

**CITY COUNCIL AGENDA ITEM**  
CITY OF SHORELINE, WASHINGTON

<b>AGENDA TITLE:</b>	Authorizing the City Manager to Execute a Settlement Agreement and Release Related to the Storm Creek Erosion Management Project and Related Easement Agreements
<b>DEPARTMENT:</b>	City Attorney
<b>PRESENTED BY:</b>	Margaret King, City Attorney
<b>ACTION:</b>	<input type="checkbox"/> Ordinance <input type="checkbox"/> Resolution <input checked="" type="checkbox"/> Motion <input type="checkbox"/> Discussion <input type="checkbox"/> Public Hearing

**PROBLEM/ISSUE STATEMENT:**

Staff is requesting that Council authorize the City Manager to execute a Settlement Agreement and Release (Attachment A) related to the Storm Creek Erosion Management Project (Project) and related easement agreements. The Project will address an eroding reach of Storm Creek to manage erosion and mitigate landslide and flood risk within a bluff-side area. The Project site is located at 18321 17<sup>th</sup> Place NW where Storm Creek crosses under 17<sup>th</sup> Place NW, passes between three homes and descends a steep coastal bluff ravine, then crosses a culvert under the BNSF Railway and enters the Puget Sound.

The City has partnered with the Innis Arden Club (homeowners association) and adjacent private property owners to collaborate on a solution to this issue. If this agreement is approved by all parties, the City will initiate design of the Project and the Capital Improvement Plan will be amended to reflect this project in the mid-bi update. Council authorization is required for the proposed Settlement Agreement and Release to formalize the collaboration and cost sharing that the Project Partners have negotiated in relation to the Project.

**FINANCIAL IMPACT:**

The Agreement sets the City's funding contribution for this Project at \$365,000, with the possibility that it could increase up to \$474,500 if Project costs increase beyond the current estimate or grant funding expires. This provides for up to a 30% (\$109,500) contingency that the City would be committing to. If the City's contribution were estimated to exceed \$474,500, the Agreement would terminate in 60 days unless the Project Partners execute an amendment to the Agreement to adjust the funding commitments.

City funding would come from a 50-50 split between the Surface Water Management Capital Fund and Wastewater Management Capital Fund. Budget from these City funds will be updated or added to the City Capital Improvement Plan during the 2022 mid-biennium budget process, pending Council authorization of this Agreement.

## **RECOMMENDATION**

Staff recommends that the City Council authorize the City Manager to execute the Settlement Agreement and Release for the Storm Creek Erosion Management Project and execute the required construction and maintenance easement agreements in a form acceptable to the City Attorney.

Approved By:           City Manager ***DT***   City Attorney ***MK***

## **BACKGROUND**

Over the span of decades, severe erosion along Storm Creek between 17<sup>th</sup> Place NW and the BNSF railway has deeply down-cut the steep bluff ravine within an Innis Arden Reserve property located at 18321 17<sup>th</sup> Place NW and between three homes. If no action is taken, severe erosion is anticipated to continue, and the risk of catastrophic erosion, landslide, and blockage-driven flooding will increase, threatening public safety, critical public infrastructure, private residences, and Puget Sound water quality.

As part of a collaborative solution to address this Storm Creek erosion issue, the Ronald Wastewater District (now assumed into the City), the Innis Arden Club (homeowners association), the three adjacent private property owners, and the City (collectively, the Project Partners) developed a project concept design (Exhibit A) for potential construction. The Project entails directing Storm Creek into a new pipe which would run most of the length of the narrow erosion canyon downstream of the first wastewater gabion (just west of 17<sup>th</sup> Place NW), with approximately five to 12 feet of cover partially filling the canyon above the pipe. More specifically, the Project would install over 100 linear feet of 36-inch diameter pipe and three large maintenance hole-type structures to convey streamflow through the erosion area, over 1,000 cubic yards of quarry spalls to fill the narrow ravine above the pipe, and full site restoration, including stream restoration improvements upstream and downstream of the new pipe, plantings, and other restoration work.

The expected long-term outcomes of the Project, if it is constructed, include broad economic and other benefits, including:

1. Proactively protecting public infrastructure upstream of the project area, including sanitary sewer, storm drain, stream culverts, and 17<sup>th</sup> Place NW roadway infrastructure, and implementing improvements before worsening erosion conditions can damage public infrastructure and/or require a costlier solution.
2. Protecting the public safety of nearby residents, 17<sup>th</sup> Place NW roadway users, BNSF railway users and passengers, and Richmond Beach Saltwater Park beachgoers from landslide and flood hazards.
3. Protecting the Puget Sound habitat/environment and recreational users (fishing, shell fishing, etc.) from landslide and flooding driven turbidity (suspended soils entering the Sound via Storm Creek erosion at the site).

The consultant that worked with the Project Partners to help develop this conceptual solution provided a very preliminary cost estimate of \$771,000 in January 2018 for this Project. To better account for the long timeframe to design, permit and construct this solution and the very initial level of concept design that this solution is currently at, staff escalated the estimated cost of this Project from \$771,000 to \$1,000,000. This amount also accounts for some additional contingency in the Project and inflation in the construction market.

Following the development of this concept solution, City staff, with the support of the Project Partners, applied for the competitive King County Flood Control District 2016 Flood Reduction Grant on June 14, 2019. Notification of the grant offer was received on September 18, 2019, and Council authorized the \$225,000 grant agreement on November 18, 2019. The staff report for this Council action can be found at the

following link:

<http://cosweb.ci.shoreline.wa.us/uploads/attachments/cck/council/staffreports/2019/staffreport111819-7e.pdf>.

On June 24, 2020, the KCFCD Board approved an additional \$227,000 in funding for the Project under a 2019 Supplemental Flood Reduction Grant. On September 21, 2020, the Council authorized the second grant agreement, increasing KCFCD grant funding for the Project to \$452,000. The staff report for this Council action can be found at the following link:

<http://cosweb.ci.shoreline.wa.us/uploads/attachments/cck/council/staffreports/2020/staffreport092120-7c.pdf>.

The success in securing grant funding was in large part based on staff working for an extended period of time on this Project with the Project Partners. Following the receipt of the KCFCD grants, the Project Partners worked to develop a funding agreement for the remaining cost of the Project not covered by grant funds. The Settlement Agreement and Release (Attachment A) sets out the collaboration and cost sharing agreement that the Project Partners have negotiated in relation to the Project. While the Agreement was negotiated with the Ronald Wastewater District as one of the Project Partners, as the District as was assumed by the City on April 30, 2021, they are not included as a party to the Agreement.

### **DISCUSSION**

The Settlement Agreement and Release sets out the collaboration and cost sharing agreement that the Project Partners have negotiated in relation to the Project. It provides that the City will be responsible for the primary activities of the Project, which will include the following:

- Design and permitting of the Project, which will be completed by an engineering consultant managed by the City with input from the Project Partners, and
- Construction of the Project, which will be done by a construction contractor hired by the City under a public works contract.

Design and permitting will be completed by an engineering consultant who will be hired under a qualifications-based selection process that will be managed by the City, with consultation with the other Project Partners. The City will make all design drawing, contract specifications, and permitting documents available to the other Partners for their review and comment, who will provide comments within a set amount of time. The City will also solicit timely design input from the Partners following 30%, 60%, and 90% design submittals. The primary design deliverables will be a set of final bid documents ready for bid advertisement and all necessary permits.

Construction of the Project will be done by a construction contractor hired by the lowest responsible and responsive qualified bidder process, all in accordance with the requirements of State law and City Code. After construction is completed, the Project will be a stormwater capital facility and the ongoing routine maintenance and repair of the Project, equipment, and all necessary and related facilities and structures will be the

responsibility of the City. Project replacement, if and when necessary in the future, will be subject to the regular budget and capital project procedures of the City.

The adjacent private property owners will contribute funding and the necessary easements for construction and maintenance of the Project and the Innis Arden Club will grant all required easements for the construction and maintenance of the Project, which are both a condition of the Agreement. Exhibit B to the Agreement provides a Draft Construction and Maintenance Easement Agreement, which is still being finalized between the City and the Project Partners. All of the Project Partners in the Agreement agree to provide mutual releases and indemnification for damages or injuries related to the Project as well as for past erosion and flooding.

### **Project Funding Agreement**

As noted above, the planning-level Project cost is estimated at \$1,000,000. Funding for the Project would be shared between the Partners as follows:

- The City will contribute funds in the amount of \$365,000 (36.5%),
- The three adjacent Property Owners will contribute \$183,000 (18.3%), and
- The KCFCD Flood Reduction Grant will provide \$452,000 (45.2%).

The Agreement provides for timing of payments and allocation of percentage towards design, permitting, and construction. As noted above, the three Property Owners and the Innis Arden Club will also provide all necessary construction and maintenance easements for the Project. All the easements will be provided at no additional cost to the City.

The Agreement also sets forth a process of addressing the situation where the Project costs come in under or over the estimated \$1,000,000 amount, providing that any additional amount saved or owed after deducting the KCFCD grant contribution and relative to the cost share allocations listed above shall be divided 50% to the City and 50% to the three Property Owners. If the cost of the Project exceeds either Party's contribution by more than 30%, the Partners shall have 60 days to execute an amendment to adjust funding or terminate the Agreement.

