



## CITY OF KIRKLAND

City Attorney's Office

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### MEMORANDUM

**To:** Kurt Triplett, City Manager

**From:** Robin S. Jenkinson, City Attorney

**Date:** November 9, 2012

**Subject:** Potential Potala Village Settlement Agreement

### RECOMMENDATION:

Staff recommends the Council authorizes the City Manager to execute a proposed Settlement Agreement resolving the current claims of Lobsang Dargey and Potala Village Kirkland, LLC ("Potala") against the City. The proposed Settlement Agreement is attached as Exhibit A to Resolution R-4940. If the Council approves the Resolution then staff recommends the Council also pass Ordinance O-4387, which terminates the moratorium on the acceptance of development permits currently in effect within the Neighborhood Business (BN) Zones. Termination of the moratorium is a City obligation under the agreement.

### BACKGROUND:

Potala has legal interests in property located at the southeast corner of 10<sup>th</sup> Avenue South and Lake Street South, with site addresses of 21 10<sup>th</sup> Avenue South, 1006 Lake Street South, and 1020 Lake Street South ("the Property"). The Property is zoned Neighborhood Business ("BN") under the City's Zoning Code. On February 23, 2011, Potala submitted an application for a Shoreline Substantial Development permit based on a mixed-use project that included 143 residential units and approximately 6,200 square feet of commercial space on the ground floor.

The City imposed a moratorium related to the BN zone on November 15, 2011, under Ordinance O-4335A. After a public hearing, the City renewed the Moratorium on January 3, 2012, under Ordinance O-4343; and then extended the Moratorium again, after another public hearing on May 1, 2012, under Ordinance O-4355, and then, after another public hearing on October 16, 2012, extended the Moratorium once more to no longer than December 31, 2012, under Ordinance O-4379.

On May 24, 2012, Potala filed a Complaint for Declaratory Judgment Writs and Injunction in King County Superior Court against the City. (An Amended Complaint was filed last week.) On June 28, 2012, Potala filed a Petition for Review with the Central Puget Sound Growth Management Hearings Board challenging the Moratorium extended by Ordinance O-4355.

City staff began negotiating the resolution of the claims made against the City in the Complaint and Petition. The proposed Settlement Agreement represents the results of those negotiations. The proposed Settlement Agreement provides for the full settlement and discharge of all claims by Potala which have been made against the City in the Complaint and Petition, or could have been made in the Complaint and Petition. By virtue of entering into this proposed Settlement Agreement, the City will not admit any liability or wrongdoing.

RESOLUTION R-4940

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE CITY MANAGER TO SIGN A SETTLEMENT AGREEMENT BETWEEN LOBSANG DARGEY AND TAMARA AGASSI DARGEY, POTALA VILLAGE KIRKLAND, LLC, AND THE CITY OF KIRKLAND TO SETTLE LITIGATION OVER PLAINTIFFS' CHALLENGE OF THE CITY'S MORATORIUM AS IT RELATES TO PLAINTIFFS' DEVELOPMENT OF THE POTALA VILLAGE PROJECT.

WHEREAS, Potala Village Kirkland, LLC, a Washington limited liability company, and Lobsang Dargey and Tamara Agassi Dargey, a married couple ("Plaintiffs") have legal interests in property located at the southeast corner of 10<sup>th</sup> Avenue South and Lake Street South in the City of Kirkland, with site addresses of 21 10<sup>th</sup> Avenue South, 1006 Lake Street South, and 1020 Lake Street South; and

WHEREAS, on February 23, 2011, Plaintiffs submitted an application for a Shoreline Substantial Development permit ("SDP") based on a mixed-use project that included 143 residential units and approximately 6,200 square feet of commercial space on the ground floor; and

WHEREAS, the City imposed a moratorium related to the Neighborhood Business ("BN") zone on November 15, 2011, under Ordinance 2335A; and

WHEREAS, after a public hearing, the City renewed the moratorium on January 3, 2012, under Ordinance O-4343; and then extended the moratorium again after another public hearing, on May 1, 2012, under Ordinance O-4355; and then after another public hearing, on October 16, 2012, the City extended it once more to no longer than December 31, 2012, under Ordinance O-4379 (the "Moratorium"); and

WHEREAS, on or about May 24, 2012, Plaintiffs caused to be filed and served a Summons and Complaint in King County Superior Court under cause number 12-2-18714-1 SEA (the "Complaint"), challenging the Moratorium; and

WHEREAS, on or about June 28, 2012, Plaintiffs caused to be filed and served a Petition for Review with the Central Puget Sound Growth Management Hearings Board under cause number 12-3-0005 (the "Petition"), challenging the Moratorium; and

WHEREAS, the City expressly denies Plaintiffs' claims as alleged in the Complaint and the Petition (collectively referred to herein as the "Litigation");

WHEREAS, the parties desire to enter into the attached Settlement Agreement in order to provide for the full settlement and discharge of all claims by the Plaintiffs which have been made against

the City in the Litigation upon the terms and conditions set forth in the attached Settlement Agreement;

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is hereby authorized and directed to sign a Settlement Agreement substantially similar to that attached as Exhibit A.

