



City of Portland
Bureau of
**Planning and
Sustainability**

Sam Adams, Mayor
Susan Anderson, Director

Planning

1900 S.W. 4th Ave., Ste. 7100
Portland, OR 97201-5350

Phone 503-823-7700
FAX 503-823-7800
TTY 503-823-6868

Sustainability

721 N.W. 9th Ave., Ste. 350
Portland, OR 97209-3447

Phone 503-823-7222
FAX 503-823-5311
TTY 503-823-6868

www.portlandonline.com/bps

An equal opportunity employer

Printed on recycled paper

EXHIBIT: 6 AGENDA ITEM: 6
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 10-19-10
PAGES: _____
SUBMITTED BY: Shannon Buono
City of Portland

October 18, 2010

Chair John VanLandingham and
Members of the Land Conservation and Development Commission
635 Capitol Street NE, Suite 150
Salem, Oregon 97301

RE: Amendment to Willamette River Greenway Boundary

Dear Chair VanLandingham and Members of the Commission,

Thank you for hearing this request to amend the Willamette River Greenway boundary along a portion of the river in Portland. The Portland City Council unanimously adopted the River Plan/North Reach on April 15, 2010, with an effective date of January 1, 2011.

On October 8, 2010 you received a report from Rob Hallyburton and Amanda Punton, Department of Land Conservation and Development staff, recommending that the Commission approve the request. Section V of the October 8 staff report addresses testimony from Gunderson, LLC and Schnitzer Steel Industries, Inc. In response to their testimony, Department staff recommended that the City of Portland provide additional information concerning:

1. the economic impacts of the boundary amendment; and
2. the location of the proposed boundary in relation to 150 feet from ordinary low water and the location of lands to be acquired by the City.

1. Economic Impacts.

The proposed Willamette River Greenway boundary amendment affects 363 acres in the North Reach. Three hundred twelve acres will be removed from the boundary, and 51 acres will be added to the boundary. The overall economic impacts of the River Plan and the boundary amendment are balanced. The River Plan/North Reach includes many components that will have significant positive economic impacts on North Reach, and the city. These components include:

- Designating Prime Industrial Land in the North Reach, and strictly limiting comprehensive plan map amendments that would change the industrial sanctuary designation of Prime Industrial Land to a non-industrial designation;
- Reinforcing the existing River Industrial overlay zone which preserves river front parcels in the zone for river-dependent and river-related industrial uses. Preserving river front parcels for river-dependent and river-related industrial uses will ensure that the working harbor remains viable;
- Identifying and prioritizing a broad and coordinated program of public investment in infrastructure improvements to support existing and future industrial development;
- Reducing regulations where possible to encourage development and redevelopment;
- Reducing the number of discretionary land use reviews required for development by implementing clear and objective development standards where possible;
- Clarifying regulations that have been identified as vague or ineffective; and

- Implementing several fee-in-lieu options for meeting development standards and approval criteria as a way to maximize on-site development potential.

Reduces regulation where possible:

Both Gunderson and Schnitzer specifically mention the economic impacts of the new vegetation enhancement standard. The 51 acres to be included within the boundary will be subject to the new vegetation enhancement standard when the River Plan/North Reach goes into effect. The 51 acres are portions of sites where the bulk of the site is currently within the boundary and subject to the existing greenway regulations. The application of the new vegetation standard to the additional 51 acres can narrowly be described as having a negative impact, however changes to other greenway regulations will have an overall positive economic impact on the sites as whole.

For example, the bulk of the Schnitzer site is currently within the greenway boundary, and development on the site is subject to the existing greenway regulations including a greenway setback standard, and a greenway landscaping standard. In addition, greenway review is required for most development that occurs within 75 feet of the top of bank. The River Plan/North Reach eliminated the greenway setback and the greenway landscaping standards, effectively increasing the amount land available for non-river dependent and non-river related development and redevelopment on the Schnitzer site. In addition, there will be fewer instances where development on the Schnitzer site will trigger a discretionary greenway review because the area within which a review could be required will be smaller, and some types of development will be allowed through clear and objective development standards.

Reduces cost on a permit by permit basis:

The new standard will require that the applicant for a development permit spend 1% of permit value on planting vegetation on-site, or spend 1% of permit value on planting vegetation off-site by paying the 1% to the City. Currently, applicants are required to spend up to 10% of permit value on coming into compliance with the existing greenway landscape standard. The new standard reduces by 90% the amount an applicant must spend on vegetation/landscaping on a per permit basis. The new standard also increases the amount of vegetation required in total. With each permit, the property owner will spend 1% of permit value on vegetation until up to 15% of the site is vegetated or an amount equal to the cost to plant 15% their site has been paid to the City for off-site plantings. In other words, the cost to comply with the new standard will be less on a permit by permit basis than the cost to comply with the existing standard, but the total cost to comply with the new standard over time could be more (there are incentives built into the vegetation enhancement standard that can reduce the total amount of vegetation required to 10% or 5%).

Increases flexibility and maximizes on-site development potential:

Schnitzer describes the new standard as converting industrial land to non-industrial land. This is a misleading statement. The vegetation enhancement standard is flexible, and allows all of the required planting to occur off-site. The vegetation enhancement standard was developed specifically to address industries' concerns that the existing greenway landscape standard is inflexible, and of little worth ecologically. Under the new standard, if an applicant does not have the space to accommodate vegetated areas, the applicant can pay the City to plant the vegetation in an off-site restoration area managed by the City. The new standard will achieve the enhancement objectives of Goal 15, while also addressing the desire of property owners to maximize their development potential. The new standard includes incentives that encourage on-site planting by reducing the total amount of vegetation required over time. If an applicant plants vegetation in an identified natural resource area, then the overall amount of vegetation required is reduced to 10% of total site area. If the vegetation is planted on the river bank, then the overall amount of vegetation required is reduced to 5% of total site area.

Increases ecosystem service benefits:

The new vegetation enhancement standard will also have positive environmental impacts that can be translated into positive economic impacts. The environment in the North Reach has very limited fish and wildlife habitat. Certain salmonid species have been listed by the federal government as threatened under the Endangered Species Act. The City of Portland is committed to improving conditions for fish and wildlife in the North Reach so that the

threatened fish species do not become endangered. Increasing the amount of vegetation in and along the river in the North Reach will help aid in the recovery of the threatened species. There are additional ecosystem benefits from increasing the amount of vegetation in the North Reach including improvements in water quality and air quality, reduction in heat island effects, and improvements to aesthetics and recreation. All of these environmental benefits translate into positive economic impacts on the community as a whole, and they offset the negative impacts of increasing the amount each property owner must spend over time to enhance vegetation in the North Reach.

Protects jobs and the economy:

Schnitzer points out that the boundary amendment will result in the imposition of new use restrictions on the 51 acres being added. This is true, however, the acres being added to the boundary are portions of river front parcels located in the heart of the city's working harbor. Portland's working harbor is a west coast trade gateway and Oregon's largest seaport, where the state's primary shipping channel, interstate rail lines, highways, and petroleum pipeline all come together. This vital resource is an important part of the region's economic prosperity, supporting 40,000 workers, and about one in eight jobs in the metro region. Since at least 1987, the City of Portland has supported the working harbor by applying use restrictions that ensure that river front parcels are reserved for river-dependent and river-related industrial uses. Without the limitations, river front parcels in the working harbor could convert to non-river dependent uses, a situation that would have long-term negative economic impacts on the working harbor. Ensuring that the 51 acres of river front parcels remain in a river-dependent and river-related use will have long-term positive economic impacts, which off-sets any negative economic impact that may occur to an individual property owner from having to go through a discretionary review to convert to a non-river dependent use.

2. The location of the proposed Willamette River Greenway boundary in relation to 150 feet from the ordinary low water mark, and to the location of City identified acquisition sites.

Attached is a map showing the location of the proposed Willamette River Greenway boundary and the location of a line measured 150 feet from the edge Willamette River. The proposed Willamette River Greenway boundary is set to include at least the land situated within 150 feet from the edge of the Willamette River. The line that is 150 feet from the edge of the river is a proxy for 150 feet from the ordinary low water mark. The City of Portland does not have GIS data on the location of the ordinary low water mark. The edge of the river is a GIS data layer that was created by drawing a polygon that includes the Willamette River and associated beaches. The polygon was drawn off an aerial photograph that was taken in July, prior to the time in the season when the Willamette River would have reached its low water point. This means that when we measure and draw a line that is 150 feet from the edge of the river, we include more land than if the measurement was taken from the ordinary low water point. Therefore, the proposed boundary includes at least all lands situated within 150 feet from the ordinary low water line on each side of the channel of the Willamette River as required by ORS 390.318(1), and likely more.

The City estimates that there is on average 192 acres per river mile within the proposed Willamette River Greenway boundary in the North Reach. The existing boundary includes on average 208 acres per river mile. The attached map shows the river miles. The table shows the amount of land per river mile, and the average.

The attached map also shows the City's identified acquisition sites. The City's acquisition sites include 18 sites for natural resource restoration, and 11 viewpoints. Three of the restoration sites and 3 of the viewpoints are located outside of the proposed boundary. The existing greenway boundary does not include all lands to be acquired by the City of Portland.

Also attached to this letter is a map showing the proposed boundary amendment in the neighborhood of Linnton. This area was shown on the maps included with the August 20, 2010 staff report, but City staff mistakenly left a portion of the area out of the maps included with the October 8, 2010 staff report. The attached map should replace page 2 of Attachment B to the October 8, 2010 DLCD staff report.

We hope that this additional information is helpful.