### **FINANCIAL IMPACT**

The Agreement sets the City's funding contribution for this Project at \$365,000, with the possibility that it could increase up to \$474,500 if Project costs increase beyond the current estimate or grant funding expires. This provides for up to a 30% (\$109,500) contingency that the City would be committing to. If the City's contribution were estimated to exceed \$474,500, the Agreement would terminate in 60 days unless the Project Partners execute an amendment to the Agreement to adjust the funding commitments.

City funding would come from a 50-50 split between the Surface Water Management Capital Fund and Wastewater Management Capital Fund. Budget from these City funds will be updated or added to the City Capital Improvement Plan during the 2022 mid-biennium budget process, pending Council authorization of this Agreement.

## **RECOMMENDATION**

Staff recommends that the City Council authorize the City Manager to execute the Settlement Agreement and Release for the Storm Creek Erosion Management Project and execute the required construction and maintenance easement agreements in a form acceptable to the City Attorney.

## **ATTACHMENT**

Attachment A: Settlement Agreement and Release for Storm Creek Erosion Management Project

Attachment A, Exhibit A: Project Conceptual Configuration

Attachment A, Exhibit B: *Draft* Construction and Maintenance Easement Agreement

## SETTLEMENT AGREEMENT AND RELEASE

June 1, 2021 Draft

THIS SETTLEMENT AGREEMENT AND RELEASE (“Agreement”) is entered into between the parties listed in the Section below and effective on the date listed on page 12 of this Agreement.

### I. PARTIES

The following are parties to this Agreement: (1) The City of Shoreline, a Washington municipal corporation (“the City”); (2) The Innis Arden Club, a Washington non-profit corporation, (“IAC”); (3) Dennis and Susan Aker, husband and wife and the marital community comprised thereof, and their property located at 18315 – 17th Place N.W., Shoreline, WA 98177 (“Aker”); (4) the Estate of Marc Weinberg, Marion Woodfield, personal representative, and Marion Woodfield, individually, and their property located at 18335 - 17th. Place N.W., Shoreline, WA 98177 (“Woodfield”); and (5) Douglas Henrikson, and his property located at 18345 - 17th Place N.W., Shoreline, WA 98177 (“Henrikson”). Aker, Woodfield, and Henrikson are collectively referred to herein as the “Individual Property Owners”. All of the above-listed individual parties are collectively referred to as “Parties” and singularly as “Party”.

### II. RECITALS

- A. Over the years the characteristics of the Storm Creek basin have been studied with several reports describing the slope and soil characteristics of the area near 17<sup>th</sup> Place NW. Around 1995-1997, the Ronald Wastewater District (RWD) installed two gabions within Storm Creek downstream of 17th Place NW to stabilize stream erosion in order to protect an RWD-owned sanitary sewer main crossing the creek.
- B. A very large 24-hour precipitation event occurred on December 3, 2007, and erosion damage within Lower Storm Creek included a trail washout and exposed sanitary sewer main near NW 185<sup>th</sup> Street, and heavy sediment deposition and erosion of the culvert headwall at the 17<sup>th</sup> Place NW culvert inlet (birdcage) structure.
- C. Denny Aker (owner of 18315 17<sup>th</sup> Place NW) began to informally measure and record the depth of the scour hole (also known as an erosion “knickpoint”) just below the westernmost RWD placed gabion downstream of 17<sup>th</sup> Place NW. In November 2010, the reported depth from bottom of hole to top of gabion was approximately 3.3 feet. Knickpoint height, as measured by Mr. Aker, increased by 5.5 feet over the following 24 months, then dramatically by another five feet during the first few months of 2013. The final available measurement taken by Mr. Aker on September 7, 2013 showed a knickpoint height of 14.7 feet.

- D. The City's Storm Creek Basin Plan update, dated March 2013, also identified erosion in Lower Storm Creek. Section 5.1.2 of the Storm Creek Basin Plan lists seven recommendations for the Storm Creek erosion issue (priority level per Table 18 in Section 6 of the Basin Plan):
- St-Study-2: Study deep infiltration of stormwater
  - St-Study-3: Evaluate out-of-basin routing and infiltration
  - St-Mon-3: Monitor erosion
  - St-CIP-2: Convert roadside ditches to bioretention
  - St-Ed-5: Voluntary rain garden program
  - St-CIP-1: Tightline Storm Creek
  - St-Ed-4: Bluff landscaping
- E. In 2017, the City began meeting with RWD, IAC, and the Individual Property Owners to identify a potential proactive, cooperative solution, and to review the feasibility of implementing the Storm Creek Basin Plan Project ST-CIP-1 recommendation: Tightline Storm Creek. After multiple meetings and preliminary investigation, the Parties identified a conceptual plan (described below) that the Parties believe will help protect City and RWD infrastructure as well as address ongoing erosion problems that are impacting the real property owned by the Individual Property Owners and by IAC.
- F. The conceptual plan, referred to herein as the Storm Creek Erosion Management Project ("Project"), addresses existing and future erosion and landslide risks downstream of 17<sup>th</sup> Place NW and upstream of the Burlington Northern Santa Fe Railway ("BNSF") Right-of-Way. The scope of work generally includes constructing improvements to pipe Storm Creek streamflow through the most eroded channel reach, and backfilling the eroded area above the new pipe, planting appropriate landscaping, and placing signage and fencing to the extent allowed by the City's shoreline and critical areas ordinances, and state and federal shoreline or railroad regulations, to forbid/prevent pedestrians from using the Project site area adjacent to the Individual Property Owners' properties as an access point to or from the beach. The Project is expected to prevent future downcutting during Storm Creek peak flows. The Project's primary activities will include the design, permitting, and construction of improvements. Design and permitting will be the responsibility of the City and will be completed by an engineering consultant who will be hired under a qualifications-based selection process that will be managed by the City with consultation with the other Parties to this Agreement. The City will make all design drawing, contract specifications, and permitting documents available to the other Parties for their review as soon as possible. The other Parties will have at least 30 days to review the documents and provide comments to the City, provided that they may waive the 30-day requirement. The City will respond to any comments prior to adoption and will make a good faith effort to address any concerns raised by the other Parties. The primary design deliverable will be a set of final bid documents ready for bid advertisement. The City will solicit timely design input from all of the other Parties following 30, 60, and 90 percent design submittals. Should those final bid documents differ materially and adversely from the approved designs and from the design of the Project described herein, the Parties must revise the same, and shall have thirty (30) days to revise any said design or permitting documents to mitigate



any said material and adverse impacts. Construction of the Project will be done by a construction contractor hired by the lowest responsible and responsive qualified bidder process in accordance with the requirements of Washington State Law and Shoreline Municipal Code and will be managed by the City under a public works contract.

- G. Based on a conceptual design presented in 2018 by Northwest Hydraulic Consultants (NHC), and previously vetted by all Parties, the Project is expected to address the erosion issue by installing over 100 linear feet of 36-inch diameter pipe and three large manhole-type structures to convey streamflow through the length of channel most impacted by erosion, placing over 1,000 cubic yards of quarry spalls to fill the narrow ravine above the new pipe, and restoring all disturbed areas within the project extents – including stream restoration improvements upstream and downstream of the new pipe, plantings, and other restoration and related landscaping work. See Exhibit A for Project conceptual configuration. Proposed improvements and estimated costs will be refined during the Project design process; final design and constructed improvements for the Project may differ from the conceptual design described above, but shall not materially or adversely differ in such a way that allows for a greater risk of existing and future erosion and landslide risks downstream of 17<sup>th</sup> Place NW and upstream of the BNSF Right-of-Way, than does the Project. The City’s public works contract construction documents with the contractor will adopt as binding terms the most recent version of the WSDOT Standard Specifications for Road, Bridge, and Municipal Construction (“Standard Specifications”), and the most recent version of the Special Provisions for the WSDOT Standard Specifications (“Special Provisions”) and shall address the items in Section V of the McAleer Creek – Goheen Project Bid Number 7604 (Bid Date No Later Than April 21 2015) (“McAleer Project”). The Parties agree that in the event the City needs to adjust any such Special Provisions referenced in the McAleer Project, as a result of the specific needs or differences of the two different projects, it will consult with IAC and the Private Property Owners who shall act in good faith to promptly agree to any reasonable and appropriate modifications. IAC and the Private Property Owners shall be designated as third-party beneficiaries of the duties of the contractor under the public works contract and shall be named as additional insureds under the insurance policies required by that contract.
- H. Proposed improvements will require access onto property and the granting of temporary construction and permanent easements by the Parties which temporary construction and permanent easements will allow for access and maintenance and be in substantially the form attached hereto as Exhibit B. It is understood that the Project scope will not include any ravine side slope stabilization beyond what is needed to construct the improvements to stabilize stream channel erosion as described above. Notwithstanding any of the foregoing, the City shall ensure and require in its contracts that design of the Project will be in compliance with the industry standard of care for design professionals in the Puget Sound region, and that construction shall be performed in a workmanlike manner and up to industry standards.
- I. To further the objectives above, the Parties desire to enter into this Agreement to cooperatively address the Lower Storm Creek erosion and flooding and related problems.

