



## **CITY OF KIRKLAND**

City Attorney's Office

123 Fifth Avenue, Kirkland, WA 98033 425.587.3030

[www.kirklandwa.gov](http://www.kirklandwa.gov)

---

### **MEMORANDUM**

**To:** Kurt Triplett, City Manager

**From:** Oskar Rey, Assistant City Attorney

**Date:** June 13, 2012

**Subject:** Proposed Settlement Agreement with Kilroy Realty L.P. Regarding Flooding Plaza at Yarrow Bay Office Campus

### **RECOMMENDATION:**

City staff recommends that the Council authorizes the City Manager to execute a proposed Settlement Agreement resolving the flooding claims of Kilroy Realty L.P. ("Kilroy") against the City.

### **BACKGROUND:**

Kilroy is the current owner of the Plaza at Yarrow Bay Office Campus located at 10210, 10220 and 10230 NE Points Drive and 3933 Lake Washington Boulevard ("Plaza at Yarrow Bay"). Kilroy acquired Plaza at Yarrow Bay from HAL Real Estate Investments, Inc. ("HAL") in April 2011. Prior to selling to Kilroy, HAL filed a claim against the City alleging that waters from Cochran Springs Creek were causing flooding at Plaza at Yarrow Bay. Upon acquiring Plaza at Yarrow Bay, Kilroy and City staff began negotiating the resolution of the flooding claims. The attached proposed Settlement Agreement represents the results of those negotiations.

City staff will provide a more in-depth review of the Settlement Agreement at the June 19, 2012 Executive Session. The Council will then have the opportunity bring a motion to authorize City execution of the Settlement Agreement during the New Business portion of the Council Meeting.

CITY OF KIRKLAND  
AND  
KILROY REALTY NORTHWEST CORPORATION  
SETTLEMENT AGREEMENT

This SETTLEMENT AGREEMENT (“Agreement”) is made between and among the City of Kirkland (“City”) Kilroy Realty, L.P., and Kilroy Realty Corporation d/b/a Kilroy Realty Northwest Corporation (“Kilroy”) (collectively “Parties”).

WHEREAS, the Parties wish to resolve a dispute concerning flooding of Kilroy’s Office Campus, the Plaza at Yarrow Bay (the “Office Campus”), located at 10210, 10220 and 10230 NE Points Drive and 3933 Lake Washington Boulevard, involving Cochran Springs Creek; and

WHEREAS, the prior owner of the Office Campus, HAL Real Estate Investments, Inc. (the “Prior Owner”), filed with the City a Notice of Claim alleging flooding damage at the Plaza at Yarrow Bay (the “Claim”). A copy of the Claim is attached hereto as **Exhibit 1**. The Prior Owner assigned the Claim to Kilroy as part of the sale of the Office Campus to Kilroy; and

WHEREAS, the Prior Owner and the City entered into an agreement whereby the Prior Owner would pay for the City’s critical areas consultant The Watershed Company (“Watershed”) to study means to alleviate flooding and afford fish passage from Lake Washington; and

WHEREAS, the Parties agree the final Watershed study, dated June 20, 2011, attached hereto as **Exhibit 2**, establishes a reasonable and cost-effective plan of action to recreate a stream bed for Cochran Springs Creek (“Restoration Project”), at an estimated construction expense to Kilroy of \$132,826.51, the Parties also agree that neither party to this agreement warrants, represents, or guarantees that the implementation of the Watershed study recommendations will reduce flooding of Kilroy’s Office Campus; and

WHEREAS Kilroy has been working in cooperation with the City since acquiring the Office Campus in April, 2011 by funding (1) completion of the Watershed study, (2) rehabilitation of Yarrow Creek during the summer of 2011 to remove beaver dams and relocate beavers, (3) preparation by Watershed of a Joint Aquatic Resource Permit Application (“JARPA”) to secure state and federal agency approvals required for the Cochran Springs Creek Restoration Project, attached hereto as **Exhibit 3**, with Kilroy’s funding of this work exceeding \$150,000.00 to date; and

