BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

IN THE MATTER OF THE REVIEW OF THE DESIGNATION OF URBAN RESERVES BY METRO AND RURAL RESERVES BY CLACKAMAS COUNTY, MULTNOMAH COUNTY, AND WASHINGTON COUNTY	))))))	**METRO'S OPENING BRIEF ON REMAND FROM COURT OF APPEALS**

I. QUESTIONS PRESENTED AND SUMMARY OF ARGUMENTS

LCDC issued a scheduling order on September 4, 2014 requesting briefing from the parties involved in the issues that were remanded to LCDC by the Oregon Court of Appeals in *Barkers Five, LLC v. LCDC*, 261 Or App 259 (2014). Metro submits this opening brief addressing the following questions:

1. May LCDC retain jurisdiction and adopt its own decision addressing the court's remand of the Stafford urban reserve designation based on its authority under HB 4078 to approve Metro's decision if there is evidence in the record that clearly supports that decision?

2. May LCDC retain jurisdiction and adopt its own decision addressing the court's remand of the Multnomah County rural reserve designation for Area 9D based on its authority under HB 4078 to approve the county's decision if there is evidence in the record that clearly supports that decision?

3. If LCDC retains jurisdiction and adopts its own decision on remand, is LCDC required to adopt findings addressing the "best achieves" standard as a result of the legislature's revisions to the Washington County reserves map in HB 4078?

4. If LCDC decides that remand to Metro and the counties is necessary, what issues should be considered on remand?

For the reasons described below, LCDC should exercise its authority under HB 4078 to approve the existing designations for Stafford and Area 9D because there is evidence in the record to clearly support those designations, and there is no need for LCDC to remand this matter back to Metro and the counties for further proceedings.

If LCDC retains jurisdiction and adopts its own decision approving the existing designations, there is no need for LCDC to adopt findings addressing the "best achieves" standard, because the changes enacted by the legislature in HB 4078 to the Washington County reserves map statutorily preempt that administrative rule requirement.

In the alternative, in the event LCDC concludes that these issues must be remanded to Metro and the counties, LCDC's order should direct Metro and the counties to *only* consider the specific issues on which the court concluded that remand was necessary. LCDC's order should specify that all other issues on appeal were affirmed by the court of appeals and are now final and acknowledged by LCDC – therefore, there is no basis on which issues other than those remanded by the court may be considered by Metro and the counties.

II. NATURE OF LCDC AUTHORITY UNDER HB 4078

As part of the "Grand Bargain" legislation enacted in House Bill 4078, the legislature included a specific grant of one-time authority to LCDC for the limited purpose of considering the court's remand of the urban and rural reserves decision:

> "When the Land Conservation and Development Commission acts on remand of the decision of the Oregon Court of Appeals in Case No. A152351, the commission may approve all or part of the local land use decision if the commission identifies evidence in the record that clearly supports all or part of the decision even though the findings of the local government either:
>
> (1) Do not recite adequate facts or conclusions of law; or

> (2) Do not adequately identify the legal standards that apply, or the relationship of the legal standards to the facts." HB 4078, Sec 9 (2014).

This language was modeled after LUBA's authority under ORS 197.835(11)(b) to affirm local land use decisions under similar circumstances, where a local government's findings are defective but LUBA identifies evidence in the record that clearly supports a necessary finding. This new statutory authority was provided to LCDC in response to the court of appeals decision in *Barkers Five*, where the court rejected LCDC's attempt to apply the "clearly supports" analysis to county findings in the absence of express authorization by statute. *Barkers Five*, 261 Or App at 340, n 44. Because the language is modeled after the LUBA statute, LUBA opinions applying that statute may provide LCDC with some guidance on the question of what it means for evidence to clearly support a decision; however, there are important differences arising out of the nature of the urban and rural reserves analysis that make the scope of LCDC's authority under its statute broader than what is granted to LUBA.

LUBA generally describes the scope of the "clearly supports" inquiry as follows: "the question is whether the evidence is sufficiently compelling to allow or require us under ORS 197.835(11)(b) to affirm the county's conclusions despite the inadequacy of its findings." *Harcourt v. Marion County*, 33 Or LUBA 400, 405 (1997). More specifically, LUBA has explained:

> "LUBA may affirm a decision with inadequate findings pursuant to ORS 197.835(11)(b) when doing so allows us to remedy minor oversights and imperfections in findings, but not when doing so will require LUBA to assume the role of the local government in weighing evidence. *Terra v. City of Newport*, 36 Or LUBA 582, 589-90 (1999); *Marcott Holdings, Inc. v. City of Tigard*, 30 Or LUBA 101, 122 (1995). LUBA will affirm a local government's decision, notwithstanding inadequate findings, where the evidence in the record makes a finding of compliance with the applicable standard 'obvious' or 'inevitable.'" *Crocker v. Jefferson County*, 60 Or LUBA 317, 324 (2010).

In *Crocker*, LUBA held that there was evidence in the record to clearly support a finding that buildings associated with a proposed composting facility were "necessary for the operation of the facility" as required under local code.

The key difference between the LCDC and LUBA authority arises out of the different nature of the decisions being reviewed by those bodies. Local land use decisions on appeal to LUBA require findings addressing whether or not mandatory land use standards and criteria have been satisfied. LUBA is authorized under ORS 197.835(11)(b) to affirm a decision if it can identify evidence that clearly supports a finding that a mandatory approval criterion has been met. In contrast, decisions regarding whether a particular property can be designated as an urban reserve or a rural reserve do not involve the same strict application of mandatory approval criteria. Rather, the reserve rules direct Metro and the counties to make decisions based on the "consideration" of various "factors." In *Barkers Five*, the court of appeals specifically rejected arguments raised by petitioners that the reserve factors constitute approval criteria that must all be satisfied in order to make an urban or rural designation; instead, the court agreed with LCDC that each factor must be evaluated, but no individual factor is determinative:

> "Second, the urban and rural reserve 'factors' are not independent approval criteria such that each factor must be satisfied before a designation may be made. * * *
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> "* * * * *
>
> "In other words, Metro or a county must (a) apply and evaluate each factor, (b) weigh and balance the factors—which are not independent approval criteria—as a whole, and (c) meaningfully explain why a designation as urban or rural reserves is appropriate." *Barkers Five* at 300-301.

Thus, any decision to designate a particular area as an urban or rural reserve necessarily requires a high level of discretionary "consideration" of the various factors and "weighing and balancing" of the factors and the evidence addressing those factors prior to providing an

explanation regarding why the chosen designation is appropriate. Many of the reserve study areas could conceivably have been designated as either urban or rural reserve through the application of each set of factors, and LCDC and the court of appeals correctly concluded that those decisions are up to the discretion of Metro and the counties:

> "In particular, LCDC concluded that even though 'many areas could have been designated either as an urban or a rural reserve,' the division 27 rules and the governing statutes 'grant substantial discretion to Metro and the counties in deciding which lands to designate as urban and rural reserves' and that ... the statutes and rules do not require a demonstration 'that an area is better suited as an urban reserve than as a rural reserve before [Metro] designates any land as urban reserve." Barkers Five at 310.

For these reasons, some of the limitations described in LUBA case law regarding application of the "clearly supports" analysis are inherently inapplicable in the context of the highly discretionary "weighing and balancing" associated with choosing an urban or rural reserve designation through the consideration of factors, as compared to findings in support of mandatory approval criteria. For example, LUBA explains that under ORS 197.835(11)(b) it may only affirm a local decision, notwithstanding inadequate findings, "where the evidence in the record makes a finding of compliance with the applicable standard 'obvious' or 'inevitable.'" *Crocker*, 60 Or LUBA at 324. In contrast, LCDC does not review the reserve designations for "compliance" with mandatory standards, and there is virtually no possibility that findings regarding any particular urban or rural designation would be "obvious" or "inevitable" due to the discretionary nature of the reserve factor analysis.