Sincerely,

Shannon Buono

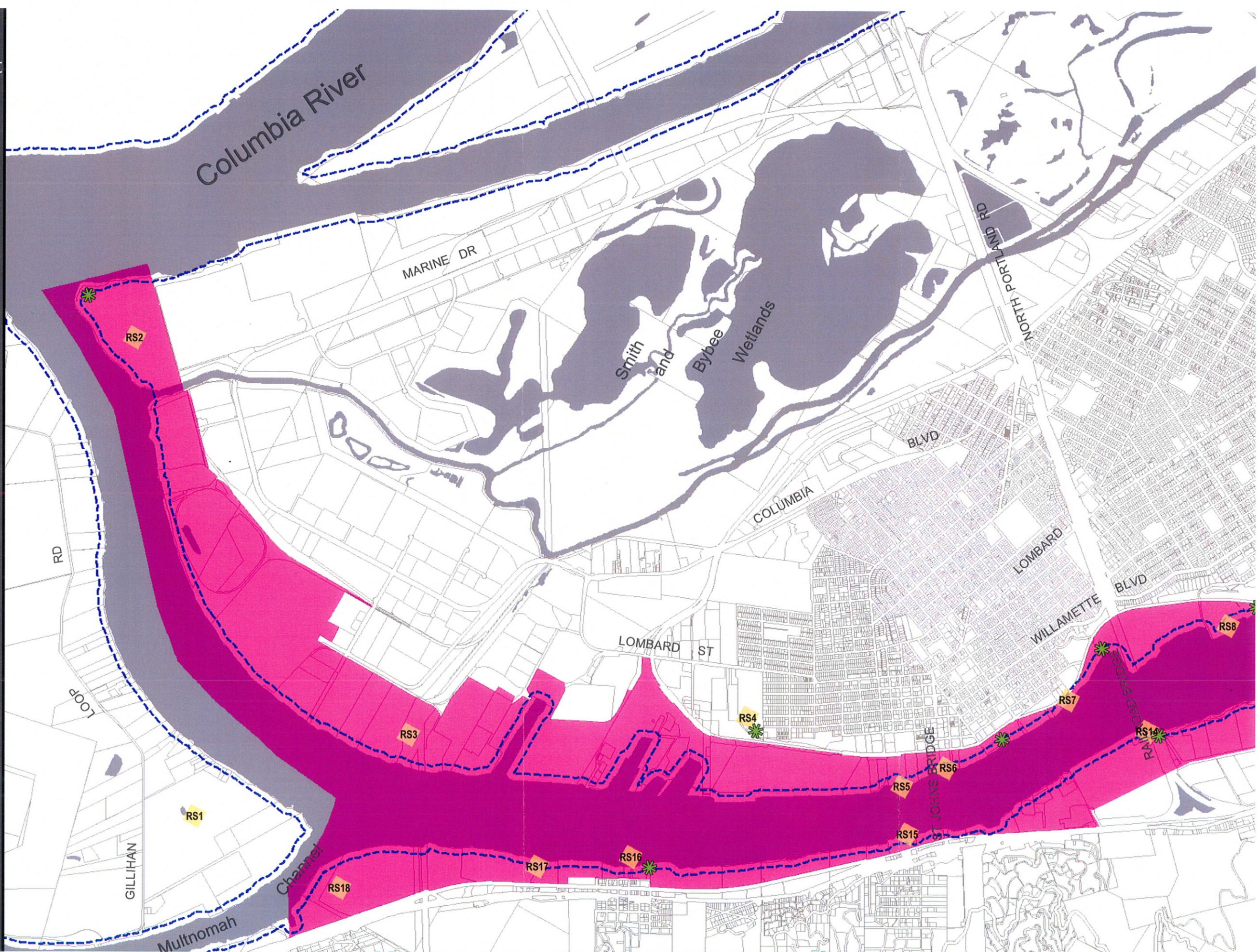
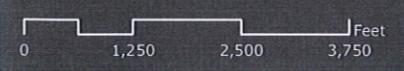
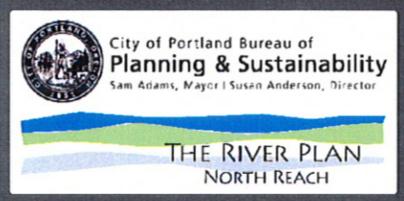
Shannon Buono, City Planner II

Proposed Willamette River Greenway Boundary Amendment
 Greenway Acquisition Sites and Proposed Greenway Boundary

Sheet #1 of 2

- Legend
-  viewpoint acquisition sites
 -  restoration acquisition sites
 -  150 feet from river (proxy for ordinary low water)
 -  proposed willamette greenway boundary
 -  Taxlots
 -  Waterbodies

October 2010
 City of Portland | Bureau of Planning and Sustainability
 Geographic Information System
 The information on the map was derived from digital data-bases on the City of Portland, Bureau of Planning and Sustainability GIS. Care was taken in the creation of this map but it is provided "as is". The City of Portland cannot accept any responsibility for error, omissions, or positional accuracy, and therefore, there are no warranties which accompany this product. However, notification of any errors will be appreciated.



Proposed Willamette River Greenway Boundary Amendment

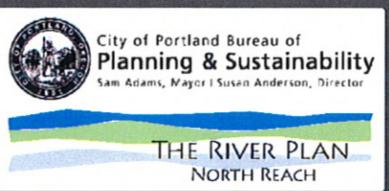
Greenway Acquisition Sites and Proposed Greenway Boundary

Sheet #2 of 2

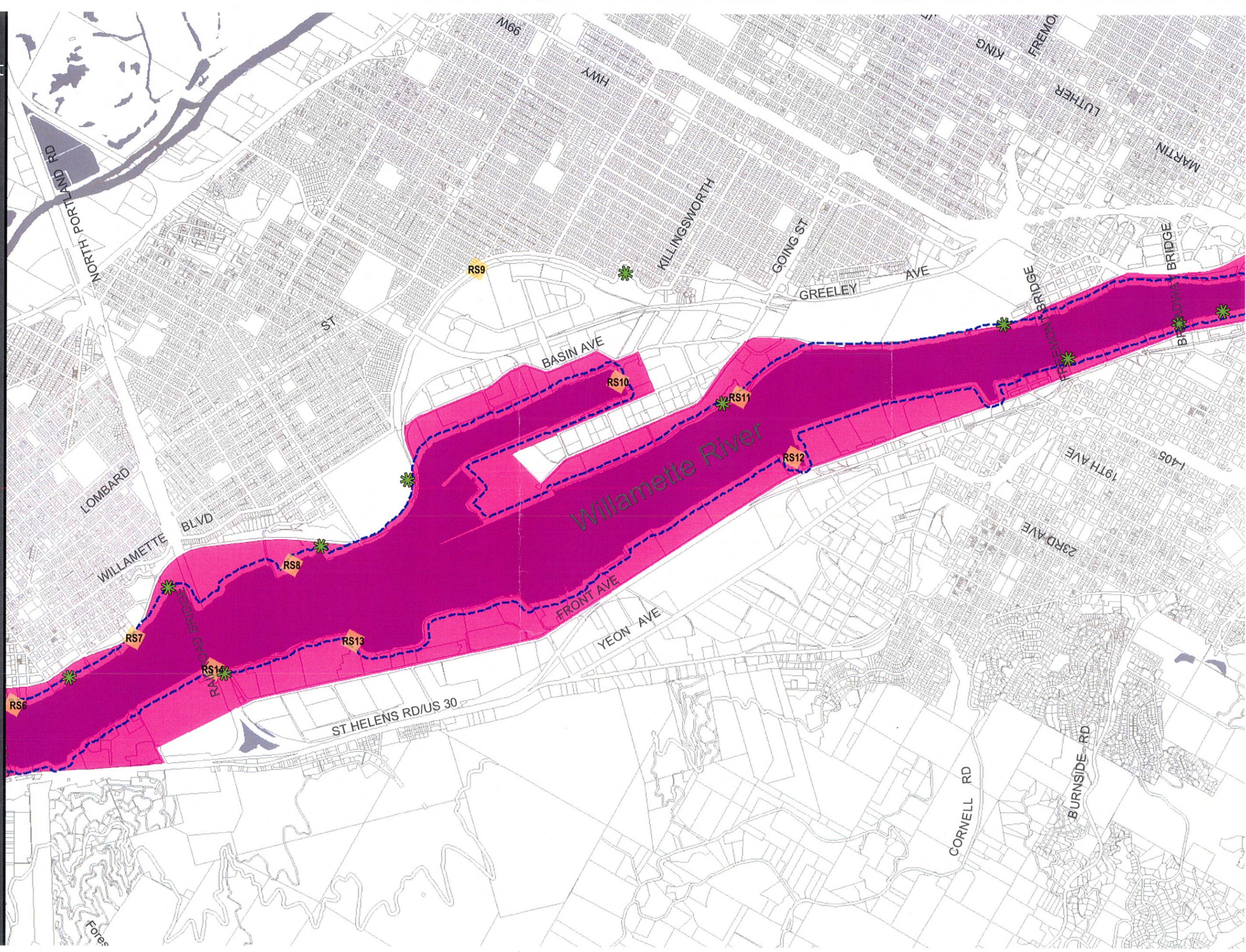
- Legend
- viewpoint acquisition sites
 - restoration acquisition sites
 - 150 feet from river (proxy for ordinary low water)
 - proposed willamette greenway boundary
 - Taxlots
 - Waterbodies

October 2010
City of Portland | Bureau of Planning and Sustainability
Geographic Information System

The information on the map was derived from digital data-bases on the City of Portland, Bureau of Planning and Sustainability GIS. Care was taken in the creation of this map but it is provided "as is". The City of Portland cannot accept any responsibility for error, omissions, or positional accuracy, and therefore, there are no warranties which accompany this product. However, notification of any errors will be appreciated.



0 1,250 2,500 3,750 Feet



A Capital Improvement Projects (cont.)

Project ID	Name	Restoration/Mitigation Project (R) Restoration site only	Property Owner	Contamination		Estimated Cost			Ranking
				Water / Bank	Land	Acquisition (millions)	Restoration (millions)	Total (millions)	
RS12	Balch Cove	Daylight creek mouth, add sand and gravel to create a confluence pool for refugia, improve and revegetate banks, add large woody debris, improve stormwater management	Private, Port, City	3	Unknown	\$0.3 - \$0.7	\$4	\$4 - \$5	Medium
RS13	Saltzman Creek	Enhance confluence. Excavate and lay back steepened banks to increase shallow water habitat, revegetate banks and creek mouth.	Private	3+	3+	\$2 - \$0.6	\$5	\$5 - \$6	Low
RS14	Doane Creek	Daylight part of creek, establish passage under Front Avenue, enhance connectivity to Forest Park, revegetate and restore banks	Private, City	Creek 3	South of Bridge 4	\$4 - \$10	\$17	\$21 - \$27	Medium
RS15	Transloader International	Daylight stream, revegetate stream mouth to create fish refugia at confluence area	Transloader International	2	2	\$0.06 - \$0.2	\$0.5	\$0.6 - \$0.7	Low
RS16	Limnton	Daylight stream mouths, create off-channel habitat fed by seasonal streams and provide connectivity, improve riverbanks, remove invasives and revegetate with native species.	Private	2-3	2	\$2 - \$5	\$8	\$12 - \$18	High-Medium
RS17	Owens Corning	Increase structural diversity in floodplain and riparian areas, add large wood, lay back riverbank, recreate off-channel habitat and seasonal stream from Forest Park	Owens Corning	2	2	\$1 - \$4	\$7	\$8 - \$11	Medium
RS18	Harborton Wetlands	Remove berm to re-establish off-channel connection to the river, possibly redirect Miller Creek to intersect this off-channel area, remove invasive species and revegetate with native species, lay back riverbank, place large wood, add riparian vegetation	PGE	2	1	\$9 - \$25	\$12	\$21 - \$37	Medium-Low
Total						\$39 - \$105	\$143	\$181 - \$247	