### III. AGREEMENT, RELEASE, INDEMNIFICATION AND HOLD HARMLESS

IN CONSIDERATION OF and subject to the terms and conditions set forth herein, the parties agree as follows

1. **Incorporation of Recitals.** The Parties hereby incorporate the Recitals and Exhibits A and B as material terms to this Agreement as if fully set forth herein.
2. **Ongoing Maintenance and Repair of the Project and Lower Storm Creek.** Upon construction of the Project, or reasonable variant thereof, the ongoing routine maintenance and repair of the Project, equipment, and all necessary and related facilities and structures, shall be the sole and exclusive responsibility of the City or the City's successors in interest.

The duty of ongoing inspection, maintenance, repair and / or replacement of the constructed facility, including all costs associated therewith, and the benefit to the Parties, shall touch and concern the land.

Project replacement shall be subject to the regular budget and capital project procedures of the City.

The City shall be responsible for all mitigation and restoration of vegetation as required by any conditions or permits that relate to the Project subject to the terms of the easements.

#### 3. **Cost Sharing and Cost Sharing Contingencies.**

a. Total Cost for design, permitting, and construction of the Project is estimated at one million dollars (\$1,000,000.00 or One Million). Cost sharing for the Total Cost of the Project based on the estimated cost of \$1,000,000.00 will be allocated as follows:

- i. A King County Flood Control District ("KCFCD") Flood Reduction Grant will provide up to \$452,000 (45.20%) in Project funding for design, permitting, and construction phases of the Project.
- ii. The City shall contribute the amount of \$365,000 (36.5%)
- iii. Woodfield shall contribute \$68,625 (6.86%)
- iv. Aker shall contribute \$68,625 (6.86%)
- v. Henrikson shall contribute \$45,750 (4.58%)

b. The City and the Individual Property Owners understand that the Total Cost of the Project after construction is complete may be lower or higher than the estimated cost of \$1,000,000.00. Should that occur, the additional amount saved or owed shall be divided 50% to the City and 18.75% to Aker, 18.75% to Woodfield, and 12.5% to Henrikson. Notwithstanding the foregoing, if any funding Party's contribution exceeds their contribution set out in subsection 3(a) by more than 30%, the funding Parties shall have 60

days to execute an amendment to adjust funding of this Agreement, otherwise the Agreement shall terminate. The funding Parties are the City, Aker, Woodfield, and Henrikson.

c. The Parties further understand KCFCD grant funding referenced in 3(a)(i) is time sensitive and contingent. The current grant expires on December 31, 2022. The Parties acknowledge that it will likely be necessary for the City to seek an extension of the grant by one year in order to extend the expiration date of the grant. Accordingly, the Parties recognize and acknowledge that time is of the essence in this regard and each Party shall agree to any extensions and act expeditiously in all review and approvals set forth in this Agreement.

d. In addition to the expiration of the KCFCD grant funding, there are additional restrictions and approvals required for the grant funding. Due to the contingent nature of this KCFCD grant funding, the Parties agree that should the KCFCD grant funding be reduced, revoked, or expire, the Parties shall support the City's attempt to apply for and obtain any additional grant funding available to replace the KCFCD grant. The Parties also understand that the City may seek or receive additional funding and is currently pursuing additional grant funding and has submitted a FEMA BRIC grant application that is currently being reviewed. Should the FEMA BRIC grant funding be approved and provide additional funding in excess of the current KCFCD grant, the funding Parties shall be credited equally as if the cost of the Project was reduced as set forth in subsection 3(b). Should the KCFCD grant be reduced, revoked, or expire, any additional funds obtained from the FEMA BRIC grant shall first be applied to replace the amount of the KCFCD grant before any remaining amounts shall be equally credited, and this same methodology will apply for any other or additional grants that the City may receive in relation to this project. Should there be no additional funds, or not enough funding to replace the KCFCD grant, the Parties shall have 60 days to execute an amendment to adjust funding of this Agreement, otherwise the Agreement shall terminate.

e. The City's obligations under this Agreement are expressly contingent upon the City's receipt of funding from the Individual Property Owners. Should Individual Property Owners fail to provide the funding in the amounts and at the times provided for herein, the City may nevertheless, in its sole discretion, move forward with the project. Should it do so, the Individual Property Owners shall forfeit any additional share from any additional funding that may become available for the Project and shall still be responsible for their share of funding, not to exceed 30 percent more than the amounts agreed to in Section 3(a), which shall become a lien on their respective properties in the amount owed by each Individual Owner. The amount owed by the Individual Property Owners is not joint and several, and any individual property owner(s) shall not be liable for amounts unpaid by other property owner(s).

**4. Access to Property and Easements.** IAC and the Individual Property Owners, to the extent they own land that is needed for the construction and/or maintenance of the Project, shall

each grant to the City any easements as reasonably needed for construction, maintenance, and repair of the Project. Each party shall be responsible for its own attorney's fees involved in the negotiation of the language of the easement. The easement shall include the right of access to properties they own or control on, around or adjacent to the Project area as needed or requested to do tests, studies, surveys, or other reasonably necessary actions to plan and construct the Project.

This Agreement is expressly contingent upon the Parties providing all necessary easement identified by the City for the Project. The easement necessary for this project is solely for the purpose of construction and maintenance of the Project and does not independently confer an obligation or rights separate or apart from the terms of this Agreement and the Easement.

**5. Payments.**

a. Within sixty (60) days of execution of this Agreement by all Parties, Aker and Woodfield shall each pay to the City \$7,500, and Henrikson shall pay \$5,000, and this \$20,000 shall be applied toward design and permitting of the Project. The remainder of the costs of design and permitting shall be paid for by the City and by the expected KCFCFCD grant.

b. After the construction contract price is known, and prior to award of the City Project construction contract, the Individual Property Owners will each pay fifty percent (50%) of their respective shares in paragraph 3(a) above to the City. The City shall thereafter execute the Project construction contract and fund the Project costs through completion of the Project.

c. The remaining share of the Project Costs to be paid by the Individual Property Owners to the City (after deducting the \$20,000 paid for design and permitting, and the 50% paid under paragraph 5(b), and any other amounts paid to date), shall be paid within thirty (30) days of the final completion of the Project.

The City shall have a lien on the properties owned by the Individual Property Owners at the addresses listed in the Recitals, securing the timely payment of that owner's share owed hereunder. All sums owed by each Individual Property Owner are due on sale of their respective property even if payment is not yet due in accordance with this Agreement. The amount due on sale is the maximum sum that could be owed under Section 3(a) plus 30% of that sum, which shall be held in escrow by the title company and paid to the City at the times provided for herein. Any amounts remaining in escrow upon completion of the Project shall be paid to the Individual Owner who sold. Upon closing of any such sale, the City shall release its lien on the real estate, but shall have a lien on the proceeds held in escrow.

**6. Mutual Releases.** Each and every Party to this Agreement hereby releases, covenants not to sue, and fully and forever discharges each and every other Party and the "Additional Released Parties" as defined below, from any and all "*Released Claims*," as defined below.

“*Released Claims*” means any and all claims, demands, causes of action, actions, rights, liabilities, damages, and/or attorney’s fees or costs whatsoever at law or in equity or otherwise, fixed or contingent, direct or indirect, known or unknown, likely or unlikely, that each Party now owns or holds and/or has at any time heretofore owned or held against any other Party which are or may be based upon any fact, act, omission, cause, or matter of any kind occurring or existing at any time up to and including the date of this Agreement and which are related to (i) the presence of Storm Creek on the property of any Party or on any other Party’s property, (ii) acts or omissions of the City or any Party who is an upstream or downstream property owner, and/or (iii) the erosion, flooding, and related problems that the Project is designed to ameliorate.

Without limiting the generality of the foregoing, “*Released Claims*” includes, without limitation: (i) claims up to and including the date of this Agreement for monetary or equitable relief; (ii) claims up to and including the date of this Agreement for costs, expenses, attorneys’ fees, or any other charges; (iii) claims up to and including the date of this Agreement based on negligence, breach of express or implied contract, tortious interference with business expectancy, assault, battery, trespass, invasion of privacy, intentional or negligent infliction of emotional distress, outrage, slander, libel, retaliation, RCW ch. 64.40, violation of any state or federal constitutional right, violation of state, federal and/or local law, regulation or policy, and any other common law theory of liability whatsoever; provided the same arise out of or are related to (i) the presence of Storm Creek on the property of any Party or on any other Party’s property, (i) acts or omissions of the City or any Party who is an upstream or downstream property owner, and/or (iii) the erosion, flooding, and related problems that the Project is designed to ameliorate.

The Parties have cooperated in choosing which potential fix to pursue and understand that there are no guarantees that the selected Project will work. As such, “*Released Claims*” also includes claims relating to the decision to pursue the Project, and what type of project to pursue, including but not limited to claims that a different project would have worked or worked better, or any claim by one Party against another arising out of or related to the Project during the existence of the Project.