Passed by majority vote of the Kirkland City Council in open meeting this \_\_\_\_ day of \_\_\_\_\_, 2012.

Signed in authentication thereof this \_\_\_\_ day of \_\_\_\_\_, 2012.

\_\_\_\_\_  
MAYOR

Attest:

\_\_\_\_\_  
City Clerk

## SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2012, by and between LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple, and POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company (collectively referred to as "Plaintiffs"), and the City of Kirkland, including all elected officials, various department heads, and employees ("City"), to settle litigation over Plaintiffs' challenge of the City's Moratorium as it relates to Plaintiffs' development of the Potala Village Project in the City of Kirkland.

### 1. Parties

- 1.1 **City/Defendant.** CITY OF KIRKLAND ("City"), a Washington municipal corporation.
- 1.2 **Plaintiffs.** POTALA VILLAGE KIRKLAND, LLC, a Washington limited liability company, and LOBSANG DARGEY and TAMARA AGASSI DARGEY, a married couple.
- 1.3 **Legal Representation.** The City is represented by City Attorney Robin Jenkinson and Stephanie E. Croll of Keating, Bucklin & McCormack, Inc., P.S.; Plaintiffs are represented by Duana Kolouskova of Johns Monroe Mitsunaga Kolouskova, PLLC.

### 2. Background

- 2.1 Plaintiffs have legal interests in property located at the southeast corner of 10<sup>th</sup> Avenue South and Lake Street South in the City of Kirkland, site addresses of 21 10<sup>th</sup> Avenue South, 1006 Lake Street South, and 1020 Lake Street South and comprised of tax parcel numbers 935490-0220, 935490-0240 and 082505-9233 (collectively referred to herein as the "Property"). The Property is zoned "BN" under the City's zoning codes.
- 2.2 On February 23, 2011, Plaintiffs submitted an application for a Shoreline Substantial Development permit ("SDP") based on a mixed-use project that included 143 residential units and approximately 6,200 square feet of commercial space on the ground floor.
- 2.3 The City imposed a Moratorium related to the BN zone on November 15, 2011, under Ordinance 2335A. After a public hearing, the City renewed the

Moratorium on January 3, 2012 under Ordinance O-4343; and then extended the Moratorium again, after another public hearing, on May 1, 2012, under Ordinance O-4355; and then after another public hearing, on October 16, 2012, the City extended it once more to no longer than December 31, 2012, under Ordinance O-4379. These moratoria are collectively referred to herein as the "Moratorium."

- 2.4 On or about May 24, 2012, Plaintiffs caused to be filed and served a Summons and Complaint in King County Superior Court under cause number 12-2-18714-1 SEA (the "Complaint").
- 2.5 The City expressly denies Plaintiffs' claims as alleged in the Complaint. However, the parties have agreed that the City need not file an Answer to the Complaint as a result of this Settlement Agreement.
- 2.6 On or about June 28, 2012, Plaintiffs caused to be filed and served a Petition for Review with the Central Puget Sound Growth Management Hearings Board under cause number 12-3-0005 (the "Petition").
- 2.7 The City expressly denies Plaintiffs' claims as alleged in the Petition. However, the parties have agreed that the City need not file an Answer to the Petition as a result of this Settlement Agreement.
- 2.8 The Complaint and Petition are collectively referred to herein as "the Litigation."

The parties desire to enter into this Settlement Agreement in order to provide for the full settlement and discharge of all claims by Plaintiffs which have been made against the City in the Litigation upon the terms and conditions set forth herein.

### **3. Terms of Agreement**

#### **3.1 Plaintiffs' Obligations**

- 3.1.1 After the City lifts the Moratorium (which shall occur at the next City Council meeting following the approval of this Agreement), and before the City's annual amendments to its Zoning Code and Comprehensive Plan go into effect (which shall occur on February 1, 2013), Plaintiffs shall submit a building permit application for the Property that proposes not more than 100 residential units, irrespective of unit size or bedroom number (referred to hereinafter as "the Building Permit Application"). The Building Permit Application shall be based on the zoning and building codes in effect as of the date this Settlement Agreement is executed.