A. Capital Improvement Projects										
Project ID	Name	Restoration/Mitigation Project (R) Restoration site only	Property Owner	Contamination		Estimated Cost			Ranking	
				Water / Bank	Land	Acquisition (millions)	Restoration (millions)	Total (millions)		
RS1	Sauvie Island Properties	Enhance upland wetland and revegetate	Private	1	1	\$0.8 - \$3	\$16	\$17 - \$19	Medium	
RS2	Kelley Point Park	Prepare a master plan for Kelley Point Park. Designate areas where appropriate to add large woody debris and boulders, revegetate with native species. (R)	City-Parks	Unknown	1	N/A	\$16	\$16	Medium	
RS3	South Rivergate Corridor	Enhance wetlands, revegetate below powerlines and increase wildlife connectivity	Port, Private	2	1	\$10 - \$28	\$9	\$19 - \$37	H-M	
RS4	Crown Cork/ Baltimore Woods	Maintain and enhance existing oak habitat, remove invasive species along the bluff, revegetate	Multiple Private	Unknown	Unknown	\$2 - \$6	\$2	\$4 - \$8	Medium	
RS5	Mar Corn Property	Create wetland habitat where conditions allow, treat stormwater outfall with swale outside of habitat area, improve riverbanks, revegetate	Port	3	2 - 3	\$0.05 - \$0.1	\$1	\$0.25-\$0.3	Low	
RS6	Cathedral Park	Excavate for stormwater retention, create stormwater swale, vegetate with hydrophytes, add large woody debris. (R)	City-Parks	In-water 3; Bank 1	1	N/A	\$2	\$2	High	
RS7	Willamette Cove	Create off-channel habitat, remove riprap, recreate shallow water habitat and floodplain, revegetate	Metro, City	3	1	N/A	\$11	\$11	High	
RS8	University of Portland	Restore floodplain, expand shallow water habitat, regrade riverbanks, add complexity with wood and boulders, revegetate	University of Portland	3	2 - 3	\$3 - \$9	\$21	\$24 - \$30	Medium	
RS9	Mock's Crest	Maintain and enhance oak habitat, remove invasive species	City, Private	1	1	\$3 - \$7	\$6	\$6	Medium	
RS10	Swan Island Lagoon	Treat stormwater from boat launch, excavate to increase inundation area and frequency of inundation, increase large wood, revegetate and improve banks	City, Port, Private	3	2 - 3	\$0.7 - \$2	\$2	\$3 - \$5	High	
RS11	Swan Island Beaches	Remove riprap, add riparian vegetation	Port, City	In-water 3; Bank 2	Unknown	\$2 - \$5	\$5	\$7 - \$10	Medium	

**Proposed City of Portland North Reach Willamette Greenway Boundary area by river mile*
 (note: River miles are not meant for dry land measures)
 river mile reach lines were estimated by extending outward to the boundaries of the Greenway**

RIVER MILE	TYPE	ACRES	AREA (SQFT)
1	Land	114	4972620
2	Land	203	8843945
3	Land	174	7563824
4	Land	350	15229294
5	Land	241	10488018
6	Land	130	5680701
7	Land	178	7750796
8	Land	157	6834628
9	Land	277	12068657
10	Land	188	8180442
11	Land	103	4506498
	average acres per river mile	<u>192</u>	

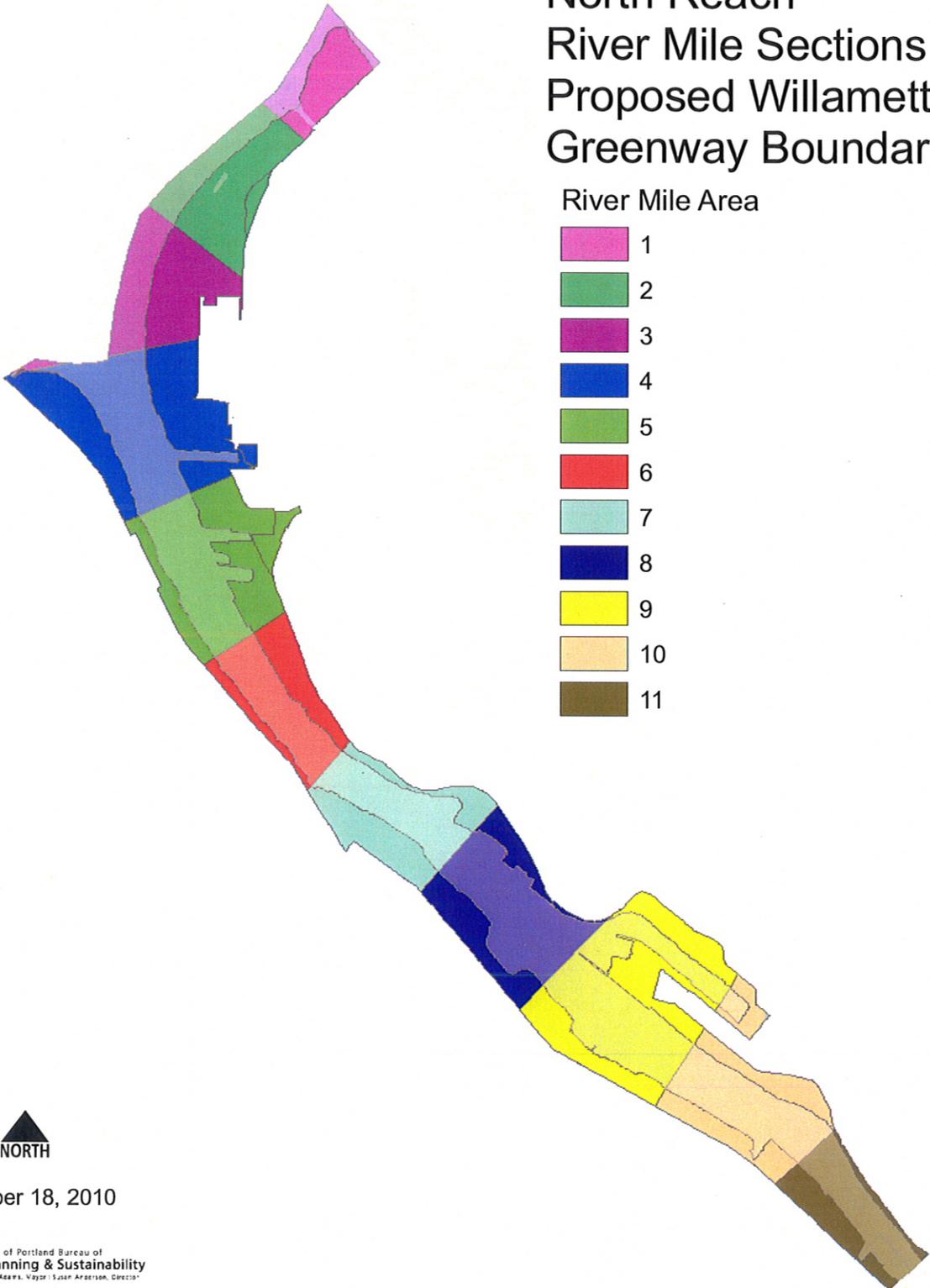
Existing City of Portland North Reach Willamette Greenway Boundary area by river mile*
 (note: River miles are not meant for dry land measures)
 river mile reach lines were estimated by extending outward to the boundaries of the Greenway

RIVER MILE	TYPE	ACRES	AREA (SQFT)
1	Land	114	4983921
2	Land	189	8242830
3	Land	179	7785093
4	Land	347	15131198
5	Land	270	11763507
6	Land	177	7712018
7	Land	203	8854582
8	Land	208	9059317
9	Land	314	13658249
10	Land	270	11760612
11	Land	104	4524791
	average acres per river mile	<u>208</u>	