Notwithstanding anything herein to the contrary, “*Released Claims*” does not include (a) any claim arising out of design errors or omissions, occurring after the date of this Agreement, by any firm hired to design or engineer the Project, or (b) any claim for construction defects caused by a contractor hired to build the Project, provided that the Parties shall be third party beneficiaries as set forth below, and any such claims by a Party against these third parties shall be limited to only those third parties, and shall not include any ability for any Party to claim or recover comparative or contributory fault against another Party. Claims for gross negligence or intentional misconduct by any Party arising after the date of this Agreement are also not included as “*Released Claims*”. In the event of any injury or damage to a Party’s property, or breach of the contract documents which materially and adversely damage a Party’s property, by the Contractor or Engineer, the Party shall contact the City in writing and request the City cure/enforce the same within thirty (30) days from the written notice. The City may choose to cure/enforce the matter pursuant to the notice. If the City accepts to cure/enforce the matter, the City shall diligently prosecute the same to its

conclusion in accordance with the contract documents. In the alternative, if the City fails or refuses to timely cure/enforce, the City shall then assign its rights to the Party and whom may at its sole cost and expense prosecute the contract documents to cure/enforce the matter against the Contractor and/or Engineer.

Nothing in this Agreement shall be deemed to release, trigger, or impose upon IAC or the Individual Property Owners any duty of maintenance or repair of the Project.

Except as set forth herein or the easement set forth in Section 6 above, nothing in this Agreement shall be deemed to impose upon the City of Shoreline any duty of maintenance or repair of the Project that differs from the Public Duty Doctrine or other law generally applicable to maintenance and repair of City-owned infrastructure.

The Release in this Agreement extends to and inures to the benefit of each and every Party to this Agreement, and to the following “*Additional Released Parties*”: (1) The City of Shoreline and all of its past and present council-members, elected and/or appointed officials, officers, directors, agents, employees, volunteers, marital communities, representatives, partners, attorneys, accountants, insurers (including Washington Cities Insurance Authority), consultants, subsidiaries, affiliates, programs, predecessors, successors, transferees, assigns, and/or related entities thereof, and all past and present members, commissioners, officers, directors, agents, employees, volunteers, marital communities, representatives, consultants partners, attorneys, accountants, insurers, parents, subsidiaries, affiliates, programs, predecessors, successors, heirs, transferees, and/or assigns of any of those persons and/or related entities; and (2) the Ronald Wastewater District and all of its past and present elected and/or appointed officials, officers, directors, agents, employees, volunteers, marital communities, representatives, partners, attorneys, accountants, insurers, consultants, subsidiaries, affiliates, programs, predecessors, successors, transferees, assigns, and/or related entities thereof, and all past and present members, commissioners, officers, directors, agents, employees, volunteers, marital communities, representatives, consultants partners, attorneys, accountants, insurers, parents, subsidiaries, affiliates, programs, predecessors, successors, heirs, transferees, and/or assigns of any of those persons and/or related entities; and (3) The Innis Arden Club and all of its past and present officers, directors, shareholders, members, agents, employees, volunteers, marital communities, representatives, partners, attorneys, accountants, insurers, consultants, subsidiaries, committee members, affiliates, programs, predecessors, successors, transferees, assigns, and/or related entities thereof.

This Release binds each and every one of the Parties to this Agreement and its or their heirs, survivors, legatees, executors, personal representatives, receivers, trustees, insurers, future marital communities, successors, subrogees, transferees, and assigns, agents and employees.

Each Party represents, warrants, and agrees that: (i) they understand the foregoing Release; (ii) they are releasing potentially unknown claims; (iii) these releases are fairly and knowingly made; (iv) these releases are voluntarily made without any undue influence; (v) these releases are supported by adequate consideration; (vi) the Parties have disclosed all claims known to them, to the other Parties; and (vi) they are aware that they may have limited knowledge with respect to

certain of the Released Claims. The Parties specifically allocate the risk of any mistake of fact by any party in entering into this Agreement to the party or parties who later claim that party was mistaken.

The Parties represent and warrant that they have not filed or initiated any administrative appeal, charge, lawsuit, arbitration or other proceeding of any kind whatsoever against the City, RWD or any of the “*Additional Released Parties*” that has not been dismissed or otherwise completely terminated, and they further represent that they have not assigned or given to anyone any Released Claims they have, will have, ever had, or claimed to have against the City, RWD, IAC, or any of the “*Additional Released Parties*”.

The Parties represent and warrant that they have full right, power and authority to enter into these releases, that they own or have the right to release each and all of the Released Claims that they purport to release.

**7. Authority.** The persons signing this Agreement represent and warrant that they have the full right, power, and authority to enter into this Agreement, to bind the party on behalf of whom they are signing, and to grant the benefits they assert in this Agreement.

**8. No Admission.** Execution of this Agreement shall not be construed as an admission of liability, responsibility, or lack of liability or responsibility, on the part of any of the Parties hereto. Each and every Party hereby expressly disclaims any liability for any of the Released Claims.

**9. Specific Performance.** The Parties agree that damages are not an adequate remedy for breach of this Agreement, and that the Parties are entitled to compel specific performance of all material terms of this Agreement by any Party in default herein. All terms and provisions of this Agreement are material. In the event of a default by any party, the non-defaulting party may seek any and all remedies permitted by law or in equity. Specifically, this Agreement may be enforced by restraining orders and injunctions (temporary, preliminary, mandatory, or permanent) mandating compliance with the provisions hereof. The act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity. The rights and remedies in this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise.

**10. Governing Law, Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Washington. Venue for any action arising from and/or relating to this Agreement shall lie in the King County Superior Court.

**11. Entire Agreement.** This Agreement contains the entire Agreement between the Parties with respect to the subject matter hereof and shall not be modified or amended in any way except in writing and signed by the relevant Parties.

**12. Full Understanding; Independent Legal Counsel.** The Parties each acknowledge, represent and agree that they have read this Agreement; that they fully understand the terms thereof; that they have been fully advised by their independent legal counsel, or have been advised to obtain independent legal counsel; that they are executed by them upon the advice and recommendation of their independent legal counsel; and that they have voluntarily and freely signed this Agreement.

**13. Waiver.** No right or obligation under this Agreement will be deemed to have been waived unless evidenced by a writing signed by the Party against whom the waiver is asserted, or by its duly authorized representative. Any waiver will be effective only with respect to the specific instance involved and will not impair or limit the right of the waiving party to insist upon strict performance of the right or obligation in any other instance, in any other respect, or at any other time.

**14. Governing Documents.** The City and IAC acknowledge that the Mutual Restrictive Easements for Innis Arden 1, 2 and 3 (King County Recorder's Office file numbers 3187136, 3530990, and 3897377 as amended ("MREs", "Covenants")) remain in full force and effect, and that nothing in this Agreement is intended to authorize violation of their provisions.

**15. Other Necessary Acts.** Each Party shall execute and deliver to the other all such further instruments and documents and take such additional acts as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other Party the full and complete enjoyment of rights and privileges hereunder.

**16. Binding Nature of Agreement.** Except as otherwise provided herein, this Agreement shall be binding upon and inure to the benefit of the Parties, their heirs, executors, administrators, successors, devisees, assigns, including subsequent purchasers of the Property, and all persons now or hereafter holding or having all or any part of any interest of a Party to this Agreement. Any of the benefits and obligations of this Agreement shall specifically run with the land and continue following the subdivision, leasing, or transfer of ownership of property.

**17. Severability.** If any portion of this Agreement is held to be invalid by a court of competent jurisdiction, such invalidity shall not affect any other portion of this Agreement.

**18. Third Party Beneficiaries.** Except as specifically set out otherwise herein, this Agreement is neither expressly nor impliedly intended to be for the benefit of any third party, and it is neither expressly nor impliedly enforceable by any third party.

**19. Duty to Record Agreement.** The terms, conditions and duties imposed under this Agreement are expressly intended to touch and concern the Properties and to run with the Properties (those parcels identified in the Recitals). Within ten (10) days of the effective date of this Agreement, the City shall record a fully executed copy of this Agreement with the King County Auditor's (or Recorder's) Office and provide proof of recording to the Parties and/or their attorneys. This recording requirement is a material term of this Agreement.