WHEREAS the City Council took action on December 12, 2011 to affirm funding of the Cochran Springs/Lake Washington Boulevard Enhancements Project (CSD0048) (“Road Project”), as specified in the document attached hereto as **Exhibit 4**, the City has retained the services of a professional engineer to conduct a design study for this Project; and

WHEREAS, the State Department of Fish and Wildlife granted Hydraulic Project Approval for the JARPA application on January 11, 2012, as specified in the document attached hereto as **Exhibit 5** and federal agency approvals are pending; and

WHEREAS, in view of the cooperative efforts of Kilroy and the City to resolve the above-referenced dispute, and the desire to continue this cooperative effort, the Parties desire to settle the Claim as set forth in this Agreement, NOW THEREFORE

In consideration of mutual benefits and promises the Parties agree as follows:

**1. Kilroy funding of Yarrow Bay wetlands and stream restoration and maintenance.**

a. Kilroy will continue to pay the expenses Watershed incurs to secure state and federal agency approvals and Muckleshoot Tribe concurrence with the JARPA application, to oversee construction of the Restoration Project, and to oversee Kilroy activities undertaken pursuant to a License Agreement with the City, with said expenses estimated at \$25,000.00 for 2012.

b. Kilroy agrees to hire a contractor and pay contractor expenses for implementation of the JARPA approval, at a present expense estimated by Watershed of \$132,826.51 as specified in the document attached hereto as **Exhibit 6**, provided that acts or neglect by the contractor performing the work pursuant to the JARPA, fires, storms, floods, earthquakes or acts of God that are beyond Kilroy's control will excuse Kilroy's duty to pay amounts in excess of 20% above the estimated \$132,826.51 to the extent of harm caused by such acts or events.

c. Kilroy will incur expenses to implement the activities authorized by the Yarrow Bay wetlands and streams license agreement, with said license attached hereto as **Exhibit 7**.

**2. City construction of Surface Water Utility Project CSD0048, Cochran Springs/Lake Washington Boulevard Enhancements.**

a. The City will complete design, engineering and permitting of the Road Project by December 31, 2014.

b. To the extent it is feasible in terms of cost, engineering and permitting, the City will pursue construction of a permanent sediment trap located in the Cochran Springs Creek stream bed as part of the Road Project as specified in the Watershed study.

c. The City will complete the construction of the Road Project by December 31, 2016.

d. The Parties acknowledge that these deadlines set for the Road Project may be extended by mutual written consent if there are delays beyond the City's control, with Kilroy's consent not to be unreasonably withheld. The Parties agree that delays in completion of the State Route 520 work in the vicinity of the Road Project would constitute a delay beyond the City's control.

e. The Parties agree that the City is not responsible for flooding occurring after completion of the work described in this Agreement if the flooding is a result of an Act of God storm event.

**3. Cochran Springs Creek sediment trap maintenance.**

a. The Parties acknowledge the need to construct and maintain a sediment trap to provide for long-term sustainability of fish passage and flood control benefits of the Cochran Springs Creek restoration project. The JARPA engineering plans specify the design of a temporary sediment trap to be utilized until the City completes the construction of a permanent sediment trap as part of project CSD0048.

b. The City will maintain both the temporary sediment trap until abandoned and the permanent sediment trap on an as-needed basis, with inspections to determine maintenance needs occurring at least once every year. The protocol for the City's inspection of the stream bed and for maintenance of both the temporary and permanent sediment traps is specified in the document attached hereto as **Exhibit 8**.

c. Should City funding of the Road Project be inadequate to construct a permanent sediment trap, the City will maintain the temporary sediment trap until such time as a permanent sediment trap is constructed through additional City or other agency funding.

d. The Parties acknowledge the importance of sediment trap maintenance to reduce the chance of flooding and to preserve and enhance fish habitat. In the event Kilroy believes that the City has not maintained the sediment traps as provided in paragraph 3b above, it shall provide a written thirty (30) day notice to the City Attorney and the Public Works Director notifying the City of the alleged failure to maintain and detailing the factual basis for the notice. If the City has not cured the condition complained of by Kilroy within the 30 day period, then Kilroy has no plain, speedy, and adequate remedy in the ordinary course of law, and Kilroy is entitled to specific performance of this paragraph and paragraph 3b of this Agreement pursuant to a writ of mandamus if Kilroy establishes the City failed to maintain either the temporary or permanent sediment trap as provided in paragraph 3b; provided that the City and Kilroy acknowledge that the State Department of Fish and Wildlife may restrict the time of year during which the City may conduct non-emergency in stream activities, and that any such restrictions shall be taken into account by any court ruling on the City's obligations under this Section 3.