The legal context created by the urban and rural reserve rules support a conclusion that the existing LUBA jurisprudence under ORS 197.835(11)(b) does not all directly apply to LCDC's new authority under HB 4078. The nature of the reserve factor analysis is such that the record before LCDC could easily include evidence that clearly supports findings that *either* an

urban or a rural designation could be appropriate for any particular area. Similarly, given the highly discretionary nature of the "consideration" of the reserve factors and the "weighing and balancing" as described by the court in *Barkers Five*, there would be no way for LCDC to meaningfully apply the new authority it has been granted under HB 4078 without necessarily "weighing" some evidence against other evidence as part of its consideration of whether there is evidence to clearly support an urban or rural designation under the factors.

III. STAFFORD URBAN RESERVE DESIGNATION

Evidence in the record and evidence contained in Metro's recently adopted 2014 Regional Transportation Plan (RTP) clearly support the designation of Stafford as an urban reserve. Although the 2014 RTP is not part of the existing record of the reserves decision, LCDC may take official notice of the RTP under OAR 660-025-0085(h)(F).

A. Summary of the Court of Appeals Opinion Regarding Stafford

The court of appeals concluded that the decision to designate Stafford as an urban reserve area was not supported by substantial evidence in the record due to the failure by Metro and LCDC to respond to conflicting evidence submitted by the City of West Linn and the City of Tualatin (the "cities") regarding estimates of future traffic conditions in the area. Specifically, the cities relied on Metro's 2035 RTP[1], which includes a series of mobility policy maps that depict traffic forecasts for the entire Metro region in 2035, based on three different funding scenarios for improvement projects to the regional transportation system over that timeframe.

The cities relied on the fact that Metro's mobility policy maps in the 2035 RTP show that four principal roads in Clackamas County providing service to the area around Stafford will

[1] The RTP adopted by Metro in 2010 was called the "2035 RTP" because it applies a 25-year planning horizon. Metro is required by federal law to update the RTP every four years. In the recently adopted RTP update, Metro renamed the RTP to conform with the year of adoption, rather than the planning horizon year. Therefore, the current RTP is known as the "2014 RTP."

exceed Metro's mobility policies by the year 2035, even if all of the improvement projects listed in the 2035 RTP are built. Those four roads are Stafford Road, Borland Road, Highway 43, and portions of Interstate 205. The cities argued that the 2035 RTP showed that, based on projected traffic levels and available funding for future improvements as of 2010, those facilities would be "failing" in 2035. The cities cited the 2035 RTP as evidence that Stafford did not comply with the two urban reserve factors related to the provision of urban services, which require Metro to consider whether an area:

> "(1) Can be developed at urban densities in a way that makes efficient use of existing and future public and private infrastructure investments;
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> "* * * * *
>
> "(3) Can be efficiently and cost-effectively served with public schools and other urban-level public facilities and services by appropriate and financially capable service providers."

Applying these two urban reserve factors, the cities argued that because the RTP forecasted the roads at issue to be above capacity in 2035, future urban development in Stafford could not be efficiently or cost-effectively served by transportation infrastructure "because there is no money" to fix the problems. Cities' Petition for Review at 16. Therefore the cities argued: (a) Stafford could not "comply" with the factors, and (b) the Metro and LCDC decisions were not supported by substantial evidence in the record.

The court of appeals rejected the cities' first contention, holding that the urban reserve factors are not approval criteria and therefore "compliance" with each of the factors is not required; rather, Metro's designation must only demonstrate "consideration" of each factor. *Barkers Five* at 360. However, the court went on to agree with the cites that the evidence they cited regarding transportation system forecasts in the 2035 RTP was "weighty countervailing

evidence" that had not been adequately addressed by Metro or LCDC. Therefore, the court concluded that LCDC failed to correctly review Metro's decision for evidentiary support:

> "In that regard, we conclude that LCDC's order is unlawful in substance because the evidence to which West Linn points, indicating that the transportation facilities serving Stafford will be failing by 2035, is 'so at odds' with LCDC's determination that the designation of Stafford as urban reserves is supported by substantial evidence that it gives rise to an inference that LCDC misunderstood its standard of review. Thus, it was incumbent on LCDC to provide a 'meaningful explanation' as to why—even in light of that conflicting evidence—the designation of Stafford as urban reserve is supported by substantial evidence. LCDC did not do so." *Barkers Five* at 360-361.

B. Statement of the Issue Before the Commission on Remand

It is critical to recognize that the problem identified by the court relates to LCDC's *application* of the substantial evidence test, and not to the weight or credibility of the evidence itself. The court did not conclude that Metro's decision to designate Stafford as an urban reserve was not supported by substantial evidence. Rather, the court held that LCDC committed a *legal* error by not correctly applying its standard of review for substantial evidence, due to a failure to respond to conflicting evidence. If Metro's decision had provided a more "meaningful explanation" regarding the cities' conflicting evidence from the 2035 RTP, the court would likely have upheld LCDC's approval.

Thus, under the court's decision the primary question currently before LCDC is whether there is sufficient evidence responsive to the cities' arguments about the 2035 RTP to support a finding by LCDC that Metro's decision to designate Stafford as an urban reserve is clearly supported by evidence in the record. For the reasons described below, LCDC may adopt findings that: (a) provide the "meaningful explanation" that the court of appeals found lacking regarding the cities' reliance on the 2035 RTP, and (b) are based on evidence from the 2014 RTP that clearly supports a decision by LCDC to approve Metro's decision regarding Stafford.

C. The RTP is Irrelevant to the Analysis of the Urban Reserve Factors

The fundamental problem with the cities' argument is that the 2035 RTP traffic forecasts and related mobility policy maps have no relevance to the question posed by the urban reserve factors, which is whether Stafford could be efficiently and cost-effectively served with transportation facilities within a 50-year horizon. The RTP traffic forecasts are constantly evolving projections that provide a snapshot in time of the current estimates of future traffic congestion in the next 25 years *based on funding for system improvement projects that are currently listed in the RTP*. New improvement projects for roads and highways are added to the RTP project list on a regular basis (even between each four-year RTP update cycle), and funding for those projects is adjusted and prioritized based on need given existing and planned levels of development. When new proposed improvement projects are added to the RTP project list, the ameliorative effects of those future improvements are then applied to the 25-year traffic congestion forecast for the region as shown on the mobility policy maps in the RTP. Obviously, adding new road improvement projects results in a corresponding decrease in projected congestion for areas that are served by those roads.

The cities argued that the 2035 RTP "demonstrates that there is no money now or in the foreseeable future to fix the problems" associated with traffic forecasts on the roads they identified. Cities' Petition for Review at 16. But this argument ignores how the planning process actually works for transportation projects, and the fact that new improvement projects are added to the RTP list on a regular basis. It is true that in 2010, when the snapshot was taken in the 2035 RTP of funding for the project lists and corresponding traffic forecasts, there was no identified funding for transportation projects designed to serve an urbanized Stafford. But when an area such as Stafford that is outside of the UGB is identified as a potential location for new urban development, the planning process that is required for urbanization will include

identification of new and necessary transportation system improvements to serve future urban development in that area, and those improvements will then be included on the RTP project list. Adding those improvements to the RTP project list will then reduce the amount of congestion forecasted on the RTP mobility policy maps for that area.

Thus, there is a basic "chicken/egg" problem with the cities' reliance on the traffic forecasts in the 2035 RTP as evidence that Stafford cannot be served by roads and highways in the area due to a lack of funding. When the 2035 RTP was adopted in 2010, the Stafford area was simply another rural residential area outside of the UGB, and had not been specifically designated as an area for future urban development. Therefore, the 2035 RTP did not prioritize funding for improvement projects in the Stafford area that would be necessary to facilitate new urban development arising out of a UGB expansion. In the absence of an existing plan for urbanization of Stafford in 2010, there is no reason why the region would prioritize funding in the 2035 RTP for improving roads to accommodate new urban development in that area.