20. **Notice.** Any notice under this Agreement shall be delivered to the Parties' representatives at the addresses listed below by certified U.S. Mail:

**City**

City Manager  
City of Shoreline  
17500 Midvale Avenue N  
Shoreline, WA 98133

**Innis Arden Club**

With Copy to Eglick and Whited  
Eglick & Whited PLLC,  
Suite 3130, 1000 2<sup>nd</sup> Avenue, Seattle, WA 98104

Dennis and Susan Aker  
18315 17<sup>th</sup> Place NW, Shoreline, WA 98177  
Copy to: [madamson@jpclaw.com](mailto:madamson@jpclaw.com)

Marion Woodfield  
18335 17<sup>th</sup> Place NW, Shoreline, WA 98177  
Copy to: [madamson@jpclaw.com](mailto:madamson@jpclaw.com)

Douglas Hendrikson  
18345 17<sup>th</sup> Place NW, Shoreline, WA 98177  
Copy to: [madamson@jpclaw.com](mailto:madamson@jpclaw.com)

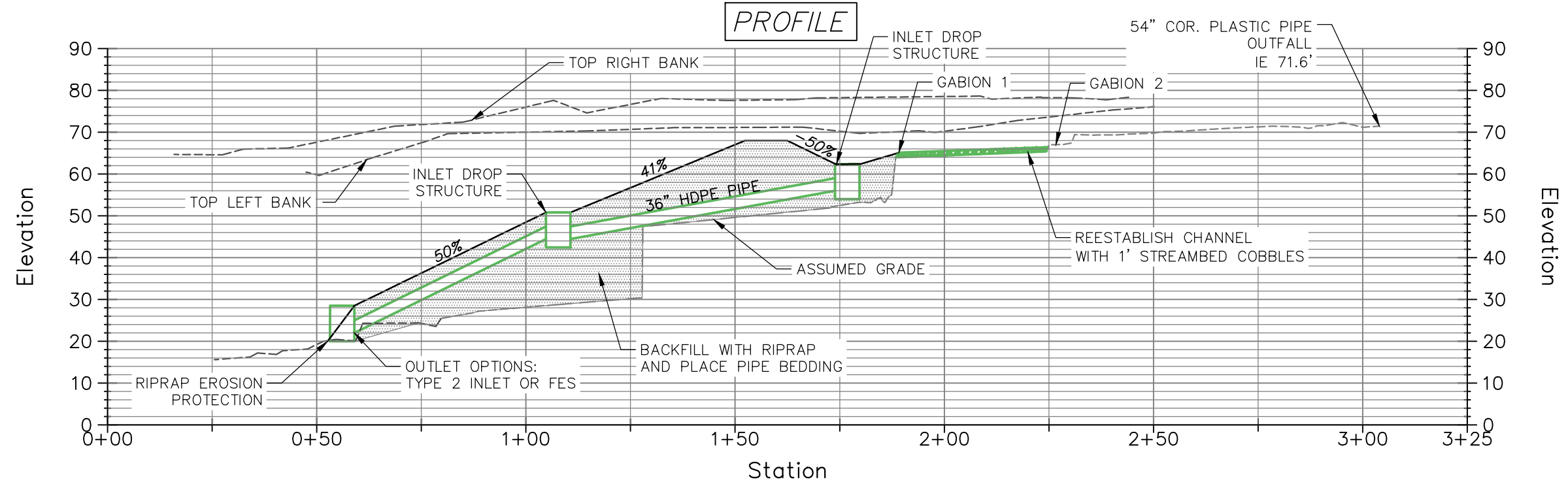
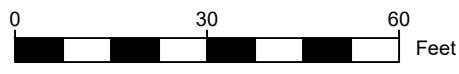
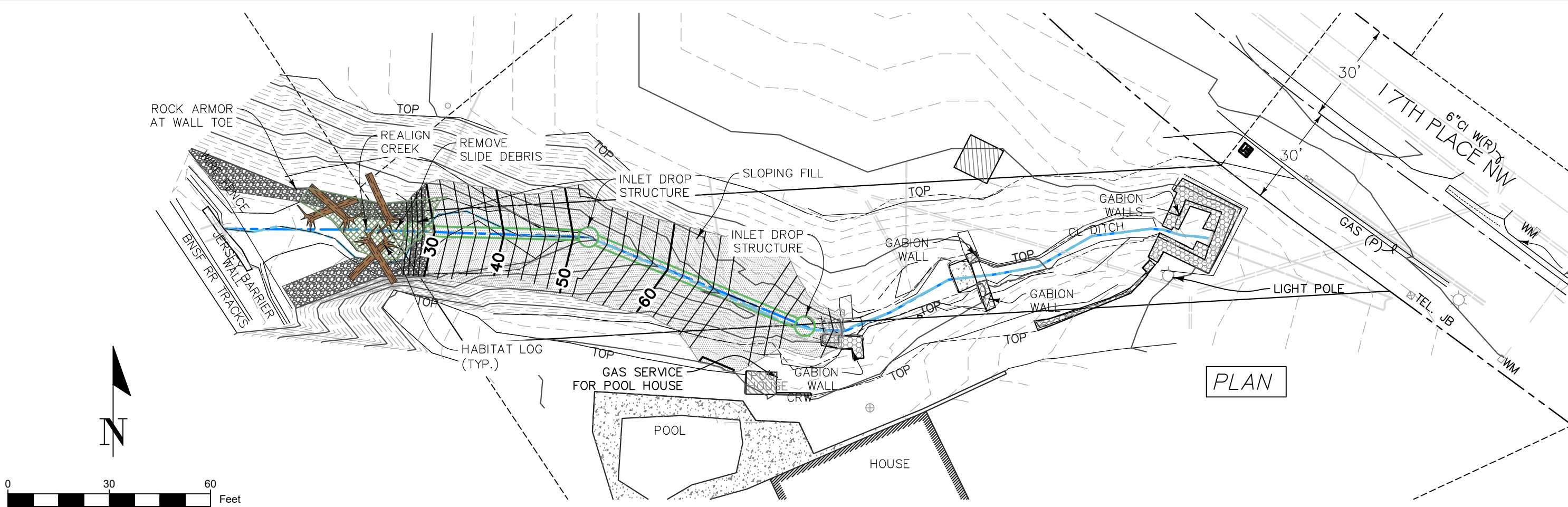












**INFORMATION ONLY**

**nhc**  
 northwest hydraulic consultants  
 12787 gateway drive south  
 tukwila, washington 98168-3308  
 phone: (206) 241-6000  
 fax: (206) 439-2420

Job: 2003259  
 Rev: 0  
 Drft: JML  
 Chkd: VC  
 Date: 26Jan18

STORM CREEK  
 CONCEPTUAL DESIGN NO. 1  
 PIPE THROUGH JUNCTIONS

**AFTER RECORDING RETURN TO:**

City of Shoreline  
Attn: Public Works – Surface Water Division  
City Reference # (if applicable): \_\_\_\_\_  
17500 Midvale Ave. N.  
Shoreline, WA 98133-4921

Grantor(s) \_\_\_\_\_  
Grantee: CITY OF SHORELINE, a Washington municipal corporation  
Property Legal Description (abbreviated): \_\_\_\_\_  
Tax Parcel ID#: \_\_\_\_\_

**SURFACE WATER DRAINAGE EASEMENT**

- A. WHEREAS, The Innis Arden Club, a Washington non-profit corporation, (“Innis Arden”) is the authorized governing body for the common areas located west of 17<sup>th</sup> Place NW in Shoreline, Washington, known as Tax Parcel No. 358590TRCT, legally described in Exhibit A (the “Innis Arden Property”).
- B. WHEREAS, the City of Shoreline (“City”) is a municipal corporation of the State of Washington.
- C. WHEREAS, pursuant to the Settlement Agreement and Release between the City of Shoreline and The Innis Arden Club and other parties dated \_\_\_\_\_ (“Settlement Agreement”) the City of Shoreline agrees to construct and maintain certain facilities in Storm Creek pursuant to the Storm Creek Erosion Management Project described therein (“Project”).
- D. WHEREAS, Innis Arden and the City agree to this easement for the construction and maintenance of the Project on the Innis Arden Property.

NOW, THEREFORE, in consideration of mutual covenants contained herein, and other good and valuable consideration, the receipt, adequacy and sufficiency of which is hereby acknowledged by the parties, the parties agree as follows:

- 1. **Grant of Easement.** Subject to the terms and conditions set forth herein, the GRANTOR, The Innis Arden Club , hereby grants and conveys to the City of Shoreline, (GRANTEE), its contractors, employees, agents, successors, and assigns, a non-exclusive perpetual surface water drainage easement (“Easement”) over, under, along, and across the Easement Area, and together with the right of ingress and egress upon the Innis Arden Property for access to and from the Easement Area for the purposes set forth below.
- 2. **Purpose of Easement.** GRANTEE shall construct, install, operate, maintain, repair, replace, improve, remove, and access, (but not expand or enlarge) the Project as described in the Settlement Agreement, which includes constructing improvements to pipe Storm Creek streamflow through the most eroded channel reach, and backfilling the eroded area above the new pipe, planting appropriate landscaping,



and placing signage to forbid pedestrians from using the Project site to walk to or from the beach within the Easement Area. Within the Easement Area, the City shall install the Project – including stream restoration improvements upstream and downstream of the new pipe, appropriate plantings, and other restoration and landscaping work -- only with Innis Arden's prior approval. GRANTEE shall have the right to cut, trim, remove, or control any and all brush, trees, or other vegetation in the Easement Area by any prudent and reasonable means on a continuing basis, only with Innis Arden's prior approval and in accordance with applicable state and city codes and regulations, provided that GRANTEE shall not be required to manage said restoration and vegetation beyond the permit restoration requirements or ten years, whichever is longer. Innis Arden may withhold, condition, or delay its approval for any landscaping by GRANTEE, in order to effectuate the preservation of views contained in Innis Arden's governing documents. Nothing herein shall preclude Innis Arden from managing said vegetation in its sole and exclusive discretion.

Any use of, or activity on, the Easement Area by GRANTEE that is inconsistent with the purposes of the Easement is prohibited, and GRANTEE shall not conduct, engage in or permit any such activities.

GRANTOR reserves for itself and its successors and assigns, any use of, or activity on, the Property which is consistent with the purposes of the Easement. GRANTOR shall not grant or convey to a third party any easement or other right of usage in the Property that would impair or limit the GRANTEE'S use of the Easement Area.