North Reach River Mile Sections Proposed Willamette Greenway Boundary

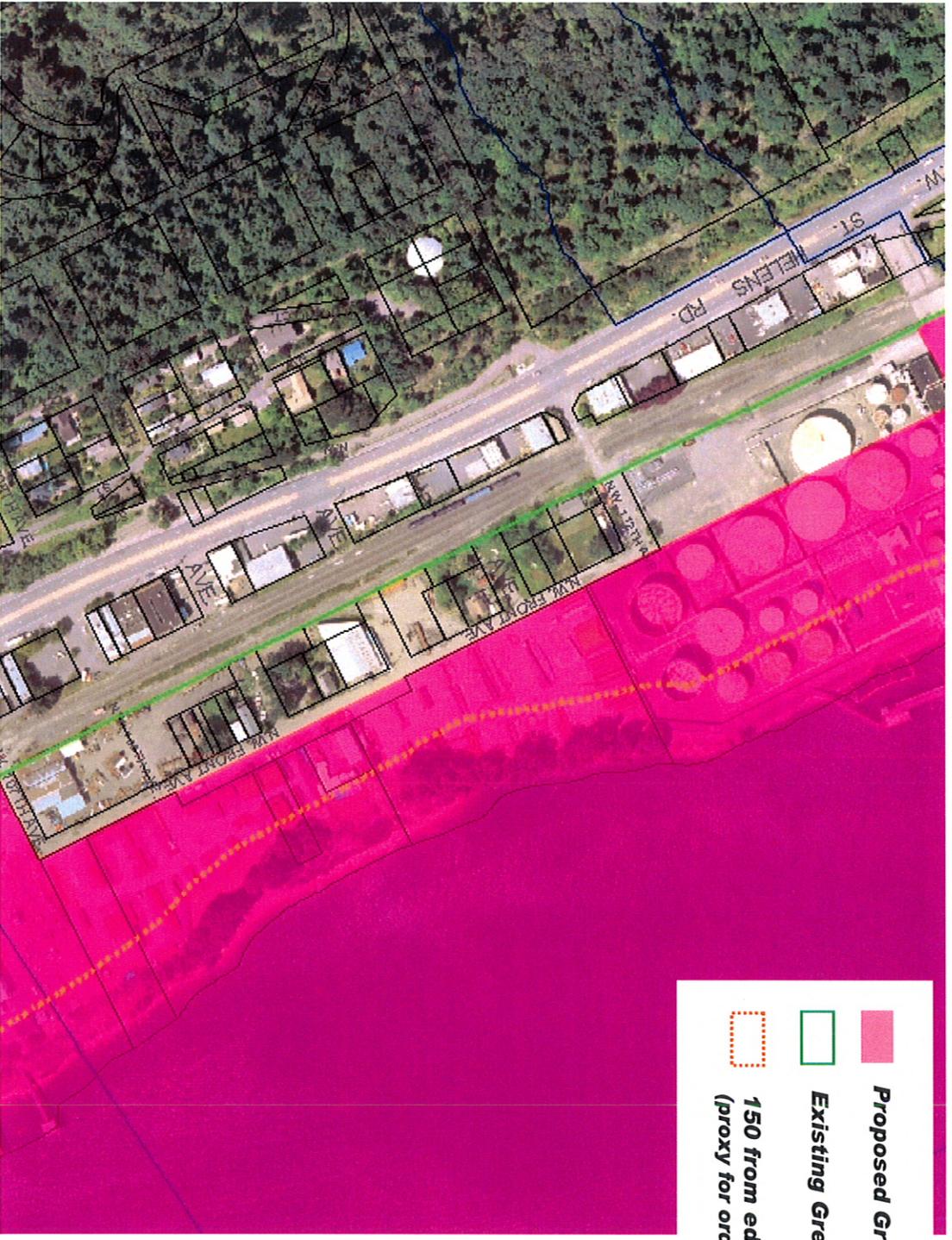
River Mile Area

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11



October 18, 2010

City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #15



Proposed Willamette River Greenway Boundary Amendment

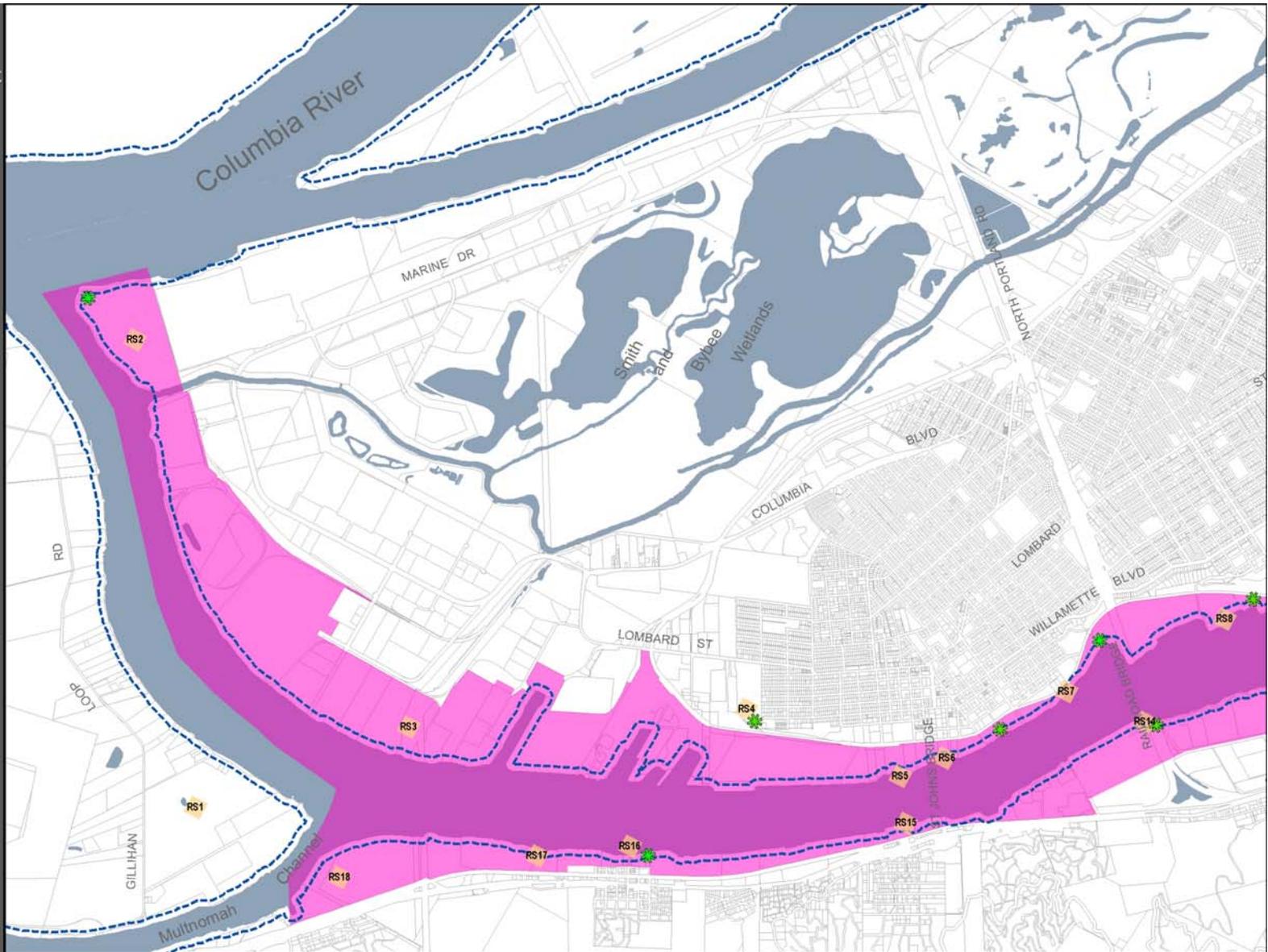
Greenway Acquisition Sites and Proposed Greenway Boundary

Sheet #1 of 2

Legend

-  viewpoint acquisition sites
-  restoration acquisition sites
-  150 feet from river (proxy for ordinary low water)
-  proposed willamette greenway boundary
-  Taxlots
-  Waterbodies

October 2010
City of Portland | Bureau of Planning and Sustainability
Geographic Information System
The information on the map was derived from digital data bases on the City of Portland, Bureau of Planning and Sustainability GIS. Care was taken in the creation of this map but it is provided "as is". The City of Portland cannot accept any responsibility for error, omissions, or positional accuracy, and therefore, there are no warranties which accompany this product. However, notification of any errors will be appreciated.



Proposed Willamette River Greenway Boundary Amendment

Greenway Acquisition Sites and Proposed Greenway Boundary

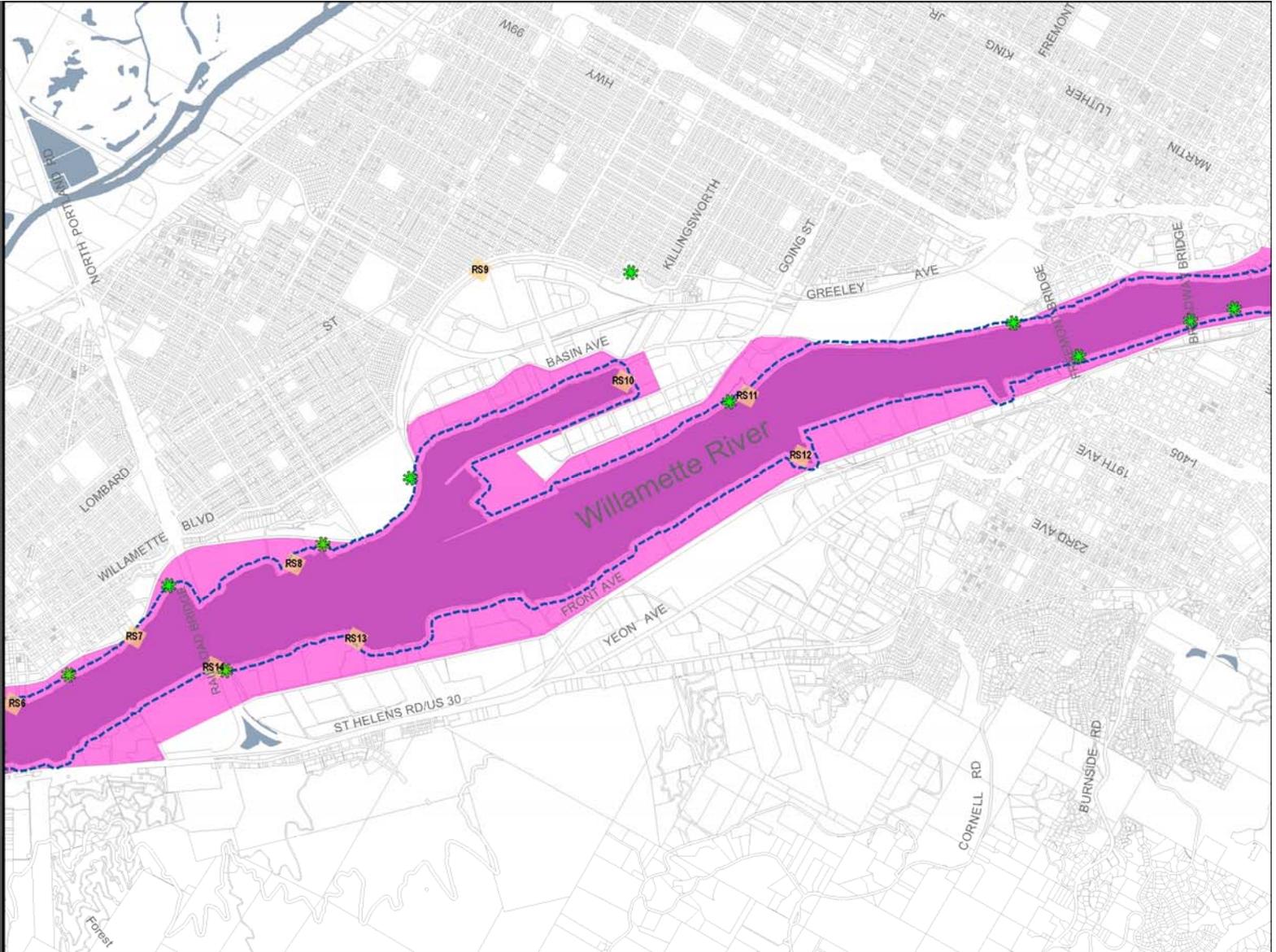
Sheet #2 of 2

Legend

-  viewpoint acquisition sites
-  restoration acquisition sites
-  150 feet from river (proxy for ordinary low water)
-  proposed willamette greenway boundary
-  Taxlots
-  Waterbodies

October 2010
 City of Portland | Bureau of Planning and Sustainability
 Geographic Information System

The information on the map was derived from digital data bases on the City of Portland, Bureau of Planning and Sustainability GIS. Care was taken in the creation of this map but it is provided "as is". The City of Portland cannot accept any responsibility for error, omissions, or political accuracy, and therefore, there are no warranties which accompany this product. However, notification of any errors will be appreciated.



