

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release of all Claims (hereinafter referred to as the "Agreement") between the City of Tacoma, Department of Public Utilities, Water Division (hereinafter "Tacoma Water") and the City of Buckley (hereinafter "Buckley") hereinafter referred to collectively as the "Parties", is entered into on this _____ day of _____, 2014.

RECITALS

WHEREAS, in the early 2000s the City of Buckley began the planning and design phase of a construction project to realign State Route 165, 112th Avenue, Ryan Road, River Avenue, and Pearl Avenue in Buckley to improve intersection alignment and traffic pass-through on those roads, herein identified as the Ryan Road Realignment / Enhancement Project (hereinafter "Realignment Project"); and

WHEREAS, in an October 18, 2002, letter, Buckley's consulting engineer requested that Tacoma Water provide drawings which illustrated the location of Tacoma Water's existing and/or proposed facilities in the area highlighted on a map attached to the letter of the roads to be affected by the Realignment Project; and,

WHEREAS, Tacoma Water provided drawings of Tacoma Water's facilities located in the designated area; and

WHEREAS, in 2011, while excavating for a new stormwater line as part the Realignment Project, Buckley's contractor encountered an abandoned 48" wood stave pipe; and

WHEREAS, in order to avoid disturbing the wood stave pipe, Buckley's contractor rerouted the stormwater line around the stave pipe incurring added costs to the Realignment Project; and

WHEREAS, the abandoned wood stave pipe did not appear on the drawings provided by Tacoma Water to Buckley's consulting engineer in 2002 but does appear on Tacoma Water drawings dated 1947; and

WHEREAS, RCW 19.122.030 provides that "excavators shall have the right to receive compensation from the owner of the underground facility for costs incurred if the owner of the underground facility does not locate its facilities in accordance with this section;" and

WHEREAS, Buckley has paid it's contractor additional compensation for extra direct and indirect costs arising from encountering the abandoned 48" wood stave pipe as a differing site condition including but not limited to the cost to re-route or realign the aforementioned stormwater line; and

WHEREAS, Tacoma Water has, in the interest of saving the cost of litigation, agreed to pay Buckley, and Buckley has agreed to accept \$28,488.00 as reimbursement for that portion of Buckley's contractor's claim Buckley paid representing the additional direct and indirect costs incurred by Buckley's contractor in rerouting or realigning the stormwater line to avoid the abandoned 48" wood stave pipe; and

WHEREAS, a portion of the realignment of 112th St. E. is situated on two parcels of real property, described herein, that Tacoma Water owns in fee simple; and

WHEREAS Buckley has been occupying said parcels pursuant to a Right of Entry Agreement entered into by the Parties on December 20th, 2011, which said parcels Tacoma Water now desires to sell and Buckley desires to purchase; and

WHEREAS, the Parties agree that the fair market value of the two parcels is \$43,000.00; and

WHEREAS, Tacoma Water desires to sell the said real property to Buckley for \$14,512.00 which is \$43,000.00 minus \$28,488.00 for the costs incurred to reroute the stormwater line;

WHEREAS, Buckley, agrees herein to accept as full and final payment and settlement of any and all claims arising from the alleged violation of RCW 19.122.030 and the abandoned 48" wood Stave pipe differing site condition, the discounted purchase /sale price of \$14,512.00 of said real property in lieu of a \$28,488.00 cash payment by Tacoma Water,

NOW THEREFORE, the Parties agree as follows:

1. **Purchase and Sale Agreement.** Tacoma Water agrees to sell to Buckley, and Buckley agrees to purchase the following described parcels of real property pursuant to the terms and conditions of the Purchase and Sale Agreement attached hereto as Exhibit A.

(Per Warranty Deed Recorded November 8 1911 under Auditor's Fee No. 349695)

Beginning at the intersection of the Northern Pacific Railway Company's right-of-way and the south line of Section 4, Township 19 North Range 6 East, W.M.; thence Northeasterly along said right of way 120 feet; thence Southwesterly 200 feet more or less, to a point on the south line of said Section 100 feet west of the place of beginning, and thence along said section line 100 feet to the place of beginning.

And

(Per Warranty Deed Recorded May 12, 1926 under Auditor's Fee No 805567)

Beginning at the Southeast corner of Section 4, T. 19N, R. 6E., W.M.; Thence West 208 feet more or less, along the south line of said Section 4 to the intersection of the Right-of-way line of the Northern Pacific Railway Company with the said south line of Section 4; Thence North 36°32' East, 120 feet along the east boundary of the triangular parcel of land purchased from Mary J. Wickersham by the City of Tacoma on August 26 1911; Thence North 60°38' East, along the projection of the north boundary of said triangular parcel of land, 160 feet, more or less to intersection with east line of said Section 4; Thence South 0°55' West, 175 feet more or less to the southeast corner of said Section 4 and the point of beginning.