GRANTOR reserves all right, title, and interest in and to the Easement Area for any purpose so long as the use does not interfere with the Easement rights herein granted. GRANTOR shall not in any way block, restrict, impede, or obstruct access to the Easement Area; shall not alter the ground surface and subsurface within the Easement Area by excavation or placement of fill material; or allow any third party to do the same without prior consent of the GRANTEE.

In carrying out any work under this Easement, the GRANTEE shall place protection and erosion control to avoid any unnecessary injury to any trees, shrubs, lawns, buildings, or appurtenances within the Innis Arden Property. Upon completion of any work, the GRANTEE shall restore the surface of the Easement Area and any private improvements disturbed or destroyed during the execution of the work to the same or similar condition in which it was before the start of the improvements pursuant to section 4 below.

GRANTEE shall be solely responsible for the costs of exercising the Easement rights herein. It is agreed that the improvements constructed on the Easement Area shall remain the property of the City, its successors and assigns. GRANTEE shall be solely responsible, at its sole cost and expense, for the maintenance, repair, and replacement of the improvements constituting the Project on the Easement Area.

In case of emergency, GRANTEE shall have the right, without prior notice or proceeding at law, to enter upon the Innis Arden Property subject to this Easement for the purpose of construction, repair, and maintenance of the surface water facilities and appurtenances. However, if prior notice is not given, GRANTEE shall provide GRANTOR with electronic and written notice as soon as possible after entry. In all other cases, GRANTEE shall notify the GRANTOR of the need to enter the Easement Area a minimum of seven (7) working days prior to doing so. Notice shall be via written hard copy as well as via e-mail.

### **3. Property Subject to Easement.**

The Innis Arden Property subject to this Easement is legally described in Exhibit A and depicted in Exhibit B, attached hereto and incorporated herein by this reference; the Easement Area being a portion of the Innis Arden Property. The Easement Area as described in this easement is legally described in Exhibit C attached hereto and incorporated herein by this reference.

4. **Construction and Maintenance of Project.** Subject to the terms of the Settlement Agreement:
- a. The City shall proceed to prepare construction drawings and shall submit such construction drawings to Innis Arden for comment in accordance with the Settlement Agreement (the “Construction Drawings”).
  - b. Construction Drawings submitted by the City to Innis Arden for comment must detail the City’s construction plans.
  - c. The City shall not submit any plans to contractors for bid, that have been prepared by contractors, subcontractors, or suppliers. All plans and specifications must be prepared by a licensed engineer.
  - d. The City shall select its own architect and contractor. The contractor must be appropriately qualified, licensed, bonded and insured, and name Innis Arden as an additional insured for any work on the Innis Arden Property (which includes but is not limited to the construction and maintenance of the Project).
  - e. Once finalized per the Settlement Agreement, no changes shall be made in the City’s Construction Drawings except with the prior written consent of Innis Arden, which shall not be unreasonably withheld. Innis Arden shall be provided with and entitled to retain at least one copy of said plans.
  - f. The City agrees to consider requests for revisions or modifications in its Construction Drawings that may be requested by Innis Arden as a result of the review process pursuant to the terms of the Settlement Agreement.
  - g. The City shall at its own expense and initiative obtain, or cause to be obtained, all governmental and utility permits, inspections, and approvals, if any, for the work on the Innis Arden Property. Additionally, The City will secure approvals of the approved Construction Drawings from the appropriate governmental authorities as well as any related permits for work. The City shall exercise diligence in prosecuting its application(s) for all permits. The City will provide Innis Arden with written evidence of the approvals and permits prior to commencement of work. Notwithstanding issuance of a building permit, no construction shall commence until all necessary approvals are obtained unless waived in writing by Innis Arden.
  - h. Prior to commencement of work, the City’s contractor will meet with Innis Arden’s on-site representative to review the nature of the work to be done as well as to review the restrictions imposed by this Easement and the Settlement Agreement.
  - i. Construction may commence after the requirements contained herein, and in the Settlement Agreement have been met. The City agrees to begin construction promptly upon the later to occur of (i) Innis Arden’s notice to the City, or (ii) issuance of all necessary governmental permits or approvals necessary to begin construction.
  - j. The City understands that Innis Arden may regularly and routinely monitor the construction on the Innis Arden Property and Easement Area to insure general conformity to approved plans and specifications and to ensure continuous progress toward completion of the City’s work.
  - k. The failure on behalf of Innis Arden to note variances in the work from the final bid documents shall not relieve the City of its obligation to correct such variances upon later discovery.

l. All work performed in the Easement Area shall be performed pursuant to, and comply with, the construction documents required per Section G of the Settlement Agreement.

m. The GRANTEE will not use electrical outlets belonging to any owner within the Innis Arden Property as a power source for construction work. Vehicles or equipment associated with the Project or its workers may not be parked or stored outside of the Easement Area on the Innis Arden Property at any time or on residential streets without advance written approval from Innis Arden.

n. Once plans are finalized, the parties agree that any work on the Easement Area will be limited in scope to the plans.

o. The parties accept the Innis Arden Property in “as is” and “where is” condition. The parties acknowledge that Innis Arden has not made any representation or warranty as to the present or future suitability of any of the Innis Arden Property for any work, or for the intended outcome.

p. The City shall pay all costs and expenses associated with the work and the Project on the Easement Area and Innis Arden Property, including, but not limited to agency fees, surveying, design, permitting, staking, construction, inspection, and related costs.

q. During any work performed on the Easement Area, or access to the Innis Arden Property required by the GRANTEE, the City shall coordinate its activities in the Construction Easement Area so as to cause minimum disruption of Grantor and Grantor’s residents.

r. Promptly upon completion of any work, GRANTEE shall remove all equipment and materials not incorporated into the Project. In the event that GRANTEE disturbs the Easement Area or Innis Arden Property after the initial construction of the Project, or in connection with any repair, maintenance, replacement, relocation, or reconstruction work on the Project, GRANTEE shall restore the Easement Area, or Innis Arden Property, as the case may be, including any paved areas, to the condition in which it existed at the commencement of such activity, all at no cost or expense to GRANTOR.

s. If in exercising its rights under this Easement, GRANTEE fails to restore any damage to the Easement Area and/or Innis Arden Property caused by GRANTEE, its employees and/or contractors, as determined by GRANTOR in its reasonable discretion, then GRANTOR shall have the right, upon fourteen (14) business days prior written notice to GRANTEE, to take such action as is reasonably calculated to cure the failure of GRANTEE, all in the name of and for the account of GRANTEE. GRANTEE shall, on demand, reimburse GRANTOR for taking such action for the monies actually expended by it in so taking such action. Reimbursement by GRANTEE shall be due and owing within thirty (30) days of demand by GRANTOR. In the event of a default, or a default which may in the sole discretion of GRANTOR threatens immediate personal injury or the like), then no notice shall be required and GRANTOR may act immediately to cure the failure without the giving of any prior notice and shall nevertheless be entitled to reimbursement as provided herein. GRANTEE reserves the right to challenge any claim of alleged damage as well as the reasonableness or relatedness of any said expenses and shall be entitled to be reimbursed where such a challenge prevails.

5. **Indemnification.** The GRANTEE shall indemnify, defend, and hold GRANTOR and its officers, directors, employees, agents, members, and other owners harmless from any and all claims, demands, causes of action, losses, costs, expenses, liabilities, suits, damages, actions, rights, attorney’s fees, torts, sums of money, accountings, reckonings, bills, covenants, controversies, or agreements, whether direct or indirect, known or unknown, liquidated or contingent, which any third party or person now owns or holds or has at any time heretofore owned or held, now or hereafter acquired, arising from or related to (i) the construction, installation, maintenance, repair, replacement of the Project on the Innis Arden Property and

Easement Area, whether by the GRANTEE or its agents or employees, or any third parties (other than those retained by GRANTOR), (ii) any improvements, modifications, alterations, or repairs made to the GRANTOR'S Property that are improperly made or outside the scope of this Easement, (iii) any damage to the Innis Arden Property, (iv) the exercise of the rights herein granted to GRANTEE, and/or (v) the use or operation of, or mere presence on Innis Arden property of, the Project, (together as "Claims"). Claims include, but are not limited to other complaints made by third parties or other residents within Innis Arden.

6. **Indemnification for Liens.** Additionally, the City shall keep the Innis Arden Property free from any liens arising out of any work performed, materials furnished, or obligations incurred by or on behalf of the City. In furtherance of the foregoing, the City further agrees to indemnify, defend, and hold Innis Arden, and their officers, directors, employees, agents, and other owners harmless from the payment of any amounts to any person or entity performing work and/or supplying labor or materials for the work on behalf of the City. The City agrees that any amounts described in this Section are the sole responsibility of the City to pay to any such person or entity, and that Innis Arden shall have no responsibility or liability for the payment of any amounts. In the event of any lien being placed against the Innis Arden Property, the City shall pay to Innis Arden immediately upon demand, the amount of said lien and any and all costs and expenses to remove the same, including but not limited to attorney's fees.