In 2010 Metro adopted amendments to Title 11 of the Urban Growth Management Functional Plan specifically designed to ensure that areas proposed for urbanization through a UGB expansion can and will be served with public facilities such as roads. Title 11 now requires that local governments must adopt concept plans for an urban reserve area prior to any such area being added to the UGB by Metro. Metro Code 3.07.1110. Concept plans must include detailed descriptions and proposed locations of all public facilities, including transportation facilities, with estimates of cost and proposed methods of financing. Concept plans must be jointly prepared by the county, the city likely to annex the area, Metro, and appropriate service districts. Title 11 requires that the concept plan *shall* provide the following information for all public facilities, including transportation:

> "b. The mode, function and general location of any proposed state transportation facilities, arterial facilities, regional transit and trail facilities and freight intermodal facilities;
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> "c. The proposed connections of these systems and facilities, if any, to existing systems;
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> "d. Preliminary estimates of the costs of the systems and facilities in sufficient detail to determine feasibility and allow cost comparisons with other areas;
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> "e. Proposed methods to finance the systems and facilities; and
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> "f. Consideration for protection of the capacity, function and safe operation of state highway interchanges, including existing and planned interchanges and planned improvements to interchanges." Metro Code 3.07.1110.C.2.

These code provisions will apply to Stafford if and when that area is proposed for inclusion in the UGB, and will require detailed planning regarding how transportation services will be provided to the area, including a description of methods for financing those services. That urban planning process will require adding specific transportation improvement projects to the RTP project lists for purposes of ensuring there can be adequate capacity to serve the Stafford area. At that point, once urban development in Stafford takes some planning steps towards potential reality, the region could decide to add and prioritize improvement projects on the RTP project lists that would be necessary to facilitate new urban development in that area. But in 2010, because Stafford was not in the UGB and not even an urban reserve area, there was no reason to include or prioritize projects in the 2035 RTP to facilitate its development.

For these reasons, LCDC should reject the cities' argument that the 2035 RTP constitutes evidence that transportation services cannot be efficiently and cost-effectively served to Stafford under the urban reserve factors on a 50-year planning horizon. The cities' argument may be likened to looking ahead two years on your calendar and, seeing no scheduled appointments that month, reaching a conclusion that you will have nothing to do in October 2016. The RTP is a

constantly evolving document that merely provides a periodic snapshot forecast of regional traffic congestion based on current funding priorities for improvement projects on the RTP project list. The RTP project list is amended and revised on a regular basis. If and when Stafford is proposed to be added to the UGB, concept planning under Title 11 must occur and necessary improvement projects would be added to the RTP project lists at that time.

D. The Cities' Arguments are Refuted by the 2014 RTP

The recently adopted 2014 RTP includes updated mobility policy maps that illuminate the fallacy of the cities' arguments. The 2014 RTP shows that the 2035 RTP mobility policy maps relied upon by the cities are already outdated and do not constitute substantial evidence to support a conclusion that it is not possible for Stafford to be served by roads on a 50-year planning horizon. On July 17, 2014, the Metro Council adopted amendments to the 2035 RTP via Metro Ordinance No. 14-1340, and also changed the name of the RTP to "2014 RTP." LCDC may take official notice of the 2014 RTP under OAR 660-025-0085(h)(F). A copy of Metro Ordinance No. 14-1340 is attached as Exhibit A.

The mobility policy maps in the 2014 RTP show significant improvement in forecasted traffic congestion on principal roads in the Stafford area for the new RTP planning horizon that ends in 2040, as compared to the mobility policy maps relied upon by the cities from the 2035 RTP. Copies of the three most relevant 2014 maps are attached as Exhibit B (these are close-up versions of the maps focused on the Stafford area and do not show the entire region). At LCDC and at the court of appeals, the cities argued that the mobility policy maps in the 2035 RTP showed that "almost all of the transportation system serving Stafford" will be failing by 2035. Cities' Petition for Review at 16. Unfortunately the cities' exaggerated assertion that four roads constitute "almost all" of the roads serving Stafford was repeated by the court of appeals in its opinion as if it were fact. There are dozens of roads that provide transportation service to the

Stafford area. *See* attached mobility policy maps from the 2014 RTP at Exhibit B. It is entirely misleading for the cities to identify four roads and claim that those constitute "almost all of the transportation system serving Stafford." The four roads that the cities argued would be "failing" in 2035 were sections of Highway 43, Interstate 205, Stafford Road, and Borland Road.[2]

The maps relied upon by the cities from the 2035 RTP are attached as Exhibit C. Sections of roads that are shown in red are locations that in 2010 were projected to exceed acceptable volume-to-capacity ratios in 2035, based on three different funding scenarios for improvements identified on the RTP project lists. The first scenario is the "no build" map (Figure 5.5), which essentially shows the worst case scenario in that it assumes all of the usual projected increases in population, jobs and new housing units for the region, but assumes that *none* of the improvements projects listed in the 2035 RTP will actually be built by 2035. This is the map with the most red lines. The second scenario is the "2035 Federal Policies" map (Figure 5.7), which assumes that all improvement projects identified on the RTP "financially constrained" list are built (*i.e.*, projects using funds from existing identifiable revenue sources). This map shows decreases in projected congestion compared to the "no build" map. The third scenario is the "2035 Investment Strategy" map (Figure 5.9), which assumes availability of additional funding for improvement projects that are listed on the RTP project list and are not "financially constrained" by existing revenue sources, but could be constructed assuming that other potential funding sources become available.

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[2] The cities' arguments to LCDC and the court include another incorrect assertion that, according to the 2035 RTP, the four roads at issue "will be functioning at service level F (for 'failing') by 2035." This is another unfortunate misstatement that found its way into the court of appeals opinion as truth. *Barkers Five* at 361. The RTP does not measure traffic congestion based on an A-F level of service analysis, and therefore none of the roads identified by the cities were projected to be at level of service F in the 2035 RTP. Metro utilizes ODOT's preferred volume-to-capacity ratio ("v/c") measurement. Under Metro's applicable mobility policies, the roads at issue are shown in red on the 2035 mobility maps if they are projected to operate at a 0.99 v/c in 2035. See 2035 RTP Table 2.4. This is not the same as level of service F, which is typically a v/c of 1.0 or higher. Nowhere in the 2035 RTP is there a description of the roads at issue being projected to operate at "level of service F (for 'failing')" as the cities claimed.

Comparing the 2014 RTP mobility policy maps to the 2035 RTP maps reveals significant improvements in projected traffic congestion levels in the Stafford area. The 2035 Investment Strategy map shows all of Interstate 205, all of Highway 23, and most of Borland Road and Stafford Road in red, meaning that they are projected to exceed Metro's mobility policy standard of 0.99 v/c in 2035. Exhibit C-3. However, the corresponding 2040 Investment Strategy map from the 2014 RTP shows no portion of Interstate 205 or Borland Road in red, and much smaller portions of Highway 43 and Stafford Road in red. Exhibit B-3. Therefore, to borrow the imprecise language employed by the cities, these facilities are no longer projected to be "failing" as the cities previously claimed. The dramatic change regarding the forecast for Interstate 205 in this area is due in part to new project assumptions for the I-205 and I-5 system that had not been included in the 2035 RTP. One of the specific investment strategies included in the 2014 RTP is to "address congestion bottleneck along I-205." Exhibit D (2014 RTP Appendix 3.1, page 302).

The significant improvements in projected traffic congestion in the Stafford area in just four years between Metro's adoption of the 2035 RTP and the 2014 RTP may be relied upon by LCDC as evidence that refutes the cities' arguments and "clearly supports" a conclusion that Stafford may be efficiently and cost-effectively served by transportation facilities under the relevant urban reserve factors. This evidence provides the "meaningful response" to the evidence cited by the cities from the 2035 RTP that the court of appeals found was lacking. At the same time, this evidence illuminates the fundamental problem with the cities' arguments that were based on the 2035 RTP mobility policy maps. As explained above in Section III.C of this brief, the RTP mobility policy maps reflect a constantly changing set of projects and related funding assumptions that do not constitute substantial evidence for purposes of determining

whether Stafford may be efficiently and cost effectively served by transportation facilities on a 50-year planning horizon under the urban reserve factors.