City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #1



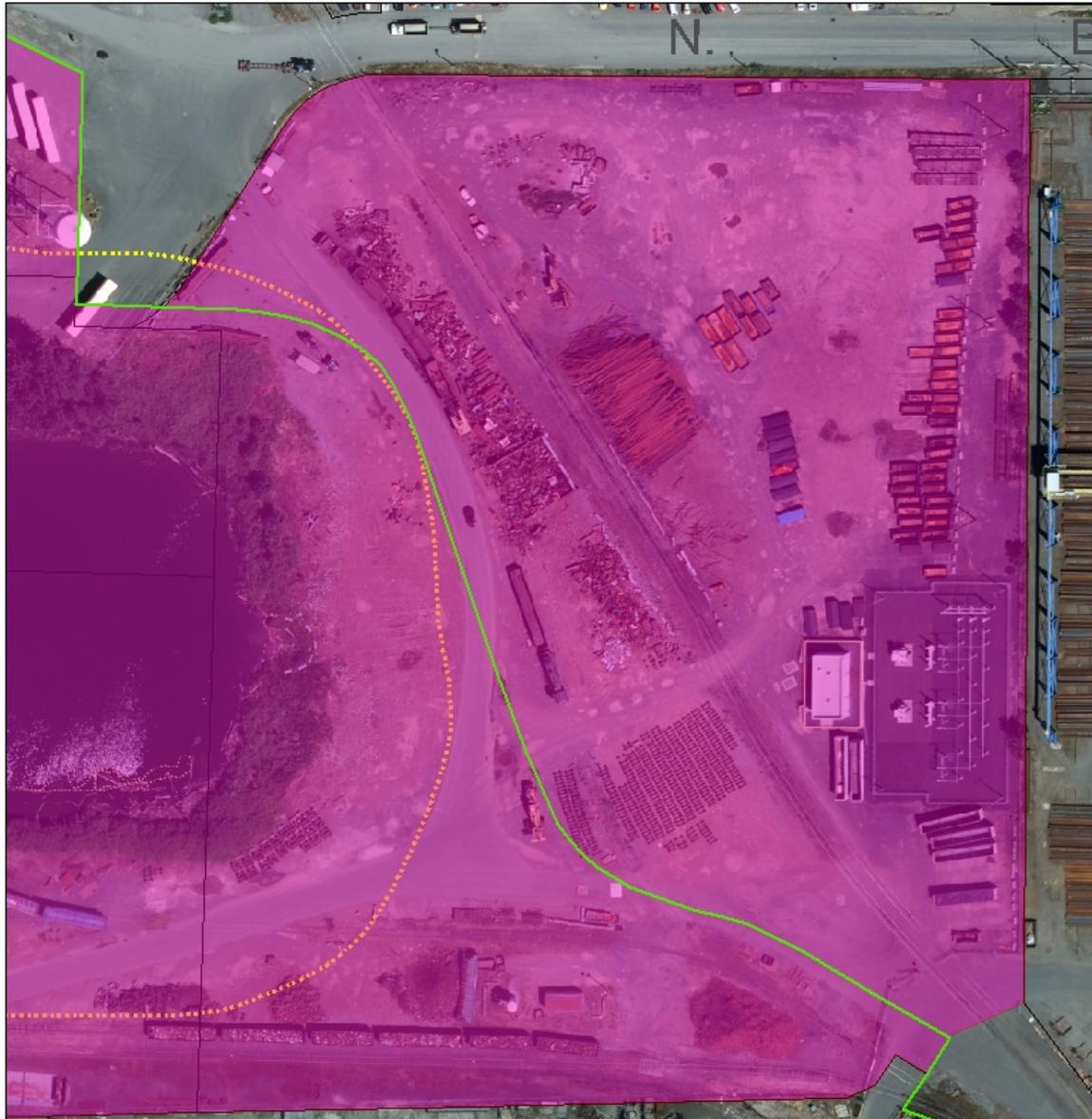
-  Proposed Greenway Boundary
-  Existing Greenway Boundary
-  150 from edge of river
(proxy for ordinary low water)

City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #2



-  Proposed Greenway Boundary
-  Existing Greenway Boundary
-  150 from edge of river
(proxy for ordinary low water)

City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #3



-  Proposed Greenway Boundary
-  Existing Greenway Boundary
-  150 from edge of river
(proxy for ordinary low water)

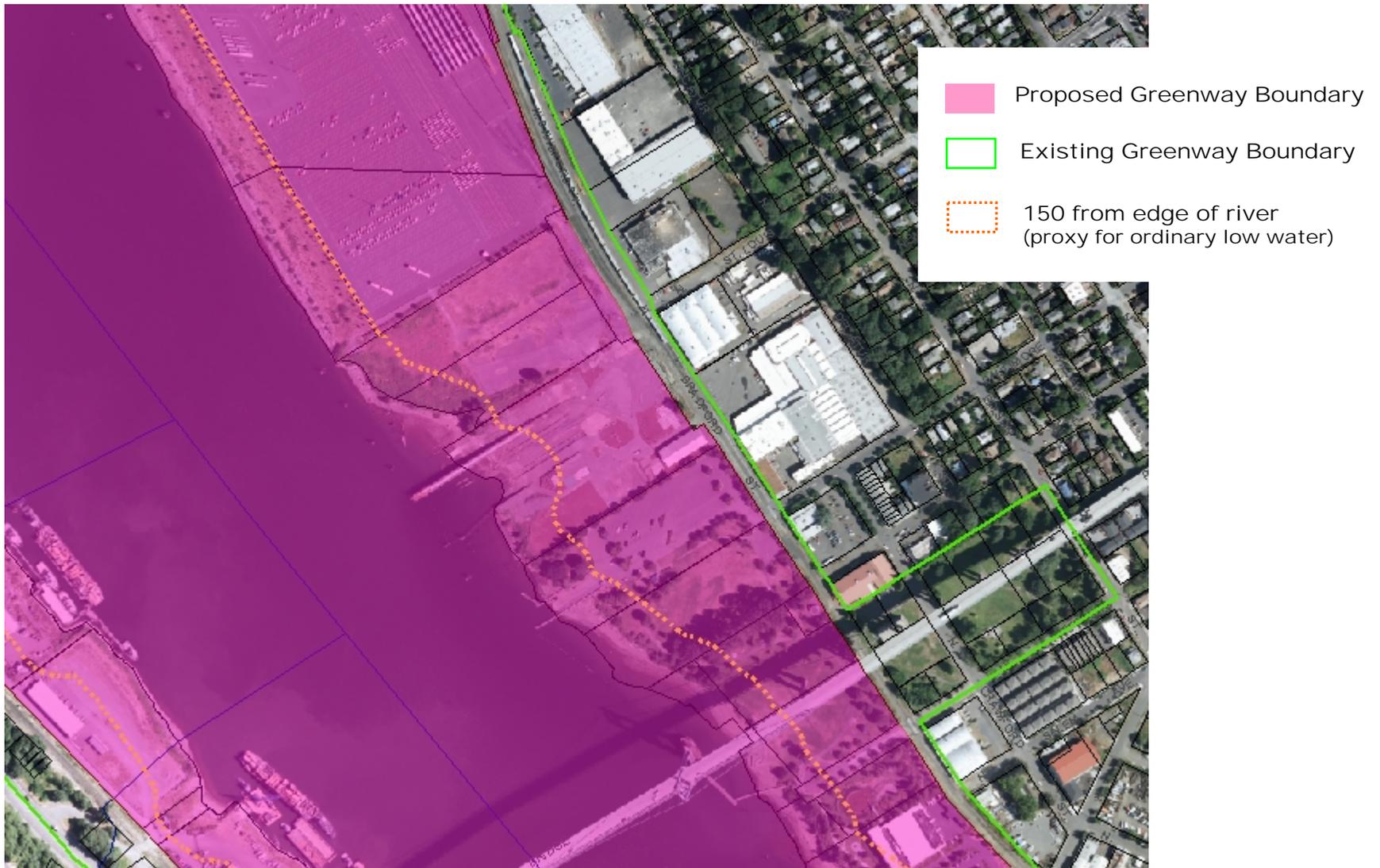
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #4



City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #5



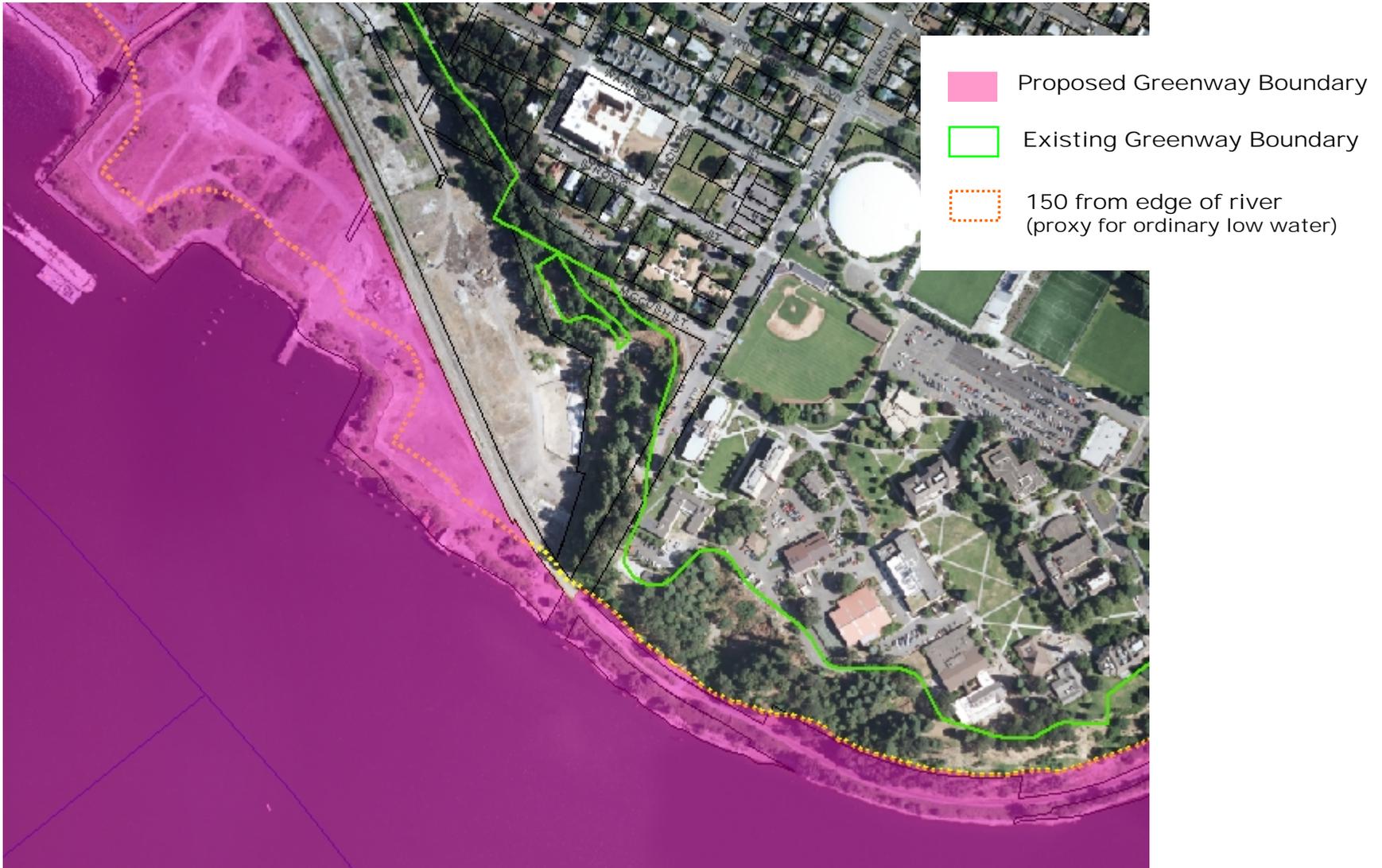
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #6