**4. City approval of Yarrow Bay wetlands and stream restoration and maintenance license agreement.**

a. The Parties approve the license agreement affixed hereto as Exhibit 7 concurrent with the execution of this Agreement.

**5. General provisions.**

a. Each of the Parties agree to cooperate in carrying out the terms of this Agreement and each party shall execute and deliver any and all additional documents as may be necessary or desirable to carry out the terms or provisions of this Agreement. However, this paragraph shall not require the execution of any document that expands, alters or in any other way changes the terms of this Agreement.

b. This Agreement constitutes the final and complete expression of the Parties on the subject set forth herein and this Agreement may not be modified, amended, waived, or revoked

orally but only by a writing signed by all Parties. This Agreement supersedes and replaces all prior agreements, discussions and representations on the subject of this Agreement, which are merged into and superseded by this Agreement. No party is entering into this Agreement in reliance on any oral or written promise, inducement, representation, understanding, interpretation, or agreement, other than as are contained and set forth in this Agreement.

c. In the event that Kilroy sells the Office Campus that is the subject of this Agreement, or any part thereof, Kilroy will advise the buyer of the existence of this Agreement. Kilroy will assign this Agreement as part of such sale or sales and notify the City of any assignment.

d. Each party acknowledges that they have read this Agreement, including the exhibits attached hereto, they understand the terms thereof; and each has had the opportunity to seek advice from their respective legal counsel and advisors regarding this Agreement.

e. If any party should be in breach of this Agreement, and any party seeks to enforce the terms of this Agreement, the substantially prevailing party shall be entitled to recovery of all costs, including its reasonable attorney's fees.

f. Maintenance of temporary and permanent sediment traps shall be conducted in accordance with all conditions set by the State Department of Fish and Wildlife, including any condition limiting the time period each year for conduct of non-emergency in-stream activities.

g. This Agreement constitutes a compromise of disputed claims. It is not and should not be construed as an admission regarding any of the claims or issues set out in the HAL Claim. Kilroy hereby withdraws the Claim and acknowledges that the resolution of the Claim as embodied by this Agreement is final and dispositive, provided that the Parties faithfully honor the terms of this Agreement. The Parties have entered into this Agreement for the purpose of settling the Claim, avoiding the cost of litigation, and advancing the positive results of collaboration occurring since Kilroy's acquisition of the Office Campus, and setting in place a long-term working relationship for stewardship of Yarrow Bay wetland and stream resources.

h. Accordingly, Kilroy, for consideration of the mutual promises set forth in this document, hereby releases, acquits, and forever discharges the City of Kirkland and its agents, servants, and employees of and from any and all claims, actions, expenses and compensation whatsoever, which Kilroy now has/have on account of or in any way growing out of any and all known, and unknown, property damage and the consequences thereof resulting or to result from

the events described in the attached Notice of Claim filed by HAL Real Estate Investments, Inc. and assigned to Kilroy.

FULLY EXECUTED and effective as of the last date written below:

CITY OF KIRKLAND

By: \_\_\_\_\_  
Kurt Triplett, City Manager

Date: \_\_\_\_\_

ATTEST/AUTHENTICATED:

By: \_\_\_\_\_  
Kathi Anderson, City Clerk

Date: \_\_\_\_\_

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY:

By: \_\_\_\_\_

Date: \_\_\_\_\_

KILROY REALTY, L.P.,  
A Delaware Limited Partnership

By: KILROY REALTY CORPORATION, a  
Maryland Corporation,  
doing business in the State of Washington as  
Kilroy Realty Northwest Corporation

By: \_\_\_\_\_

Title: \_\_\_\_\_

By: \_\_\_\_\_

Title: \_\_\_\_\_