E. Other Issues Not Addressed by the Court of Appeals

The court of appeals did not address certain other arguments raised on appeal by the cities related to the evidentiary support for designating Stafford as urban reserve, because the court held that "on remand, LCDC must demonstrate that it properly reviewed Stafford's designation as urban reserve for substantial evidence." *Barkers Five* at 362-363. Specifically, the cities raised evidentiary challenges to Metro's consideration of urban reserve factors 1 and 3 regarding the provision of sewer and water service to Stafford, and also raised evidentiary challenges to Metro's consideration of the other six urban reserve factors regarding Stafford.

Again, it is important to remember that the court's remand is specifically directed at LCDC (and not to Metro or the counties) for the purpose of asking LCDC to correct a purely legal (and not evidentiary) deficiency in its order regarding the correct application of the substantial evidence test. The court did not hold that Metro's decision to designate Stafford as an urban reserve was not supported by substantial evidence in the record. The court held that LCDC incorrectly applied its standard of review for substantial evidence by failing to "meaningfully respond" to conflicting evidence relied upon by the cities in the 2035 RTP. For the reasons described above, LCDC may adopt findings on remand that provide the response the court found lacking on those issues, based on evidence that clearly supports an approval of Metro's decision.

The court did not find fault with LCDC's review of Metro's decision concerning provision of water and sewer, or concerning the application of the six other urban reserve factors. Presumably, the court did not specifically address these other issues that were raised by the cities in order to allow LCDC the ability to ensure on remand that its revised application of the

substantial evidence test applies to the *entire* Metro decision regarding the Stafford designation, and not only to that portion that considers transportation issues under factors 1 and 3. Thus, the court's decision does not require LCDC to remand to Metro in order to take more evidence; nor does it require LCDC to undertake a new analysis of the evidentiary support for Metro's findings under each factor. Rather, it requires LCDC to adopt findings demonstrating that it is correctly applying its standard of review to the entirety of Metro's decision regarding Stafford.

The evidentiary record supporting Metro's consideration of each urban reserve factor is extensive. Regarding provision of water and sewer to Stafford under factors 1 and 3, Metro adopted the following findings and recitation of evidence supporting an urban reserve designation:

> "This Urban Reserve can be efficiently and cost-effectively served with public schools and other urban-level public facilities and services by appropriate and financially capable service providers over a 50 year horizon. As with all of the region's urban reserves, additional infrastructure will need to be developed in order to provide for urbanization. It is clear that development of new public infrastructure to accommodate 50 years of growth will not be 'cheap' anywhere. Relative to other areas under consideration for designation, however, this Urban Reserve area is suitable. Technical assessments rated this area as highly suitable for sewer and water. Clack. Co. Record 795-796; Metro Record 1163, 1168-1180. The July 8, 2009, technical memo prepared by Clackamas County also demonstrates the suitability of this area for various public facilities. Clack. Co. Record 704. This area can be served by the cities of Tualatin, West Linn and Lake Oswego. These cities have objected to the designation of this area as Urban Reserve, but have not stated that they object because they would not be able to be an urban service provider for some part of the area."
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> "* * * * *
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> "Similarly, Metro's panel of sewer experts rated the entire Stafford area as having a 'high' suitability for sewer service. See e.g. Metro Record 1174. We find this analysis more probative for comparison across areas than the analysis submitted by cities. Moreover, since the analysis of urban reserves addresses a 50-year time frame, we do not find that the current desires of neighboring cities to serve

> the area influences the question of whether the area can be served." Metro Exhibit B to Ordinance No. 11-1255 at 30; Cities' Petition for Review at App 6.

There can be no doubt that the evidence relied upon by Metro, standing alone, constitutes substantial evidence because it is evidence a "reasonable person" would rely upon to make a decision regarding availablity of sewer and water to Stafford. *See, e.g., Younger v. City of Portland*, 305 Or 346, 360 (1988). The cities will likely argue that they submitted conflicting evidence that Metro and LCDC failed to analyze or respond to, similar to their argument regarding transportation services. However, the mere presence of conflicting evidence is not enough to require remand on evidentiary grounds. As explained by the court in *Barkers Five*, only where there is unanswered conflicting evidence that is "so at odds with" a decision will it require a conclusion that LCDC misunderstood its standard of review for substantial evidence. *Barkers Five* at 361.

If on remand LCDC concludes that the cities submitted "weighty countervailing evidence" regarding other public services such as water and sewer, or other urban reserve factors that did not receive a "meaningful response," LCDC may adopt revised findings responding to the cities' evidence and argument in the same manner as the transportation issues discussed above. The mere presence of conflicting evidence does not require LCDC to remand the decision to Metro for additional evidentiary hearings. Rather, LCDC may comply with the court's instructions to correctly apply its standard of review for substantial evidence by adopting its own responsive findings based on the voluminous evidence in the record.

IV. AREA 9D RURAL RESERVE DESIGNATION

Evidence in the record clearly supports the designation of all of Area 9D as a rural reserve for the reasons explained by Multnomah County in its opening brief. Metro adopts and incorporates by reference the arguments presented by Multnomah County on this issue.

V. APPLICATION OF "BEST ACHIEVES" STANDARD

In *Barkers Five*, the court of appeals remanded Washington County's designation of all urban and rural reserves in the county for reconsideration. As a result of this wholesale remand of the entire Washington County reserves package, the court also noted that "any new joint designation" of reserves by the county and Metro on remand would also require new findings addressing the "best achieves" standard in OAR 660-027-0005(2). *Barkers Five* at 333.

The court's opinion is clear that the best achieves standard would only be triggered in the event there are any *new* designations of reserve areas on remand that are different from what was approved in the original decision. That is because the stated purpose of the best achieves standard is to ensure that the overall "balance in the designation of urban and rural reserves" across the entire region "best achieves" liveable communities, vitality of farm and forest uses, and protection of natural features that define the region. OAR 660-027-0005(2). Thus, any changes in the "balance" of those designations by Metro and the counties on remand would require a reassessment of whether and how those objectives are still met.

This aspect of the court of appeals decision was overridden by the enactment of HB 4078, which legislatively established a new map of the locations of the UGB and urban and rural reserves in Washington County. This legislative action negated the court's directive requiring remand to Metro and Washington County for reconsideration of the reserve designations. The enactment of HB 4078 also negates any need to reconsider or apply the best achieves standard, which is an administrative rule requirement that was necessarily – and expressly – preempted by the legislature as part of its decision to redesignate substantial portions of the Washington County reserve areas. If LCDC retains jurisdiction over the court's remand and there are no changes in the reserve designations for Stafford and Multnomah County, there is no need for

LCDC to reconsider the best achieves standard to account for the legislative changes made by HB 4078 in Washington County. Even if LCDC remands the decision to Metro and the counties for further proceedings, as long as those proceedings do not result in changes to the reserves maps in Multnomah and Clackamas Counties, there will be no need to reconsider the best achieves standard to account for the HB 4078 revisions.

The Oregon legislature is presumed to be aware of existing law when it enacts new legislation. *Blanchana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 691 (2014); *State v. Stark*, 354 Or 1, 10 (2013). This presumption also applies to administrative rules adopted by LCDC. *Beaver State Sand & Gravel v. Douglas County*, 187 Or App 241, 249-50 (2003). When the legislature adopted revisions to the Washington County reserves map as part of HB 4078, it is presumed to have been aware of LCDC's administrative rule requiring that there be a balance in reserve designations that "best achieves" the stated goals. The adoption of HB 4078 created a statutory requirement regarding the location of reserves in Washington County that takes precedence over LCDC's "best achieves" rule and does not require subsequent action by LCDC, Metro and/or the counties to explain why the statute satisfies an administrative rule requirement. Statutes necessarily control over administrative rules. *Avis Rent A Car System, Inc. v. Dept. of Rev.*, 330 Or 35, 41 (2000).

Moreover, the express terms of HB 4078 indicate a legislative intent to preempt existing land use law. Each section of HB 4078 that establishes new locations for reserve areas or the UGB begins with the phrase "*For purposes of land use planning in Oregon*, the Legislative Assembly designates the land in Washington County...." HB 4078, Sec 3(1), (2), (3) (2014). The legislature was aware that its actions in redrawing the UGB and reserve maps preempt other land use planning rules (including for example LCDC's Goal 14 rules regarding UGB

expansions), and therefore included this language to clearly state that its action in adopting the new maps need not demonstrate compliance with other existing land use statutes, goals or rules.