7. **Disclaimer.** INNIS ARDEN MAKES NO WARRANTIES HEREUNDER, AND EXPRESSLY DISCLAIMS ALL WARRANTIES, EXPRESS OR IMPLIED FOR ANY WORK PERFORMED BY THE GRANTEE ON INNIS ARDEN PROPERTY. INNIS ARDEN SHALL HAVE NO LIABILITY TO THE CITY UNDER THIS EASEMENT OR OTHERWISE FOR ANY DAMAGES, INCLUDING BUT NOT LIMITED TO, CONSEQUENTIAL, EXEMPLARY, SPECIAL, INCIDENTAL, OR PUNITIVE DAMAGES (INCLUDING WITHOUT LIMITATION, LOST PROFITS OR LOST BUSINESS) EVEN IF THE CITY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

8. **No Nuisance.** During any construction, maintenance, repair, or use, the City shall not do or permit anything to be done in or about the Innis Arden Property and/or Easement Area, nor bring or keep anything therein, which will (i) in any way increase or affect the existing rate of any fire or other insurance policy, or cause a cancellation of any such insurance policy, (ii) cause, maintain or suffer or permit any nuisance in, on or about the Innis Arden Property and/or Easement Area, or (iii) commit or allow to be committed any waste in or upon the Innis Arden Property and/or Easement Area. The City shall not do or permit anything to be done in or about the Innis Arden Property and/or Easement Area, nor bring or keep anything thereon, that is or will constitute or create a hazardous waste or substance or violate any environmental law. The City shall defend, indemnify and hold Innis Arden harmless from any and all damages related to the City's introduction to, or creation of, hazardous waste on the Innis Arden Property and/or Easement Area.

9. **No Liability.** In no event shall GRANTOR be liable for any damage to the Project, or any damage to, or loss of, personal property or equipment sustained or installed in the Easement Area. whether or not it is insured, even if such loss is caused by the negligence of GRANTOR, provided that the GRANTOR shall be responsible to the extent of its negligence. The improvements installed as part of the Project shall be constructed and maintained at the sole risk and expense of the City. As it relates to work performed by the GRANTEE under this Easement, and the Settlement Agreement, Innis Arden shall not be liable to the GRANTEE for any injury or damage, either to person or property from any cause whatsoever, unless due to the gross negligence or intentional misconduct of Innis Arden.

10. **Survival.** The insurance, indemnification and liability provisions shall survive the termination or expiration of this Easement for any reason whatsoever.

11. **Insurance.** The GRANTEE, or any party performing any type of work on the Easement Area, including but not limited to the construction, operation, maintenance, repair or replacement of the Project,

or upon accessing the Innis Arden Property shall comply with the insurance requirements set forth in this Section for any and all work:

a. The GRANTEE shall self insure, and require the contractor to purchase from and maintain, in a company or companies lawfully authorized to do business in the jurisdiction in which the Project is located and which carry a Best's Rating of A-VII or higher or are otherwise acceptable to the Innis Arden, such insurance as will protect the GRANTEE from claims set forth herein which may arise out of or result from the GRANTEE's operations on the Easement Area or the location of the Project on the Easement Area, and for which the GRANTEE may be legally liable, whether such operations be by the GRANTEE or by anyone directly or indirectly employed by Grantee or contractor, or by anyone for whose acts any of them may be liable. The insurance shall be written for not less than the following limits and coverages, or greater limits and coverages where required by law.

- A. Workers' Compensation
  1. State and applicable Federal authority
    - a. Statutory Limits
  2. Employer's Liability
    - a. \$1,000,000 Per Accident, Disease, Policy Limit
  3. United States Longshoreman's Act and Employee Harbor Worker's Act, if applicable
    - a. \$1,000,000 Disease Each Employee
  4. Benefits stipulated by labor contracts where applicable
  
- B. Commercial General Liability (including Premises/Operations, Independent Contractor's Protective, Products and Completed Operations, Broad Form Property Damages, Personal Injury, Blanket Contractual, Explosion, Collapse and Underground):
  1. Bodily Injury and Property Damage
    - a. \$1,000,000 Each Occurrence
    - b. \$2,000,000 Aggregate (per project)
  2. Products and Completed Operations to be maintained for (three) 3 years after final payment (and does not include the Excess Liability Umbrella), and the GRANTEE shall continue to provide evidence of such coverage to the Innis Arden on an annual basis during this three-year period.
    - a. \$2,000,000 Aggregate
  3. Property Damage Liability Insurance shall provide coverage for X, C, and U perils.
  4. Broad Form Property Damage Coverage shall include completed operations.
  5. Contractual Liability, (Hold Harmless Coverage): Bodily Injury and Property Damage
    - a. \$1,000,000 Each Occurrence
    - b. \$2,000,000 Aggregate
  6. Personal Injury with Employment Exclusion deleted. If the General Liability includes a General Aggregate, such General Aggregate shall be not less than \$2,000,000. The policy shall be endorsed to have General Aggregate apply to this Project only.
    - a. \$1,000,000 Aggregate
  
- C. Business Auto Liability (Including owned, non-owned and hired vehicles):
  1. Bodily Injury and Property Damage
    - a. \$1,000,000 Combined Single Limit

- D. Umbrella Liability Insurance policy covering the excess over the limits specified for all employer's liability, commercial general liability, business auto liability, watercraft liability, and aircraft liability insurance required hereunder with minimum limits of \$5,000,000 aggregate per policy year. There shall be no self-insured retention.
- E. Innis Arden shall be included as Additional Insureds on all City and/or contractor liability and umbrella policies associated with the City's work or operations on the Easement Area. Such insurance is primary and will not seek contribution from any other insurance available to the Additional Insureds.
- F. Certificates of Insurance acceptable to Innis Arden shall be filed with Innis Arden prior to commencement of the any work by the GRANTEE, and maintained for as long as the Project remains on the Easement Area. These certificates and the insurance policies required by this Section shall contain a provision that coverages afforded under the policies will not be non-renewed, canceled or allowed to expire until at least 60 days' prior written notice has been given to Innis Arden. Information concerning reduction of coverage shall be furnished by the GRANTEE with reasonable promptness in accordance with GRANTEE's information and belief.
1. All Certificates of Insurance required under this Article shall be submitted on either an AIA Document G705 form or an ACORD Certificate of Insurance form and shall be filed with Innis Arden within prior to any work on the Easement Area. The Certificate of Insurance shall specifically set forth evidence of all coverage required by this Section. If this ten (10) day period for delivery of insurance certificates has passed without delivery of satisfactory insurance certificates, Innis Arden shall be entitled to suspend the work at no cost to Innis Arden and without triggering any claim or right of termination by the GRANTEE until such time as Innis Arden has received satisfactory insurance certificates or has procured the required insurance on the GRANTEE's behalf and at the GRANTEE's expense. Renewal certificates, acceptable to Innis Arden, shall be filed with Innis Arden not later than 10 days prior to any coverage expiration date.
  2. The acceptance of any certificate of insurance evidencing the insurance coverages and limits required in this Easement does not constitute approval or agreement by Innis Arden that the insurance requirements have been met or that the insurance policies shown are in compliance with this Easement.
- G. All required coverages shall remain in force for the benefit of Innis Arden for claims arising out of the work performed by the GRANTEE under this Easement and during the entire term the Project is located on the Easement Area.
- H. The GRANTEE shall furnish to Innis Arden copies of any endorsements that are subsequently issued amending coverages or limits. Failure of Innis Arden to collect certificates does not void the requirement to obtain insurance.
- I. Insurance effected or procured by the GRANTEE shall not reduce or limit the GRANTEE's obligation to indemnify and defend Innis Arden for claims made or suits brought which result from or are in connection with the performance of this Easement.
- J. The City may self insure, but must otherwise comply with the terms and coverages set forth herein.

b. The City shall require its contractor and subcontractors of every tier to carry similar insurance coverages and limits of liability as required under Section, adjusted to the nature of such subcontractor's operations, and shall submit evidence of such coverage to Innis Arden before such subcontractor commences work. In the event the GRANTEE fails to obtain the required insurance, the City shall defend, indemnify and hold Innis Arden, Innis Arden's members, directors, officers, agents and affiliates harmless against any and all claims, cost or expense arising out of the matter which should have been covered by insurance.

12. **Authority.** The GRANTOR warrants that it is the legal owner of or has an interest in the property described herein and have the authority to grant and convey the easements and covenants herein.

13. **Covenants Run With the Land.** All the covenants, agreements, conditions and restrictions set forth in this Easement are intended to be and shall be construed as covenants running with the land, binding upon, inuring to the benefit of and enforceable by, the parties and their respective representatives, heirs, successors and assigns, lessees and tenants. Specifically, the covenants herein shall be appurtenant to and for the benefit of the parties' property as set forth herein and each part thereof and shall run with the land. Innis Arden, or its successor in interest shall have the right to enforce by proceedings at law or in equity, all covenants now or thereafter imposed by the provisions of this Easement

14. **Term.** This Easement, and all rights and obligations provided for herein, shall run in perpetuity and shall terminate and expire only by mutual agreement or unanimous consent of Innis Arden and the City, which subsequent agreement shall be recorded in the same places as this Easement is recorded.

15. **Default, Injunctive Relief.** A breach of any provision in this Easement is a default under this Easement. In the event of a default by either party, the non-defaulting party may seek any and all remedies permitted by law or in equity. Specifically, this Easement may be enforced by restraining orders and injunctions (temporary, preliminary, mandatory, or permanent) mandating compliance with the provisions hereof. The act of obtaining an injunction or restraining order will not be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity. The rights and remedies in this Agreement are cumulative and are in addition to and not in substitution for any other rights and remedies available at law or in equity or otherwise.

