AST") and subsurface investigation of the soil beneath for contaminants;
- b. Subsurface investigation of the former orchard and row crop areas to determine if persistent agricultural chemicals have adversely impacted site soils;
- c. Subsurface investigation of a portion of the site that appeared to have been used as a staging/maintenance area for farm equipment in the 1960s and 1970s. The area included the abandoned drums, a former fuel shed and a possible livestock pen. The recommendation included characterizing all remaining hazardous materials and containers for disposal at an appropriate recycling/disposal facility. In addition, significant blackberry overgrowth had to be cleared in order to confirm that additional drums or other debris were not located on the Property.

Metro and the Seller agreed to implement the recommendations, with the Seller agreeing to pay for the oil storage tank work (item a) and the removal of the drums, and with Metro paying for the subsurface investigation, as is our standard practice in carrying out our due diligence property investigations.

Metro's environmental consultant has successfully completed the removal of the AST and associated contaminated soil. The investigation of the former orchard area did not detect the presence of hazardous levels of pesticides or other contaminants, nor did the investigations of the former fuel shed area and the livestock pen. The investigation of the contents of the drums proved more complicated than originally estimated, with additional laboratory testing required, which ultimately confirmed that the drums contained mostly oil and water, which proved not to be considered hazardous waste and was appropriately disposed.

The Phase II investigation did find, however, that there were four locations where drums had leaked and contaminated underlying soil, two of which were petroleum contamination, one was lead from spilled paint, and the last was low-level metals contamination (barium). Additional testing has once again concluded, however, that the extent of all of that contamination is confined, and the cost to remediate it is relatively certain. In addition, clearing the additional blackberries on the Property resulted in the identification of two ravines that were used as dumping areas over the years on the Property. These areas were each filled with miscellaneous debris including more drums, old household appliances, tires, etc. In one of these areas there was a noticeable petroleum odor and laboratory samples have concluded that the soil in that location is also contaminated and will need to be removed. Additional sampling has defined the extent of that contamination as well. A laboratory sample taken from below the other dumping area

did not show signs of contamination, and it should be noted that Metro's environmental consultant has informed Metro that none of the contamination identified on the Property has risen to the level where reporting to DEQ is required. Metro's environmental consultant has estimated that cleanup of the two dumpsites and the removal of the remaining contaminated soil on the Property, including resampling to confirm that all contamination has been removed, will cost \$32,700.

Typically, Metro would require completion of the Phase II work before closing on a property acquisition. The problem with that approach in this instance, is that the two affected areas are located at the heads of small drainages where the removal of the garbage and any contaminated soil will require the use of a small backhoe. Until the cessation of the current rainy period, these soils will remain wet with some areas of surface runoff and seeps. Using heavy track machines prior to the soils drying out will cause significant soil compaction, displacement, rutting and channelization of erosion. Mitigation of soil disturbance during and after removal will likely be more complex and extensive if removal is done prior to dry soil conditions. In addition, Metro intends to remove the old house located on the Property, and the removal of the debris and any contaminated soil can be efficiently combined with removal of the structure as part of stabilization activities.

The Seller has agreed to provide a \$50,000 holdback in escrow to pay for the additional cleanup work on the Property, if Metro agrees to close as soon as possible, but is unwilling to extend the agreement further.

Staff believes that the environmental condition of the Property has been adequately characterized by Metro's environmental consultant and that the current cleanup estimates are reliable. Closing on the Property prior to completing this work will, however, expose Metro to the risk that additional contamination may be discovered at the Property. By closing on the acquisition prior to completing the cleanup work, Metro would lose its "innocent purchaser" defense with respect to any such contamination. Thus, closing at this time is not without risk. Metro staff believe, however, that the risk of any further discovery is relatively low, and recommends that the Council approve this Resolution to authorize the Chief Operating Officer to close this transaction.

## **ANALYSIS/INFORMATION**

### **1. Known Opposition**

None.

### **2. Legal Antecedents**

The voters approved Metro's 2006 Natural Areas Bond Measure at the general election held on November 7, 2006.

Resolution No. 07-3766A "Authorizing the Chief Operating Officer to Purchase Property With Accepted Acquisition Guidelines as Outlined in the Natural Areas Implementation Work Plan," was adopted by the Metro Council on March 1, 2007, and established the Acquisition Parameters and Due Diligence Guidelines for the purchase of properties as part of the 2006 Natural Areas Bond Program.

Resolution No. 07-3834, "Approving the Natural Areas Acquisition Refinement Plan for the Rock Creek Headwaters and Greenway Target Area," was adopted by the Metro Council on September 6, 2007.

**3. Anticipated Effects**

The 40-acre acquisition will build on an existing Metro acreage, creating an anchor assemblage that substantially protects an important stream and wildlife corridor in close proximity to areas that are changing from a rural to an urban nature. The Property will help meet Metro's Tier I acquisition goal and provide a link to proposed future greenways. Metro will undertake the final contamination cleanup activities on the Property after closing, once the weather becomes drier, and will bear the risk and potential additional liability if further contamination is identified during such activities.

**4. Budget Impacts**

Metro's contribution to the Property shall be funded with 2006 Regional Bond proceeds. The Seller is expected to pay for the majority of the environmental cleanup work.

**RECOMMENDED ACTION**

The Chief Operating Officer recommends passage of Resolution No. 10-4155.