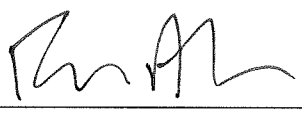
For these reasons, the new reserve designations created by HB 4078 do not create a need for LCDC, Metro or the counties to reconsider compliance with the "best achieves" standard to account for the legislature's changes to the Washington County reserves map.

VI. IF LCDC REMANDS TO METRO AND THE COUNTIES, THE ISSUES MUST BE LIMITED TO THE SPECIFIC ISSUES REMANDED BY THE COURT

In the event LCDC concludes that these issues must be remanded to Metro and the counties, LCDC's order should direct Metro and the counties to only consider the specific issues on which the court concluded that remand was necessary: (1) consideration of the urban reserve factors regarding the Stafford area, and (2) revised findings by Multnomah County explaining why all of Area 9D should be designated as rural reserve. LCDC's order should specify that other issues previously raised on appeal and/or particular reserve area designations that were affirmed by the court of appeals are final and acknowledged by LCDC as of the date of its order; therefore those issues may not be the subject of remand proceedings under the "law of the case" doctrine. *See Beck v. City of Tillamook*, 313 Or 148, 153 (1992) (when a record is reopened on remand, the "parties may not raise old, resolved issues again"). Metro and the counties have no legal authority to consider issues other than those remanded by the court and LCDC, specifically including any proposed redesignation of reserve areas that were previously acknowledged by LCDC and affirmed by the court of appeals.

Dated this 25th day of September 2014

OFFICE OF METRO ATTORNEY



Roger A. Alfred, OSB No. 935009
Alison R. Kean, OSB No. 930114

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF AMENDING THE 2035 REGIONAL TRANSPORTATION PLAN TO COMPLY WITH FEDERAL AND STATE LAW; AND TO AMEND THE REGIONAL FRAMEWORK PLAN	))))	Ordinance No. 14-1340 Introduced by Chief Operating Officer Martha Bennett with the Concurrence of Council President Tom Hughes

WHEREAS, the Regional Transportation Plan (RTP) is the federally recognized transportation policy for the metropolitan region, and must be updated every four years; and

WHEREAS, the RTP fulfills statewide planning requirements to implement Goal 12 Transportation, as implemented through the Transportation Planning Rule, and must be updated every 5-7 years; and

WHEREAS, the RTP is a central tool for implementing the Region 2040 Growth Concept, and constitutes a policy component of the Regional Framework Plan; and

WHEREAS, the most recent update to the RTP was completed in June 2010 and approved and acknowledged by US Department of Transportation and US Environmental Protection Agency on September 20, 2010; and

WHEREAS, on September 12, 2013 the Metro Council and the Joint Policy Advisory Committee on Transportation approved the proposed 2014 RTP work program identified as Exhibit A; and

WHEREAS, subsequent to adoption of the work program Metro solicited projects pursuant to the criteria included in the work program; and

WHEREAS, a 45-day public comment period on the 2014 RTP was provided from March 21 to May 5, 2014; and

WHEREAS, Metro Council held a public hearing on May 8,2014 and accepted the 2014 RTP project list for purpose of air quality conformity determination by Resolution No. 14-4527; and

WHEREAS, the Metro Council adopted the Regional Active Transportation Plan (ATP) by Resolution No. 14-4526 on July 17, 2014 and the 2014 RTP includes updated bicycle and pedestrian policies and maps that reflect direction from the ATP; and

WHEREAS, the Metro Council adopted the Environmental Justice and Title VI Assessment for the 2014 RTP and 2015-2018 MTIP by Resolution No. 14-4533 on July 17, 2014; and

WHEREAS, the Metro Council adopted a substitution for the transit Transportation Control Measure as part of the state air quality strategy and the region's Air Quality Conformity Determination by Resolution No. 13-4490 on December 19, 2013, which was later approved by the U.S. Environmental Protection Agency (EPA); and

WHEREAS, the Metro Council adopted the joint Air Quality Conformity Determination for the 2014 RTP and 2015-2018 MTIP by Resolution No.14-4534 on July 17, 2014 ; and

WHEREAS, the adopted joint Air Quality Conformity Determination reflects the substitute transit Transportation Control Measure as part of the state air quality strategy adopted by the Metro

Council by Resolution No. 13-4490 on December 19, 2013 and concurred by the U.S. Environmental Protection Agency (EPA); and

WHEREAS, the Metro Council, the Joint Policy Advisory Committee on Transportation ("JPACT"), the Metro Policy Advisory Committee ("MPAC"), the Metro Technical Advisory Committee ("MTAC"), the Transportation Policy Advisory Committee ("TPAC"), the Federal Highway Administration and the Federal Transit Administration, and other elected officials and advocates assisted in the development of the 2014 RTP and provided comment on the RTP throughout the planning process; and

WHEREAS, JPACT and MPAC have recommended approval of the 2014 RTP by the Council; and

WHEREAS, the Metro Council held a public hearing on the 2014 RTP and its components identified in Exhibit A, Exhibit B, Exhibit C, and Exhibit D, on July 17, 2014; now, therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. The 2035 Regional Transportation Plan is hereby amended to become the 2014 Regional Transportation Plan (RTP), as indicated in Exhibit A and Appendices and the addendum to Exhibit A, attached and incorporated into this ordinance.

2. Chapter 2 (Transportation) of Metro's Regional Framework Plan is hereby amended, as indicated in Exhibit B, attached and incorporated into this ordinance, to reflect the updated transportation policies in the 2014 RTP in Exhibit A.

3. The "Summary of Comments Received and Recommended Actions," attached as Exhibit C, is incorporated by reference and any amendments based on these comments are included in Exhibit A.

4. The Findings of Fact and Conclusions of Law in Exhibit D, attached and incorporated into this ordinance, explain how these amendments comply with the Regional Framework Plan, statewide planning laws and the Oregon Transportation Plan and its applicable components.

5. Staff is directed to submit this ordinance and exhibits to the Land Conservation and Development Commission (LCDC).

6. The 2014 RTP is hereby adopted as the federally-recognized metropolitan transportation plan and shall be transmitted to the U.S. Department of Transportation.

ADOPTED by the Metro Council this 17th day of July, 2014.

For Tom Hughes, Council President

Attest:

Jill Schmidt, Recording Secretary

Approved as to form:

Alison Kean, Metro Attorney

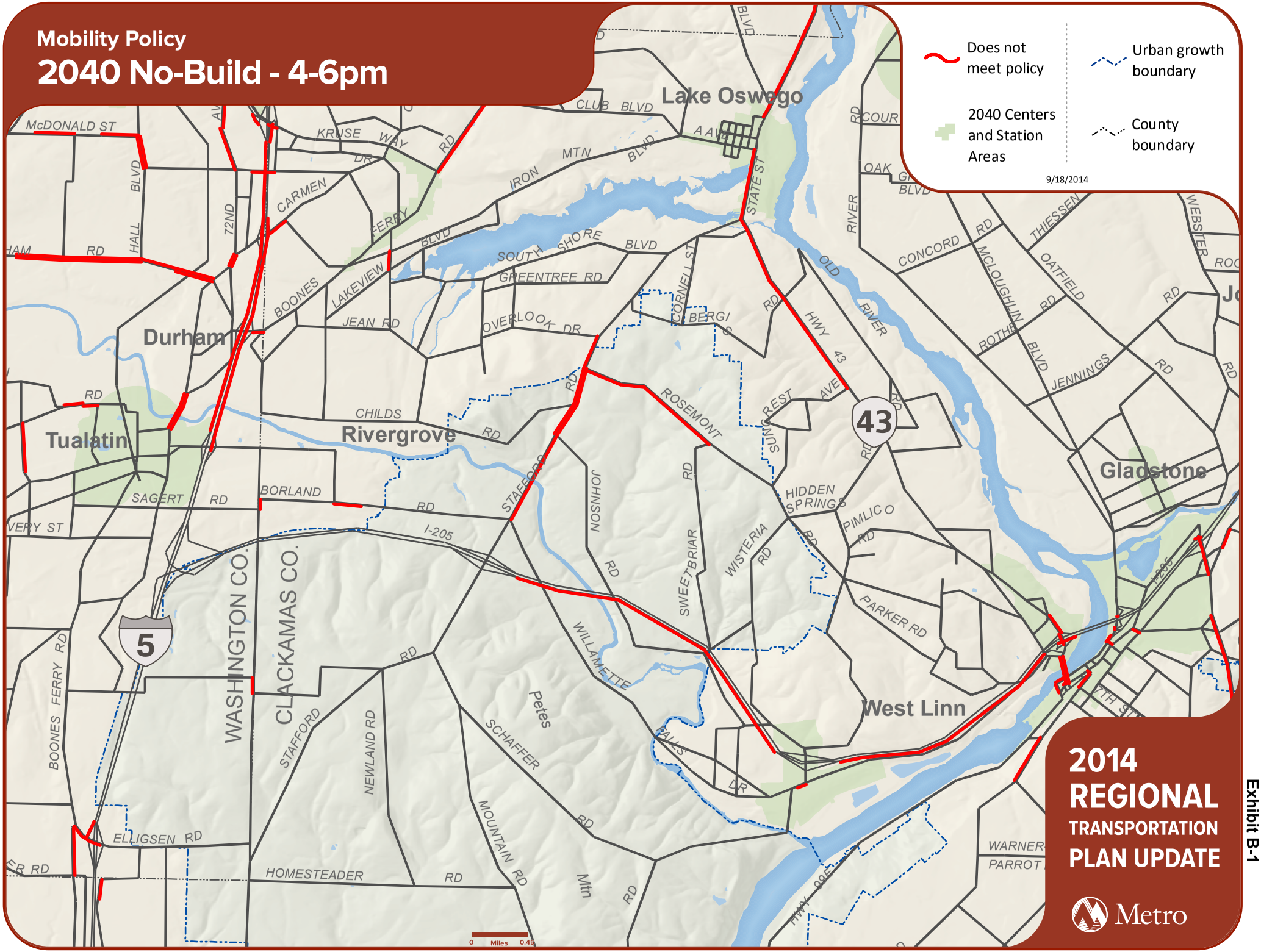
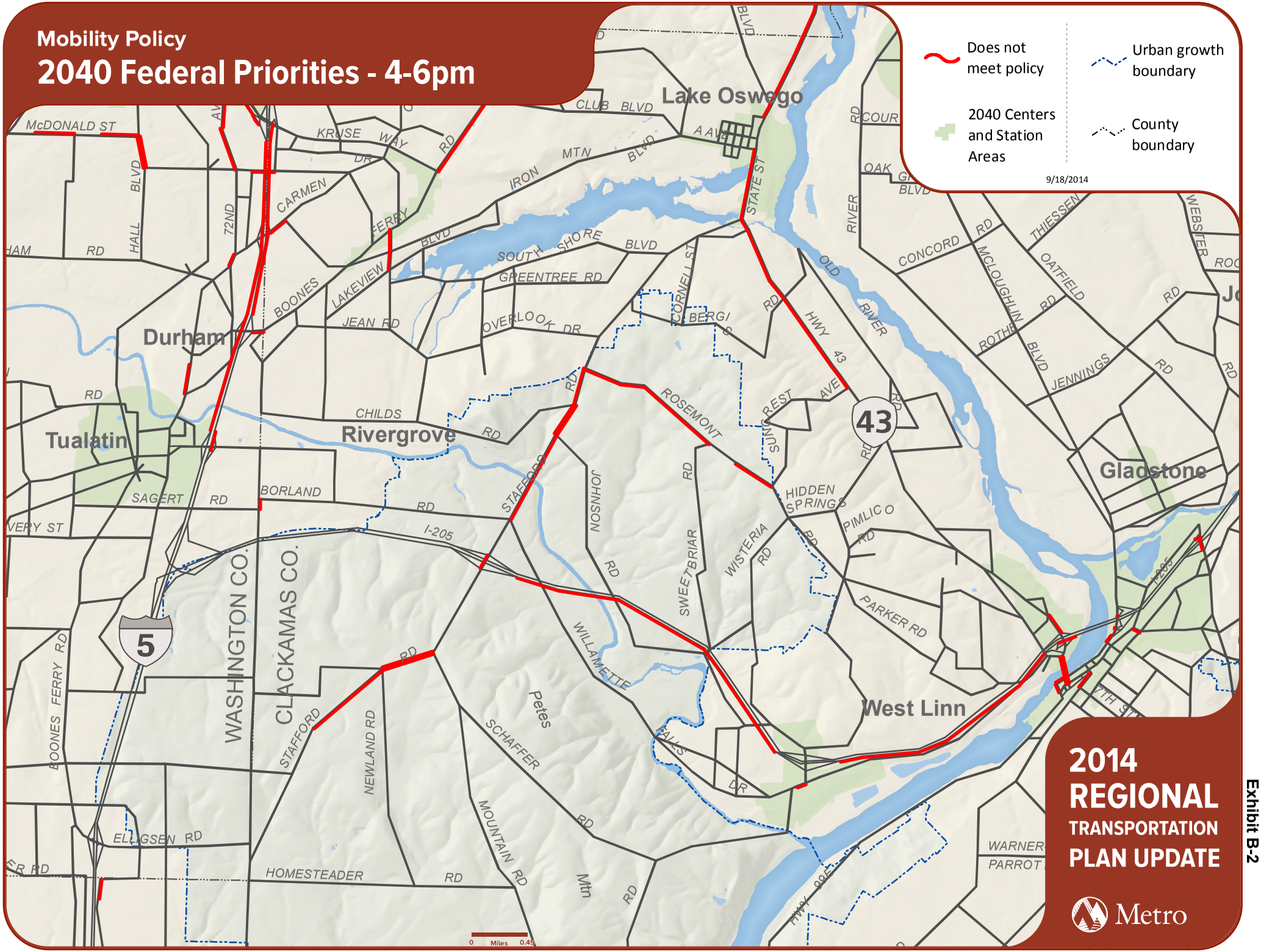

Mobility Policy
2040 No-Build - 4-6pm
Does not meet policy
2040 Centers and Station Areas
Urban growth boundary
County boundary
9/18/2014
Lake Oswego
Durham
Tualatin
Rivergrove
Gladstone
West Linn
WASHINGTON CO.
CLACKAMAS CO.
5
43
McDONALD ST
KRUSE WAY
CLUB BLVD
IRON MTN BLVD
CARMEN
FERRY
SOUTH SHORE BLVD
GREENTREE RD
LAKEVIEW
BOONES
JEAN RD
OVERLOOK DR
CHILDS RD
ROSEMONT
SUNCREST AVE
HIDDEN SPRINGS
PIMLICO RD
PARKER RD
SAGERT RD
BORLAND RD
I-205
STAFFORD
JOHNSON RD
SWEETBRIAR
WISTERIA RD
WILLAMETTE
SCHAFFER RD
Petes Mtn
NEWLAND RD
MOUNTAIN RD
STAFFORD RD
BOONES FERRY RD
ELLIGSEN RD
HOMESTEADER RD
HWY 43
OLD RIVER
STATE ST
CONCORD RD
MCLOUGHLIN BLVD
THIESSEN
OATFIELD
ROTHE RD
JENNINGS RD
WEBSTER
WARNER
PARROT
HWY 99E
0 Miles 0.45
2014 REGIONAL TRANSPORTATION PLAN UPDATE
Metro