The Building Permit Application shall propose ground floor commercial uses. In the event the City changes the applicable zoning code to reduce the land

use buffer for all commercial uses (including retail uses) to ten (10) feet or less, then, retail tenants of the Property shall have the right to request tenant improvements that allow for a buffer of ten (10) feet or less, consistent with the zoning code in effect at the time their application for tenant improvements is filed.

- 3.1.2 Plaintiffs are not obligated to revise the pending Environmental Impact Statement ("EIS") currently being processed except as provided herein. Consistent with the Building Permit Application, Plaintiffs shall submit a revised site plan for their shoreline substantial development permit. The revised site plan shall not affect the vesting date of Plaintiffs' SDP permit application. The City agrees no fees will be charged for submittal or review of the revised site plan. The revised site plan may require new public noticing and a new public comment period.

Plaintiffs agree to take all reasonable steps necessary to allow the City to expeditiously process the SDP application, the EIS and the Building Permit Application. This does not mean the City agrees to process the applications in an expedited manner; provided, with regard to their Building Permit Application, Plaintiffs may request Progressive Plan Review (PPR).

- 3.1.3 Consistent with the terms of the Final Environmental Impact Statement (FEIS), Plaintiffs agree to the following terms and conditions:

- (a) Plaintiffs will step back the top floor along the west building façade an average of 10-feet from the façade on the floor below;
- (b) Along the north, facade, provide exterior wall modulation with a width of at least 35 feet and a depth of at least 10 feet on the upper three floors. On the upper two floors, balconies shall not take up more than 50% of the area of the modulation and the walls of the balconies shall be either transparent or railings, but shall not be solid;
- (c) The building may extend across the entire ground floor except for an inset plaza with a minimum dimension of 40' X 40' located along the west façade;
- (d) Along the west, facade, provide exterior wall modulation with a width of at least 40 feet and a depth of at least 85 feet on the upper three floors. On the second and third floor, the balconies may extend into the modulation five feet in depth on both sides, but shall not be longer than 30 lineal feet total on each side ; and
- (e) Along the east, facade, provide exterior wall modulation with a width of at least 40 feet and a depth of at least 10 feet on the upper two floors. On the upper floor, balconies shall not take up more than 50% of the area of the modulation and the walls of the balconies shall be either transparent or railings, but shall not be solid;

- (f) The City will accept a portion of the landscape buffer below the level of adjacent properties provided plantings are of a sufficient height to provide buffering to adjacent properties;
- (g) Modulation shall be further enhanced by the use of colors, materials and other design features.

### **3.2 City's Obligations**

- 3.2.1 The City shall continue to process the SDP, EIS and FEIS in as expeditious a manner as is reasonably feasible, including processing of any administrative appeals.
- 3.2.2 The Building Permit Application shall be deemed vested to those land use laws, codes and regulations in effect as of the date of this Settlement Agreement. The City agrees not to adopt any changes to the BN zone or building codes between the date of this Settlement Agreement and Plaintiffs' submittal of the building permit application, if submitted by Plaintiffs on or before February 1, 2013, that would affect Plaintiffs' proposed project at not more than 100 residential units. This section shall not preclude the City from continuing with its ongoing legislative review of the BN zone, nor shall this Section be construed as requiring the City to make a commitment to adopt any particular legislation or affirmatively take any legislative action.
- 3.2.3 As allowed per the City's Zoning Code, KZC Ch. 105, the City will agree to accept 1.7 parking spaces per multifamily residential dwelling unit which will be sufficient for resident and guest parking. This amount of parking will also be sufficient for commercial parking if supported by a shared parking plan submitted to the City.
- 3.2.4 The City agrees to lift the Moratorium on the BN zone and Plaintiffs can then submit their Building Permit Application of not more than 100 residential units under the land use codes and regulations in effect as of the date of this Settlement Agreement.
- 3.2.5 The City shall not take any unlawful action that is intended to impermissibly impede or delay Plaintiffs' submittal of the Building Permit Application, or the City's processing and issuance of a final decision on the SDP application, the EIS, and/or the Building Permit Application.
- 3.2.6 While the City cannot commit in advance to approving a building permit application for not more than 100 residential units per 3.2.3, the City recognizes that a building permit for not more than 100 residential units is possible to approve under the City's building and zoning codes in effect as of the date of this Settlement Agreement is executed, depending on the size of the units and any other applicable environmental factors.