In the event of any violation or threatened violation by the City of the terms of this Easement, Innis Arden shall have the right to enjoin such violation or threatened violation in a court of competent jurisdiction upon \$100.00 bond. The right of injunction shall be in addition to all other remedies set forth in this Easement and all remedies available under statute, law and/or equity.

16. **Modification Provision.** This Easement may not be modified in any respect whatsoever, or rescinded, in whole or in part, except with the unanimous consent of both of Innis Arden, and the City at the time of such modification or rescission and then only by written instrument duly executed and acknowledged by all of the parties and duly recorded in the office of the Recorder of King County, Washington. No modification or rescission of this Easement shall affect the rights of any lienholder unless the lienholder consents in writing to the modification or rescission.

17. **No Rights to the Public or by Prescription.** Nothing herein contained shall be deemed to be a gift or dedication of any portion of the properties to, or for, the general public or to, or for, any public purpose whatsoever, it being the intention of the parties that this Easement shall be strictly limited to and for the purposes herein expressed. It is not intended that this Easement convey any rights to the public to use, travel on or occupy the Easement Area. Any person or persons not authorized, empowered or privileged to use the Easement Area may be ejected therefrom by Innis Arden and/or the City.

18. **Breach Shall Not Permit Termination.** It is expressly agreed that no breach of this Easement shall entitle Innis Arden and/or the City, to cancel, rescind or otherwise to terminate this Easement, and such limitation shall not affect, in any manner, any other rights or remedies which such party may have hereunder by reason of any breach of this Easement. Any breach of this Easement shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value, but this Easement shall be binding upon and be effective against any owner whose title is acquired by foreclosure, trustee's sale or otherwise.

19. **Notices.** All notices to be given pursuant to this Easement shall be by personal delivery, nationally recognized overnight courier (with all fees pre-paid), facsimile (with confirmation of transmission), and e-mail of a PDF document (with confirmation of receipt of document), as well as certified or registered mail (in each case, return receipt requested, postage prepaid). Except as otherwise provided in this Easement, a notice is effective only: (a) upon receipt by the receiving party and (b) if the party giving the notice has complied with one of the delivery requirements of this Section 19.

Notice shall be sent as follows:

To the Grantor: \_\_\_\_\_

With Copy to : Josh Whited

To the Grantee:

20. **Attorneys' Fees.** Should it be necessary for any party to this Easement to initiate legal proceedings to enforce this Easement, the party or parties to such legal proceedings who substantially prevail, regardless of whether the proceedings proceed to final judgment, shall be entitled to attorneys' fees, costs and disbursements, including the fees and expenses of expert and fact witnesses, reasonably incurred or made by the substantially prevailing parties in preparing for, and participating in, any proceeding or suit, during said proceeding or suit, on any appeal, on petition for review, and in enforcing any judgment or award, from the other party or parties.

21. **Construction.** The Recitals and other matter preceding the first numbered paragraph are a part of this Easement and incorporated herein by this reference. Headings in this Easement have been included for convenience and ease of reference only and shall not be used to interpret or construe this Easement or any of its provisions.

22. **No Partnership.** This Easement shall not be interpreted or construed to create an association, joint, venture or partnership between the parties or to impose any partnership obligation or liability upon the parties. Except as expressly provided in this Easement, no party shall have any right, power or authority to enter into any agreement or undertaking for, or on behalf of, to act as or be an agent or representative of, or to otherwise bind the other parties.

23. **Nonwaiver.** The failure of any party to insist upon or enforce strict performance by any other party of any provision of this Easement shall not be a waiver or relinquishment to any extent of such party's right to assert or rely on any such provision or right in that or any other instance; rather, the same shall be and remain in full force and effect. No right or obligation under this Easement will be deemed to have been waived unless evidenced by a writing signed by the party against whom the waiver is asserted, or by its duly authorized representative. Any waiver will be effective only with respect to the specific instance involved and will not impair or limit the right of the waiving party to insist upon strict performance of the right or obligation in any other instance, in any other respect, or at any other time.



24. **Severability.** The parties intend that this Easement be enforced to the greatest extent permitted by applicable law. If any term or provision of this Easement, or the application of it, to any person or circumstance shall to any extent be invalid and unenforceable, the remainder of this Easement or the application of such term or provision to persons or circumstances, other than those as to which it is invalid or unenforceable, shall not be affected thereby and each term and provision of this Easement shall be valid and shall be enforced to the extent permitted by law.

25. **Washington Law.** This Easement shall be interpreted and enforced, and the rights, duties and obligations of the parties will be determined, according to the laws of the State of Washington, without regard to its conflicts of laws provisions. In the event of any dispute arising out of this Easement, the parties waive any right to use the rule of construction that the Easement is to be constructed against the drafter thereof. All parties shall submit and not object to jurisdiction and venue in the King County Superior Court, Seattle Case Assignment Area State of Washington, in connection with any claims arising out of this Easement.

26. **Entire Agreement.** In addition to the Settlement Agreement, this Easement, and attached exhibits, constitutes the entire agreement (both final and integrated) of the parties on these subjects. This Easement may not be modified, interpreted, amended, waived or revoked, unless by a writing signed by all parties. This Easement supersedes and replaces all prior agreements, discussions and representations on these subjects, all of which are merged into, and superseded by, this Easement. No party is entering into this Easement in reliance on any oral or written promises, inducements, representations, understandings, interpretations or agreements other than those contained in this Easement. There are no other prior or contemporaneous agreements, either written or oral, between the parties with respect to this subject.

27. **Time of the Essence.** Both parties agree that time is of the essence and that time specifications contained herein shall be strictly construed.

28. **Further Cooperation.** Each party agrees to execute such other documents and to perform such other acts as may be reasonably necessary or desirable to further the expressed and intent purpose of this Easement.

29. **Subordination.** Intentionally Omitted.

30. **Estoppel Certificates.** Each party shall execute, acknowledge, and deliver to the other party, within ten (10) days of request, a certificate certifying:

a. That this Easement is unmodified and in full force and effect or, if there have been modifications, that this Easement is in full force and effect, as modified, and that the modifications are as described in (or attached to) the certificate.

b. that the party delivering the certificate has not given to the other party notice of default under this Agreement that has not been cured and, to the best of the party's knowledge and belief, no default exists or, if there has been notice given or a default exists, certifying to those facts and to the accuracy of the description of the default.

Certificates delivered under this Section 30 may be relied on by the receiving party's prospective mortgagees, prospective tenants, and prospective successors in interest under this Agreement.

31. **Easement, Rights, and Obligations Subject to Existing Restrictions.** The rights and obligations in this Easement are made subject to: (a) any and all existing covenants, conditions, restrictions, and easements of record affecting the Easement Area; and (b) all applicable building and zoning codes and

ordinances. The parties acknowledge that Innis Arden is governed by the Mutual Restrictive Easements for Innis Arden 1, 2 and 3 (King County Recorder’s Office file numbers 3187136, 3530990, and 3897377 as amended (“MREs”) which remain in full force and effect, and the parties specifically acknowledge that as it relates to Innis Arden, this Easement is subordinate to the MREs.

THESE COVENANTS AND AGREEMENTS SHALL RUN WITH THE LAND AND SHALL BE BINDING ON ALL PARTIES HAVING OR ACQUIRING ANY RIGHT, TITLE, OR INTEREST IN THIS LAND DESCRIBED HEREIN OR ANY PART THEREOF, AND IT SHALL PASS TO AND BE FOR THE BENEFIT OF EACH OWNER THEREOF.

EXECUTED. In Witness whereof, the undersigned herein set their hands as of the day and year first above written

Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**GRANTOR**

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title (if applicable): \_\_\_\_\_

**GRANTEE**

By: \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

State of Washington )  
 ) ss.  
County of King )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me on \_\_\_\_\_, 20\_\_\_\_, and said person acknowledged that they signed this instrument, on oath stated that they are authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

.  
GIVEN under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC in and for the State of Washington,  
residing at \_\_\_\_\_  
My appointment expires \_\_\_\_\_  
Print Name \_\_\_\_\_

State of Washington )  
 ) ss.  
County of King )

I certify that I know or have satisfactory evidence that \_\_\_\_\_ is the person who appeared before me on \_\_\_\_\_, 20\_\_\_\_, and said person acknowledged that they signed this instrument, on oath stated that they are authorized to execute the instrument and acknowledged it as the \_\_\_\_\_ of \_\_\_\_\_ to be the free and voluntary act of such party for the uses and purposes mentioned in this instrument.

.  
GIVEN under my hand and official seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
NOTARY PUBLIC in and for the State of Washington,  
residing at \_\_\_\_\_  
My appointment expires \_\_\_\_\_  
Print Name \_\_\_\_\_

**EXHIBIT A**

Legal Description of the Innis Arden Property

**EXHIBIT B**

Depiction of the Innis Arden Property

**EXHIBIT C**

Legal Description of the Easement Area

During Initial Construction

**EXHIBIT D**

Legal Description of the Easement Area

After Initial Construction

DRAFT