Exhibit B-1

Mobility Policy

2040 Federal Priorities - 4-6pm



2014 REGIONAL TRANSPORTATION PLAN UPDATE

Metro

Exhibit B-2

Mobility Policy

2040 Investment Strategy - 4-6pm

2014 REGIONAL TRANSPORTATION PLAN UPDATE

Metro

Exhibit B-3

Figure 5.5

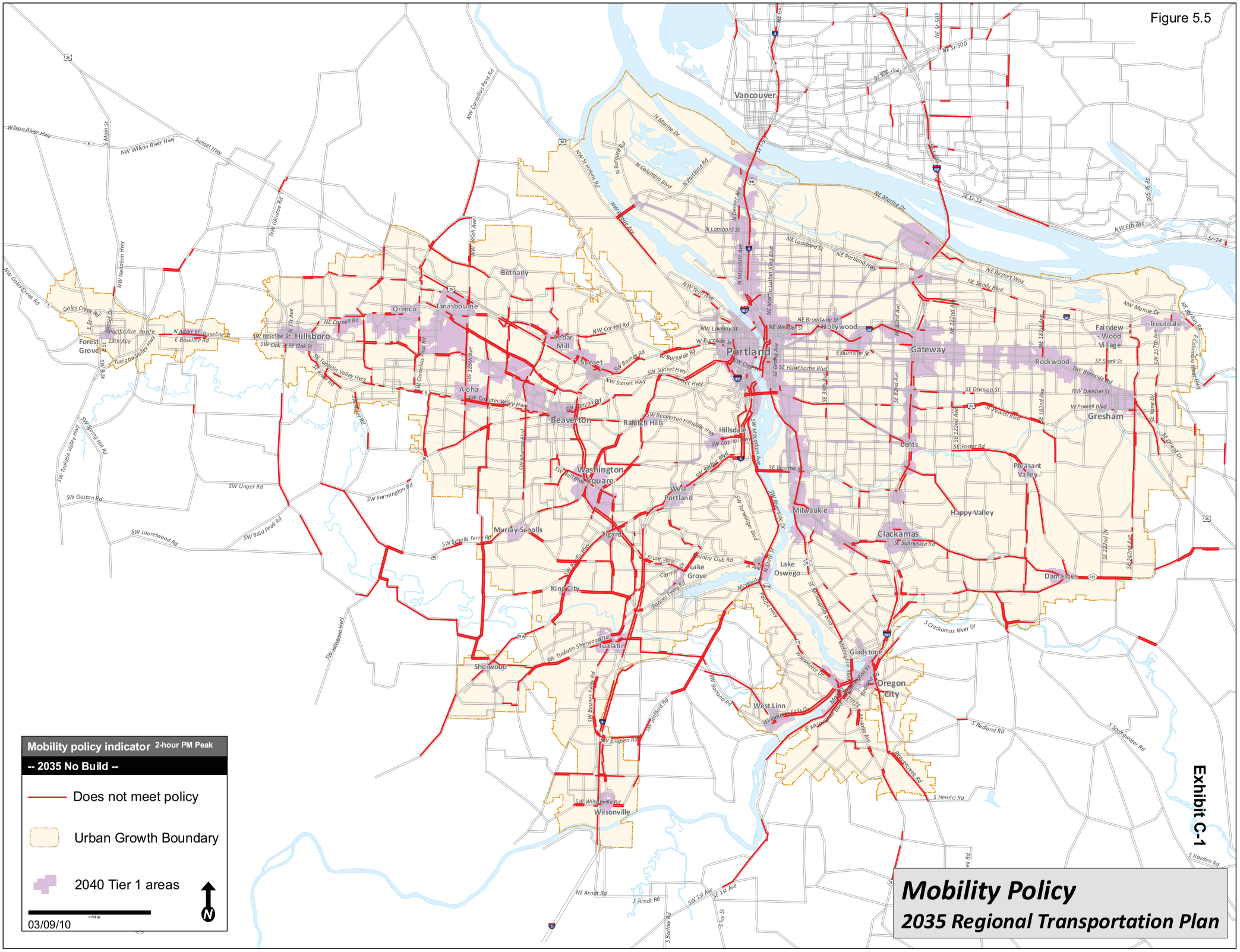
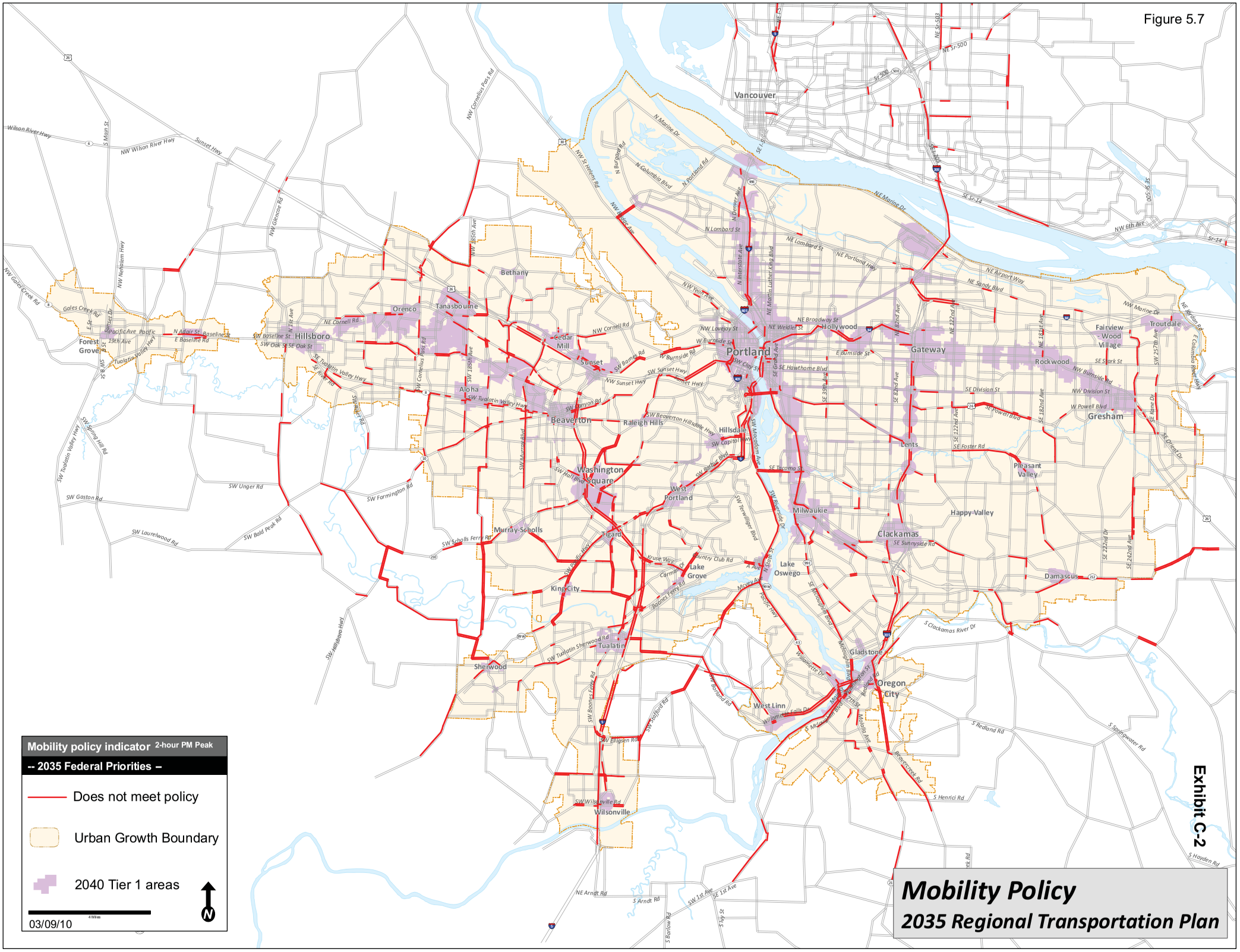

Mobility policy indicator 2-hour PM Peak
-- 2035 No Build --
Does not meet policy
Urban Growth Boundary
2040 Tier 1 areas
4 Miles
N
03/09/10
Vancouver
Portland
Gateway
Hollywood
Fairview
Wood Village
Troutdale
Rockwood
Gresham
Lents
Pleasant Valley
Happy Valley
Clackamas
Damascus
Milwaukie
Lake Oswego
Gladstone
Oregon City
West Linn
Tualatin
Sherwood
King City
Lake Grove
Tigard
Murray-Scholls
West Portland
Washington Square
Beaverton
Raleigh Hills
Hillsdale
Aloha
Cedar Mill
Sunset
Bethany
Tanasbourne
Orenco
Hillsboro
Forest Grove
Wilsonville
Mobility Policy
2035 Regional Transportation Plan
Exhibit C-1