- 3.2.7 The City acknowledges that there is no required design review process under the BN zone as of the date this Settlement Agreement is executed. The City agrees that the Building Permit Application shall not be subject to design review or review by the City's design review board.
- 3.2.8 The City will not impose unlawful conditions or unlawful mitigation on the SDP or building permit that would impermissibly require a reduction in the residential unit count to less than 100 per 3.2.3, or impermissibly reduce the proposed number of floors or square footage. The City reserves its authority to impose conditions or mitigation under the Final EIS. Such conditions and/or mitigation are not affected by this Settlement Agreement, except to the extent such conditions have been previously agreed to by Plaintiffs and the City, and incorporated herein, as set forth in paragraph 3.1.3 above. The parties do not, by signing this Agreement, waive any appeal rights they have regarding the Final EIS, and any conditions or mitigations imposed thereunder; except with regard to those conditions set forth in paragraph 3.1.3 above. In the event of any condition, mitigation or potential denial, the City shall provide Plaintiffs with a reasonable opportunity to cure any defect in project design, including allowing Plaintiffs a reasonable opportunity to revise any building plans, engineering, surveying or any other component of the proposed project as allowed by state and local law.
- 3.2.9 The parties acknowledge that mediation discussions are occurring with the community surrounding the Potala Village site. The purpose of the mediation is to avoid possible future litigation that may affect all parties. The mediation may result in the City choosing to make a financial contribution to the Plaintiffs for a mediated settlement agreed to by both parties that would result in a smaller project with potentially less required parking. Such agreement, if reached, must be reached by November 20, 2012, so that the City Council can consider the agreement at the December 11, 2012 City Council meeting. The amount and type of the financial contribution must be mutually agreed to by both parties.

### **3.3 General Obligations**

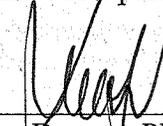
- 3.3.1 The parties agree to stay the Litigation, to allow for the parties to complete their foregoing, respective obligations up to the point of final decision on the Building Permit Application. The parties recognize this may require a stay of several months or longer in order to complete this process.
- 3.3.2 The parties agree that this settlement is a compromise of an existing disputed claim, and further agree that any action or other concession made in this Settlement Agreement by either party shall not be construed or asserted as an admission of liability, wrongdoing, or fault by any party. The parties further recognize that this Settlement Agreement does not restrict the ability of any

party to bring any claim, appeal, lawsuit or other action regarding a future decision, permit, approval, or construction activity of the project that is not subject to the terms of this Settlement Agreement.

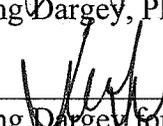
- 3.3.3 The Settlement Agreement is not an admission or waiver of the validity of any claims or defenses applicable to the Litigation.
- 3.3.4 The parties agree that each party shall bear all of their own attorneys' fees and costs incurred in connection with the Litigation, this Settlement Agreement, and/or the matters and documents referred to herein.
- 3.3.5 The parties agree that this Settlement Agreement shall be construed and interpreted in accordance with the laws of the State of Washington.
- 3.3.6 The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement.
- 3.3.7 Except as may be expressly provided herein, this Settlement Agreement is for the benefit of the parties hereto only and is not intended to benefit any other person or entity, and no person or entity not a party to this Settlement Agreement shall have any third-party beneficiary or other rights whatsoever hereunder.
- 3.3.8 The obligations in this Settlement Agreement may be modified only by written agreement of the parties; signed by duly authorized representatives of each of the settling parties. Any such modification shall not affect any other provision of this Settlement Agreement.
- 3.3.9 This Settlement Agreement constitutes the entire agreement between the parties. This Settlement Agreement is fully integrated and constitutes the complete and final agreement between the parties. All previous agreements, offers, counteroffers, and negotiations are merged herein. There are no other or further agreements which modify the terms of this Settlement Agreement. This Settlement Agreement cannot be modified or amended in any way (except in writing as set forth in Section 3.3.8 above).
- 3.3.10 The parties agree that each of the parties is giving up certain rights, claims, and defenses in executing this Settlement Agreement, and each party hereby agrees to act in good faith in carrying out their respective duties and obligations herein.
- 3.3.11 The parties have each participated and had an equal opportunity to participate in the drafting of this Settlement Agreement. No ambiguity shall be construed

against any party based upon a claim that such party drafted the ambiguous language.

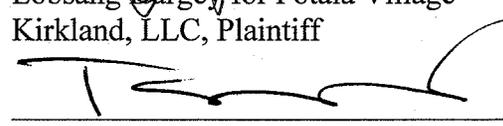
DATED: Nov. 2. 2012

  
\_\_\_\_\_  
Lobsang Dargey, Plaintiff

DATED: Nov. 2. 2012

  
\_\_\_\_\_  
Lobsang Dargey for Potala Village  
Kirkland, LLC, Plaintiff

DATED: 11-2-12

  
\_\_\_\_\_  
Tamara Agassi Dargey, Plaintiff

DATED: \_\_\_\_\_

CITY OF KIRKLAND

\_\_\_\_\_  
By \_\_\_\_\_  
Its \_\_\_\_\_