City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #8



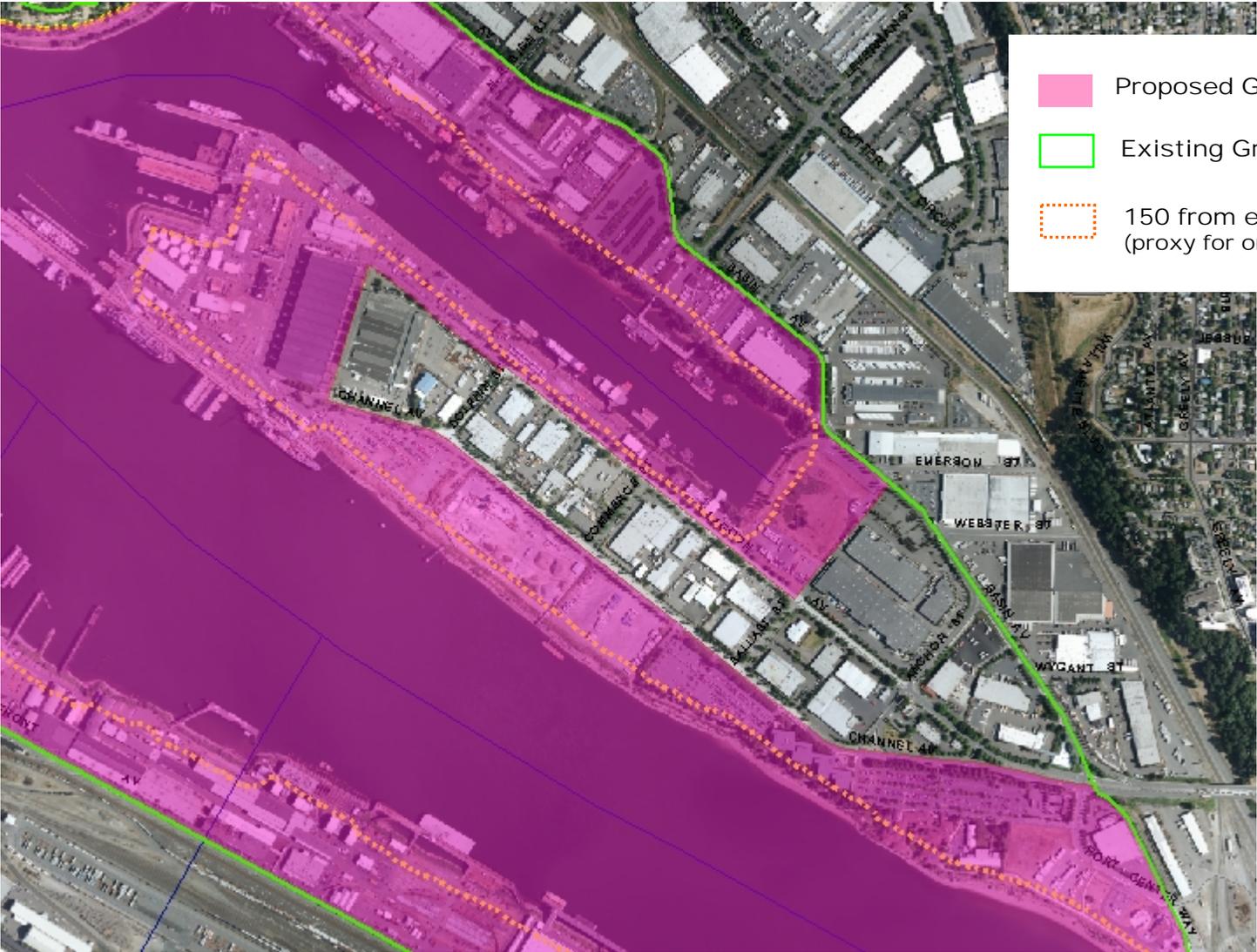
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #9