Figure 5.7


Mobility policy indicator 2-hour PM Peak
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Does not meet policy
Urban Growth Boundary
2040 Tier 1 areas
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Wilsonville
Lake Oswego
Milwaukie
Clackamas
Oregon City
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Rockwood
Gateway
Hollywood
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Pleasant Valley
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Damascus
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Raleigh Hills
Sunset
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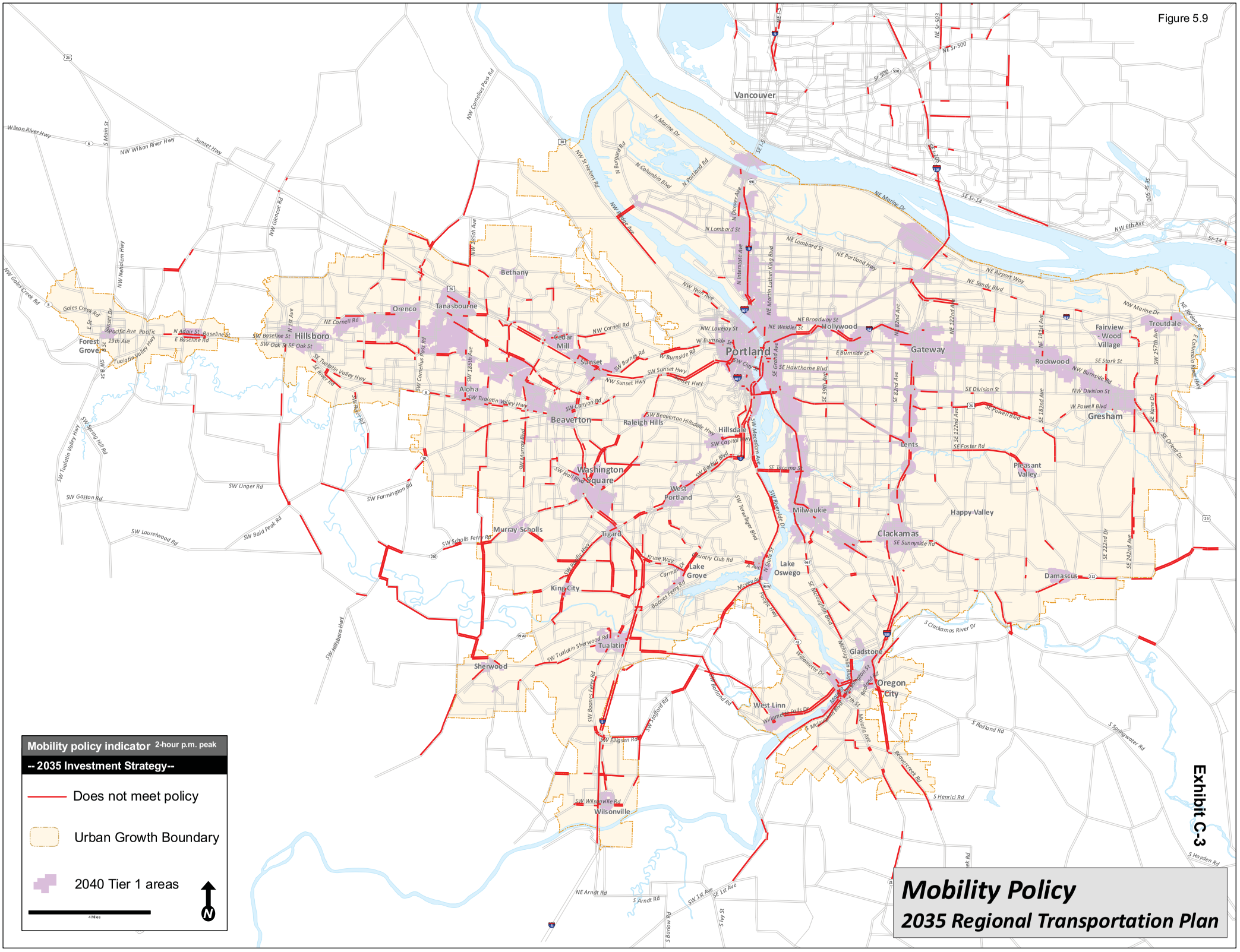
Orenco
Aloha
Forest Grove
Murray-Scholls
King City
Lake Grove
Tualatin
Wilsonville
Exhibit C-2
Mobility Policy
2035 Regional Transportation Plan

Figure 5.9


Mobility policy indicator 2-hour p.m. peak
-- 2035 Investment Strategy--
Does not meet policy
Urban Growth Boundary
2040 Tier 1 areas
4 Miles
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Vancouver
Portland
Beaverton
Hillsboro
Tigard
Tualatin
Lake Oswego
Oregon City
West Linn
Gresham
Milwaukie
Clackamas
Happy Valley
Damascus
Wilsonville
Sherwood
King City
Tanasbourne
Bethany
Cedar Mill
Orenco
Aloha
Raleigh Hills
Washington Square
West Portland
Murray-Scholls
Lake Grove
Forest Grove
Hollywood
Gateway
Fairview
Wood Village
Troutdale
Rockwood
Pleasant Valley
Lents
Gladstone
Mobility Policy
2035 Regional Transportation Plan
Exhibit C-3

	Regional Needs	Corridor Strategies
Regional Bridges	• Address a need for another south Willamette River crossing. • Sellwood Bridge (new bridge completed by 2016) • Abernathy Bridge (I-205)	• Implement Regional Transportation Functional Plan and Urban Growth Management Functional Plan.
Safety	• OR 99E/Powell, OR 99E near Holgate, and 17th and Tacoma St. intersections rank on the ODOT SPIS list as Category 4 and 5(Scale 1-5, 5 being highest priority).	• Implement Regional Transportation Functional Plan and Urban Growth Management Functional Plan. • Implement local Transportation Safety Action Plans
Regional Freight	• Improve access to Brooklyn Yard.	• Implement Regional Transportation Functional Plan and Urban Growth Management Functional Plan.

2040 INVESTMENT STRATEGY

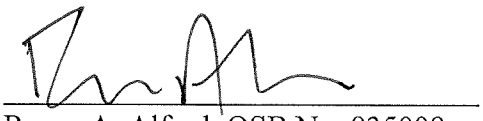
	Strategy
Near-Term (1 – 4 years)	• System and demand management along mobility corridor and parallel facilities for all modes of travel. • Address arterial connectivity and crossings. • Complete construction work on Milwaukie HCT. • Complete Trolley Trail connection to Milwaukie • Determine the appropriate bikeway connection between Lake Oswego and Portland • Improve safety for pedestrians and cyclists crossing McLoughlin Blvd and along McLoughlin Blvd through unincorporated Clackamas County • Conduct feasibility study for Trolley Trail bridge between Gladstone and Oregon City
Medium Term (5 – 10 years)	• Complete gaps in the arterial network. • Complete gaps in the pedestrian and bike facilities network. • Identify funding for bikeway between Lake Oswego and Portland • Construct pedestrian and bikeway facilities on priority collectors and arterials in the McLoughlin corridor •
Long-term (10 – 25 years)	• Construct bikeway or multi-use trail between Lake Oswego and Portland • Identify funding and construct pedestrian and bikeway bridge between Oak Grove and Lake Oswego. • Address congestion bottleneck along I-205

CERTIFICATE OF FILING

I certify that on September 25, 2014 I filed the foregoing **Metro's Opening Brief on Remand** with the Oregon Land Conservation and Development Commission via e-mail to Casaria Taylor at casaria.taylor@state.or.us.

DATED this 25th day of September 2014.

OFFICE OF METRO ATTORNEY



Roger A. Alfred, OSB No. 935009
Attorney for Respondent Metro