2. **Payment.** Buckley agrees to pay Tacoma Water, in accordance with the Purchase and Sale Agreement, FOURTEEN THOUSAND FIVE HUNDRED TWELVE DOLLARS AND NO CENTS (\$14,512.00) for the above described parcels which the Parties agrees represents the fair market value of the property minus the payment toward the costs incurred for the stormwater line realignment. The Parties acknowledge and agree that said payment and sale of real property described above shall be the full and final payment in settlement and compromise of any and all Released Claims. It is agreed and understood that to avoid Tacoma Water being exposed to a claim and multiple payments for damages, Buckley agrees herein to indemnify and hold Tacoma Water harmless from any claim by Buckley's contractor arising from Tacoma Water's alleged violation of RCW 19.122.030 and the resulting differing site condition.

3. **Released Claims.**

a. For the sole consideration stated above, the City of Buckley herein agrees to fully release and acquit and discharge from liability Tacoma Water from any and all claims of any type or nature, known, unknown, foreseen, unforeseen, claimed or could have been claimed by the City of Buckley for failure to notify it of the wood stave pipe. "Released Claims" means any and all claims, demands, causes of action, actions, rights, liabilities, contract obligations, damages, costs, tort suits, debts, sums of money, accountings, reckonings, bills, covenants, back pay, controversies, agreements, or promises whatsoever, at law or in equity or otherwise, whether direct or indirect, known or unknown, which the City of Buckley now owns or holds or has at any time heretofore held, or may in the future hold, against Tacoma Water which (i) are related in any way, directly or indirectly to the claim herein mentioned, and (ii) are or may be based on any facts, acts, omissions, conduct, representations, contracts, agreements, claims, events, causes or matters of any kind occurring or existing at any time or related to or arising out of the occurrence therein mentioned and (iii) any and all claims for attorney's fees and costs.

b. The City of Buckley represents, warrants, and agrees that (i) Buckley understands and is releasing potentially unknown claims, (ii) these releases are fairly and openly made; (iii) Buckley is aware that the City may have limited knowledge with respect to certain other of the

Released Claims; and (iv) the Parties specifically allocate the risk of any mistake by any party entering into this agreement to the party who later claims to be mistaken.

c. The City of Buckley fully understands that it is giving up all rights of any kind against Tacoma Water, known or unknown, that are in any way related to the occurrence which is the subject of the referenced claim, except as specifically set forth herein, and shall hold Tacoma Water harmless from any subrogated claim related to payments made to the City of Buckley.

6. **Publicity.** The Parties and their attorneys agree not to publicize, or otherwise make known the terms of this Agreement, or any matter or information obtained herein unless required by law to disclose the same.

7. **No Admission of Liability.** This Agreement does not constitute, and shall not be construed as, an admission of liability or responsibility on the part of Tacoma Water. The Parties have entered into this Agreement solely for the purpose of settling the aforementioned claims and all other controversies between them related thereto.

8. **Tacoma Public Utility Board and City of Buckley Approval.** This Agreement, and the transaction contemplated hereby and the Purchase and Sale Agreement, is subject to review and approval by the Tacoma Public Utility Board and the City of Buckley City Council. If such approval is not obtained, this Agreement will terminate, and neither party will have any further rights or obligations under this Agreement, except as otherwise provided for in this Agreement.

9. **Governing Law.** This Agreement shall be interpreted and enforced according to the laws of the State of Washington.

10. **Consent to Jurisdiction and Venue.** The Parties shall submit, and shall not object, to jurisdiction and venue in the Pierce County Superior Court, State of Washington, in connection with any claims arising out of this Agreement.

11. **Attorneys Fees.** Should it be necessary for any party to this Agreement to initiate legal proceedings to adjudicate any issues arising hereunder, the party or parties to such legal proceedings who substantially prevail shall be entitled to reimbursement of their attorneys' fees, costs, expenses and disbursements, including the fees and expenses of expert and fact witnesses reasonably incurred or made by the substantially prevailing party in preparing to bring suit, during suit, on appeal, on a petition for review, and in enforcement of any judgment or award from the party who does not substantially prevail; EXCEPT, this provision shall not apply in the event of default, or rescission made necessary due to good faith errors as to fact, law or legal authority.

12. **Headings Not Controlling.** Paragraph headings included herein are for reference only and are not a part of this Agreement. The headings shall not control or alter the meaning of this Agreement as set forth in the text.

13. **Equal Opportunity to Participate in Drafting.** The Parties have had an equal opportunity to participate in the drafting of this Agreement. No ambiguity shall be construed against any party based upon the claim that one party drafted ambiguous language.

14. **Agreement.** This Agreement constitutes the entire agreement of the Parties on all subjects. This Agreement may not be modified, interpreted, 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 all subjects, all of which are merged into, and superseded by, this Agreement. No party is entering into this Agreement in reliance on any oral or written promises, inducements, representations, understandings, interpretations or agreements other than those contained in this Agreement.

15. **Full Understanding; Independent Legal Counsel.** The Parties each acknowledge, represent and agree that they have read this Agreement and that they fully understand the terms thereof and have been fully advised by their legal counsel and that they are executing this Agreement upon advice and recommendation of their independent legal counsel.

16. **IN WITNESS WHEREOF,** the Parties have caused this Agreement to be executed in Tacoma, Washington effective on the date first mentioned above.

THE CITY OF BUCKLEY
BY:

TACOMA WATER
By:

William A. Gaines, Director of Utilities /CEO

Linda McCrea, Water Superintendent