City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #10

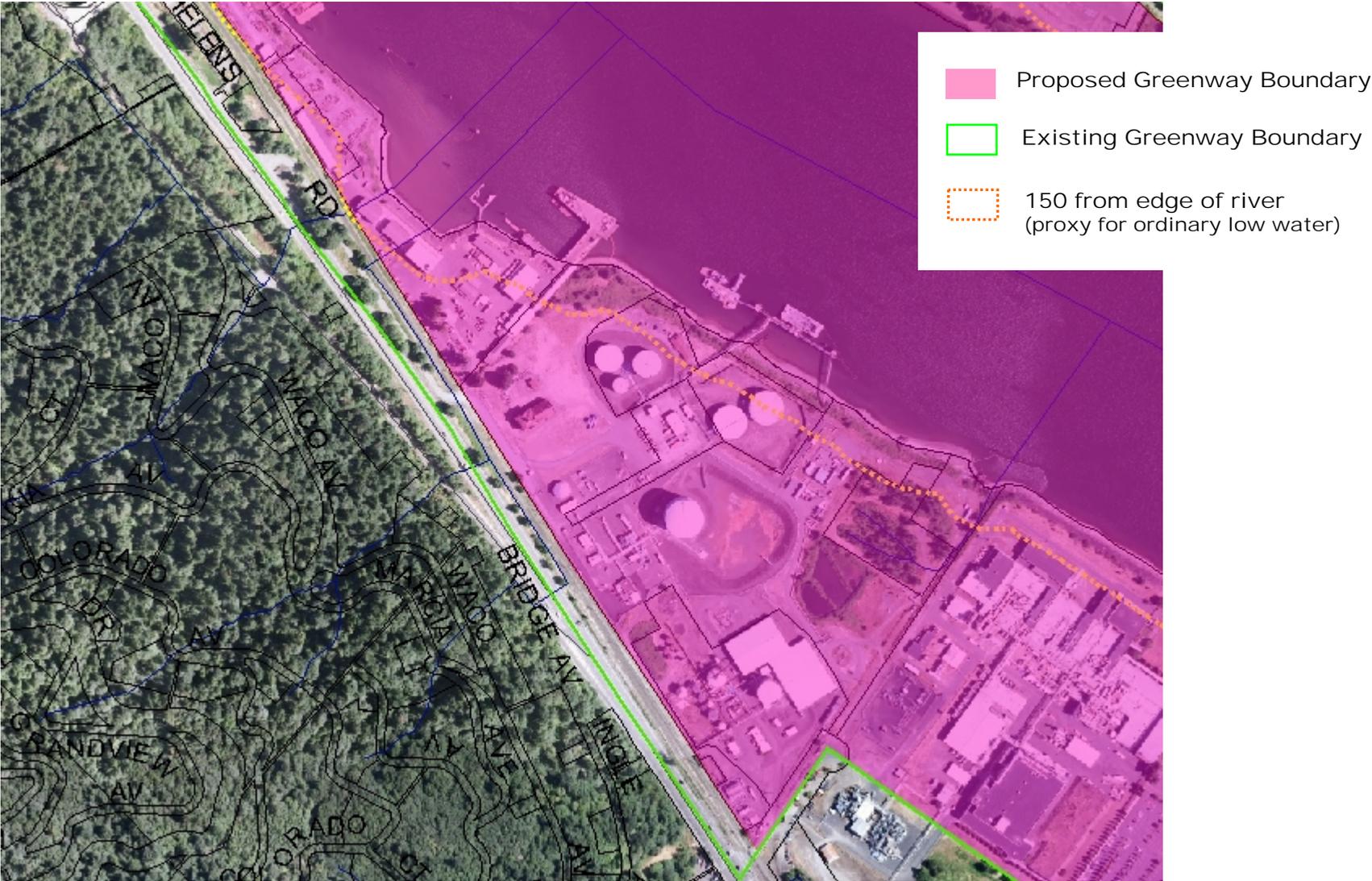


City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #11

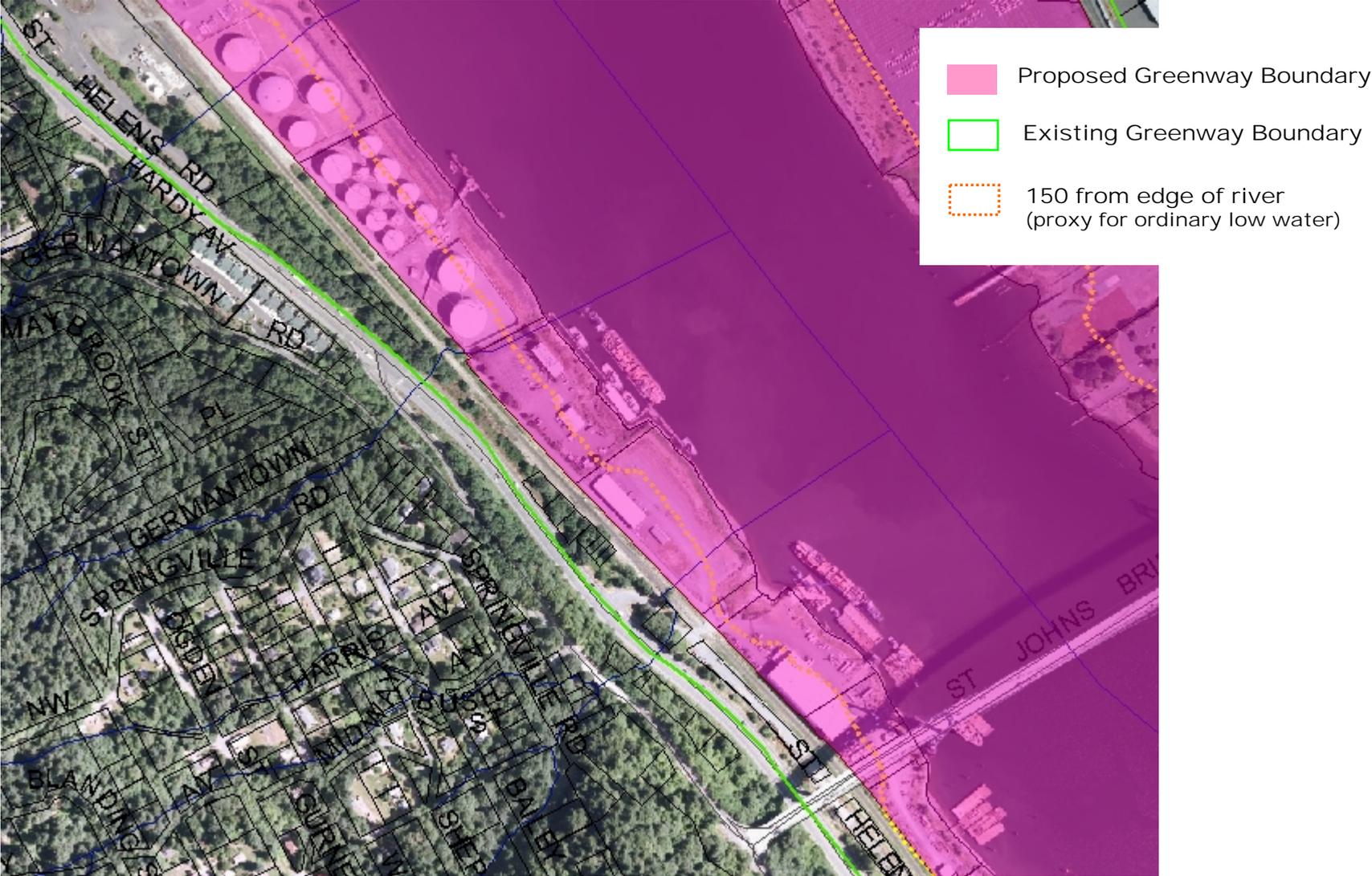


-  Proposed Greenway Boundary
-  Existing Greenway Boundary
-  150 from edge of river (proxy for ordinary low water)

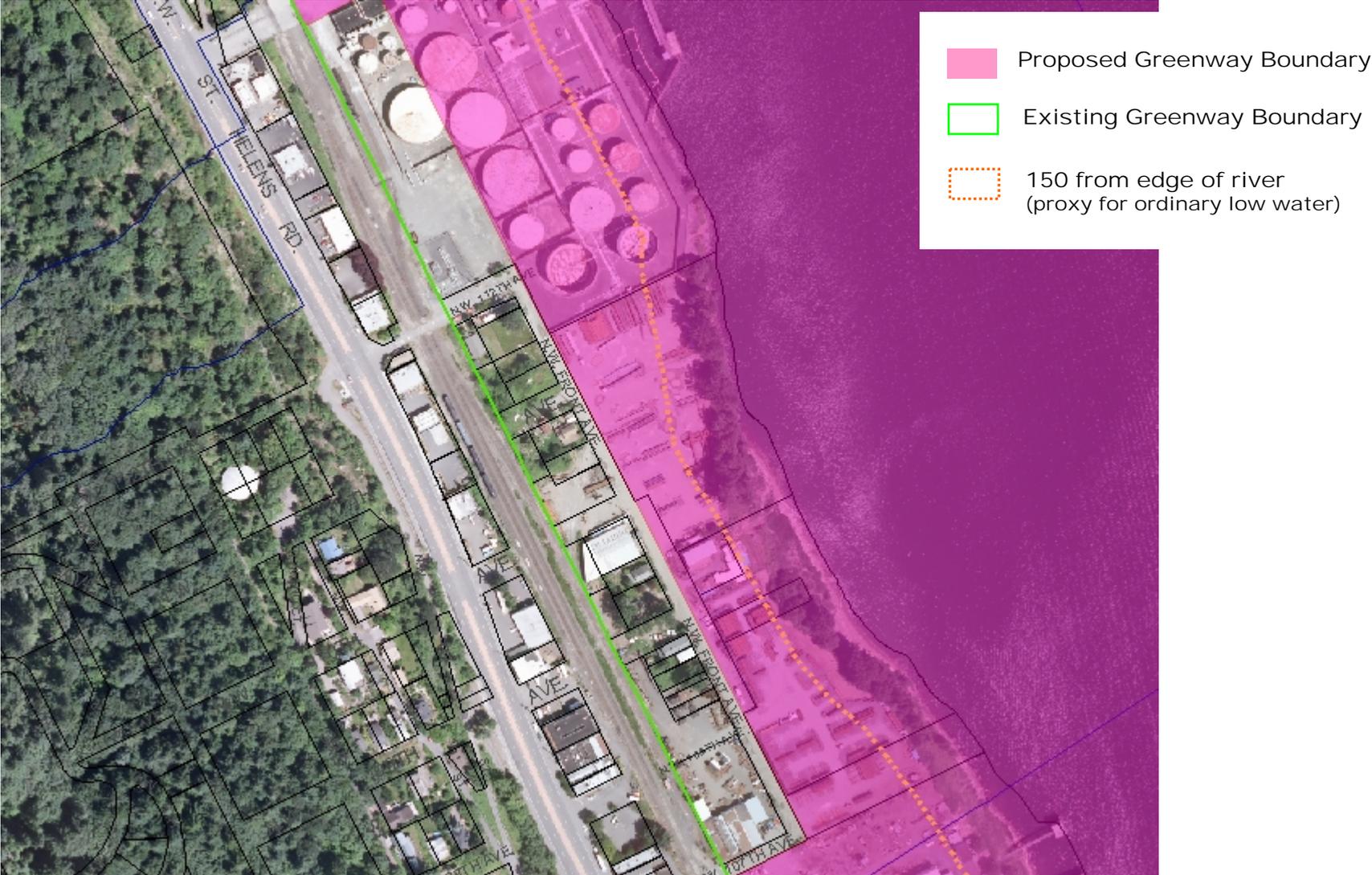
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #12



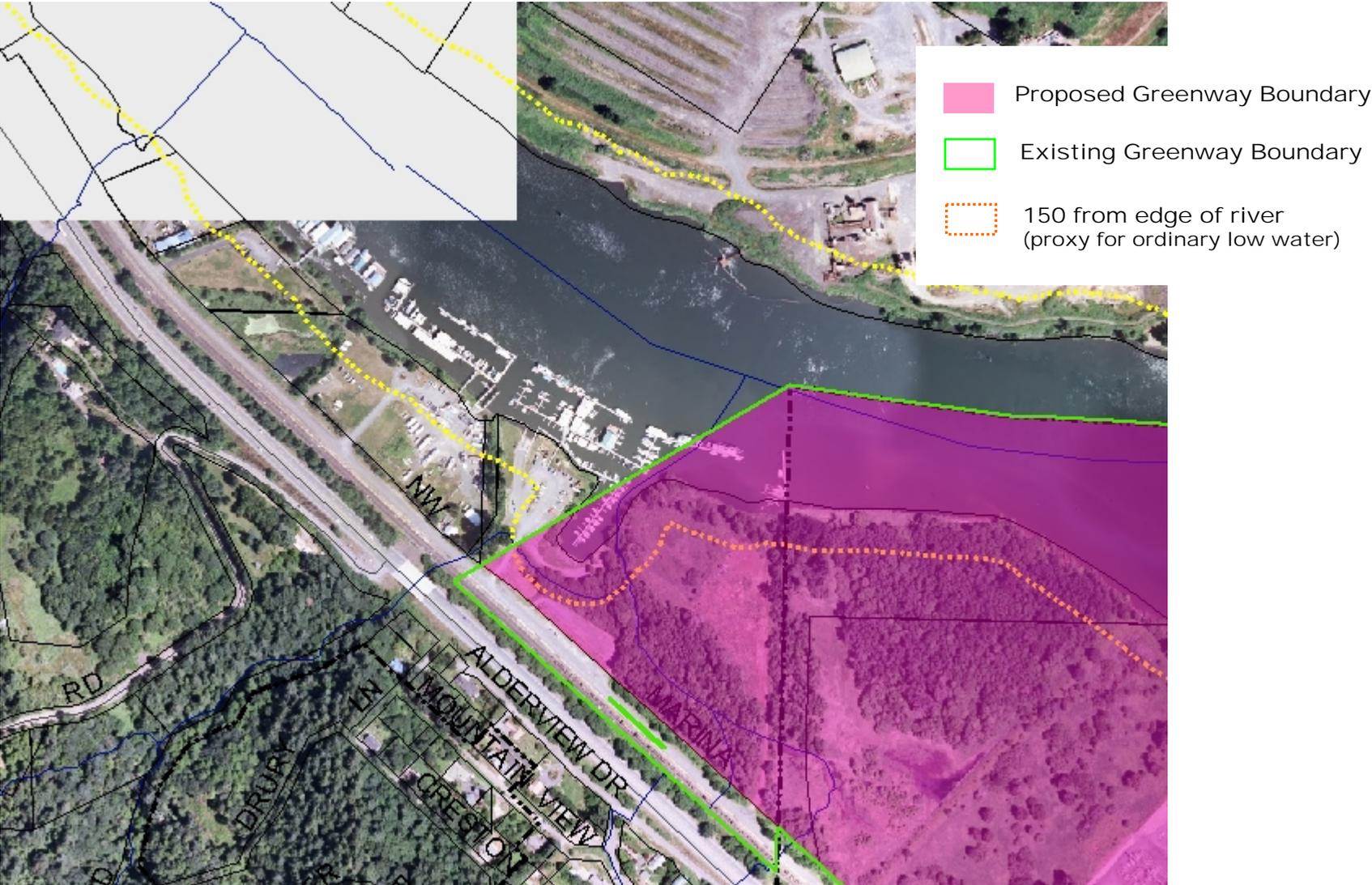
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #13



City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #15



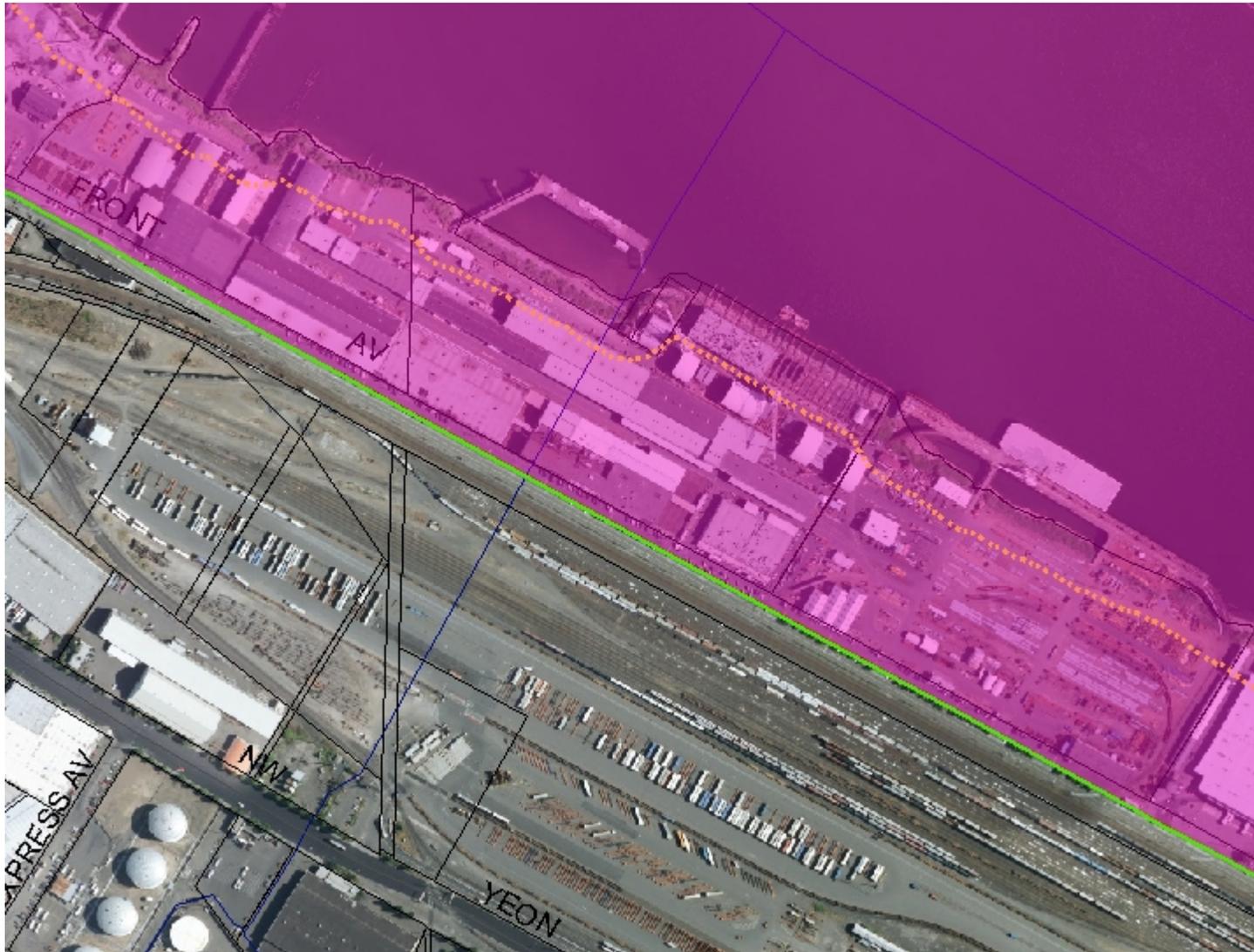
City of Portland Oregon—Proposed Willamette Greenway Boundary Amendment—MAP #16



Schnitzer Site



Gunderson Site



Joseph S. Voboril
Admitted to practice in Oregon and Washington

503.802.2009
Fax: 503.972.3709
joe@tonkon.com

October 19, 2010

Chair John VanLandingham and Members of
the Land Conservation and Development Commission
c/o Casaria Tuttle
Rules, Records & Policy Coordinator/
Assistant to Deputy Director
Oregon Department of Land Conservation and Development
635 Capitol Street N.E., Suite 150
Salem, OR 97301-2540

Re: Gunderson, LLC ("Gunderson") Response to the October 8, 2010 Staff
Report of the Department of Land Conservation and Development
(the "Department") regarding Agenda Item 6, October 19-22, 2010,
Land Conversation and Development Commission ("LCDC") Meeting

Gentlemen:

This letter will supplement my October 5, 2010 letter to LCDC in which Gunderson submitted its comments regarding the Willamette River Greenway Plan Boundary amendments as proposed by the City of Portland (the "Proposed Amendments"). The purpose of this letter is to respond to the Department's conclusions with regard to Gunderson's comments as set forth in the above-referenced Staff Report.

A. LCDC Must Comply with ORS 197.040(1)(b)

In its Staff Report, the Department asserts that "Gunderson has not established as a matter of law how the Proposed Amendments to OAR chapter 660, division 20 that are necessary to carry out the Willamette River Greenway provision of ORS chapter 390 are subject to ORS 197.040(1)(b)." As explained below, Gunderson does not understand why the Department is taking this position.

In its Notice of Proposed Rulemaking Hearing (the "Notice") and the Statement of Need and Fiscal Impact (the "Fiscal Impact Statement") which the Department filed with the Oregon Secretary of State in August, the Department acknowledged that its

EXHIBIT: 7 AGENDA ITEM: 6
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 10-19-10
PAGES: _____
SUBMITTED BY: Joe Voboril

statutory authority for the proposed rulemaking is ORS 197.040. Accordingly, it's surprising that the Department would now take the position that in adopting this rule, LCDC need not comply with ORS 197.040(1)(b).

ORS 197.040(1)(b) is clear. When LCDC is engaged in rulemaking—as it is here—it must make certain assessments. In pertinent part, ORS 197.040(1)(b) states:

"[t]he commission shall:

....

- (C) Assess what economic and property interests will be, or are likely to be, affected by the proposed rule;
- (D) Assess the likely degree of economic impact on identified property and economic interests; and
- (E) Assess whether alternative actions are available that would achieve the underlying lawful objective and would have a lesser economic impact."

It is not sufficient to state, as the Department did in the Fiscal Impact Statement filed with the Oregon Secretary of State, that "there could be a significant negative economic impact on a property owner as the result of additional development limitations imposed in the greenway area."

The new development limitations, and their likely economic impact on the property interests affected, must be assessed by LCDC. At a minimum, this would require identification of the property interests that will be affected when their properties are included within the greenway area. ORS 197.040(1)(b)(D) requires LCDC to assess the likely degree of economic impact that these property owners will suffer. It's not enough to state that there "could be a significant negative economic impact." Finally, ORS 197.040(1)(b)(E) requires LCDC to assess whether alternative actions are available to achieve the City's objective that would have a lesser economic impact.

By using the word "shall" in ORS 197.040(1)(b), the Oregon legislature makes it clear that LCDC must make such assessments. It is elementary that agencies must follow the commands of the legislature when the legislature uses the word "shall." See, e.g. *Dika v. Dept. of Insurance and Finance*, 312 OR 106, 109 (1991). Thus, LCDC cannot choose to ignore the legislative directives set forth in ORS 197.040(1)(b) when it takes action on the Proposed Amendments. If such assessments are not properly made, any rule adopted by LCDC in this proceeding will be invalid.

B. The Fiscal Impact Statement is Deficient

In its Staff Report, the Department improperly attempts to shift the burden to provide certain required information in the Department's Fiscal Impact Statement to Gunderson. In my October 5, 2010 letter to LCDC, Gunderson asserted that the Fiscal Impact Statement fell short of the requirements of the Oregon Administrative Procedures Act, which requires agencies to include with the notice of rulemaking the following information:

"A statement of fiscal impact identifying state agencies, units of local government and the public which may be economically affected by the adoption, amendment or repeal of the rule and an estimate of that economic impact on state agencies, units of local government and the public. In considering the economic effect of the proposed action on the public, the agency shall utilize available information to project any significant economic effect of that action on businesses which shall include costs of compliance effect on small businesses affected."
ORS 183.335(2)(b)(E). (Emphasis added.)

In response, the Department states that "Gunderson has not identified additional legislative economic effects of the proposed amendment that should have been described in the impact statement, and the department is not aware of any that are not already described." However, it is the Department, not Gunderson nor any other potentially affected party, that has the duty to provide the information required by the Administrative Procedures Act. Oregon courts have consistently held that the burden of providing the estimated economic impact of a certain rule falls to the agency, not the parties potentially affected by the rule. See, *Dika*, 312 Or 106; *Independent Contractors Research Institute v. Department of Administrative Services*, 207 Or App 78, 87 (2006); *Oregon Cable Telecommunications Ass'n v. Department of Revenue*, 2010 WL 3894787 (Or App October 6, 2010).

Given the facts at hand, ORS 183.335(2)(b)(E) contains two distinct requirements that were ignored by the Department when it filed the Fiscal Impact Statement with the Oregon Secretary of State. First, the Fiscal Impact Statement should have identified the businesses which would be affected by the Proposed Amendments, i.e. those businesses within the 51 acres that are being added to the greenway area. See *Independent Contractors Research Institute v. Department of Administrative Services*, 207 Or App 78, 87 (2006). Second, the Fiscal Impact Statement should have given affected parties enough information "so that they might participate meaningfully in the rule adoption process." *Id.*

Finally, the Department's Fiscal Impact Statement falls short of the legislative requirement because it does not provide a cost of compliance effect on the small businesses affected as required by ORS 183.335(2)(b)(E), which analysis must comply with

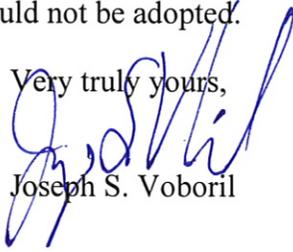
Chair John VanLandingham and Members of
the Land Conservation and Development Commission
October 19, 2010
Page 4

ORS 183.336. See *Oregon Cable Telecommunications Ass'n* WL 3784787 *3 ("[T]here can be little doubt that ORS 183.336(1) establishes the minimum content that must be included in the 'statement of cost of compliance effect on small businesses' mandated by ORS 183.335(2)(b)(E)."). In fact, the Fiscal Impact Statement filed with the Oregon Secretary of State does not even address small businesses.

These are fatal errors and the Proposed Amendments, if promulgated with the existing Fiscal Impact Statement, will be invalid.

Given the above-described procedural deficiencies, Gunderson renews its position that the Proposed Amendments should not be adopted.

Very truly yours,


Joseph S. Voboril

JSV/cb
(20 copies of this letter are attached)
cc: David Harvey, Gunderson LLC
Steven L. Pfeiffer
Amanda Punton

007774/00251/2507821v1