

## RESOLUTION NO. 2430

### **A RESOLUTION OF THE CITY OF WILSONVILLE AUTHORIZING THE CITY MANAGER TO EXECUTE A SETTLEMENT AGREEMENT AND EASEMENT CONCERNING A DISPUTED CLAIM BETWEEN THE CITY OF WILSONVILLE AND SAM AND CHRISTINE CARUSO**

WHEREAS, the City Council having heretofore authorized the City's attorneys to negotiate a settlement over a disputed claim concerning the City's stormwater channel, located in an area commonly referred to as Morey's Landing, with an adjoining landowner who had installed an unpermitted storm pipe into the channel and who claimed that improper management of the City's stormwater facilities within the stormwater channel were causing significant erosion to his property; and

WHEREAS, THE City is planning a major improvement and construction project to improve the stormwater facilities and drainage within the stormwater channel; and

WHEREAS, in consideration of some additional stormwater facility improvements over and above those required for the project being made by the City and in consideration of the Easement being granted to the City by Caruso, to be used to facilitate that work and house some of the improvements, the parties have agreed that performance of the Settlement Agreement will without either side admitting any liability, constitute full and final settlement between them as to any current claims that either may have against the other related to the stormwater channel and any alleged damage to the Caruso property; and

WHEREAS, in order to allow the parties to perform the Settlement Agreement, in accordance with its terms, the parties have agree to enter into a Tolling Agreement to toll any action that either may have against the other arising out of the dispute with respect to the stormwater channel, facilities or loss of property and that all claims will be extinguished upon completion of the obligations to be performed under the Settlement Agreement;

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

1. The above Recitals are incorporated by referenced herein.
2. The City Manager is authorized to execute on behalf of the City of Wilsonville the form of the Settlement Agreement which is attached as **Exhibit 1**; the form of the Easement which is attached hereto as **Exhibit 2**; and the City Attorney is

authorized to execute on behalf of the City of Wilsonville the Tolling Agreement in the form attached hereto as **Exhibit 3**.

3. This resolution becomes effective upon the date of adoption.

ADOPTED by the City Council of the City of Wilsonville at a special meeting thereof this 17th day of June, 2013, and filed with the Wilsonville City Recorder this date.

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Tim Knapp, Mayor

ATTEST:

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Sandra C. King, MMC, City Recorder

SUMMARY OF VOTES:

Mayor Knapp	Yes
Council President Starr	Yes
Councilor Fitzgerald	Excused
Councilor Goddard	Yes
Councilor Stevens	Yes

Attachments:

Exhibit 1:	Settlement Agreement
Exhibit 2:	Easement
Exhibit 3	Tolling Agreement

## RELEASE AND SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into by and between the City of Wilsonville (“City”) and Christine and Sam Caruso (hereinafter “Caruso”). Caruso is the owner of certain real property located at 31394 SW Olympic Drive, Wilsonville, Oregon, adjacent to a public storm drainage area and channel.

### Recitals

- A. In June 2011, after Caruso experienced a landslide on his property, Caruso caused a large drainage pipe and fill to be installed in a stormwater drainage channel located on his property and on land owned by the Homeowner’s Association for Morey’s Landing (“HOA”). A complaint was made by a neighbor to the HOA regarding a large number of dump trucks passing by the neighbor’s house and placement of a pipe within HOA property. Following receipt of that complaint, the City’s building inspector visited the site and issued a stop work order. Subsequent thereto, the United States Army Corps of Engineers (“Corps”) issued a letter advising Caruso that the unpermitted pipe must be removed on or before June 1, 2013. The City’s stop work order was lifted, in part, on October 17, 2011 to allow certain interim repairs.
- B. The City is responsible for maintenance of the public stormwater channel and outfall structures. The City is preparing to do extensive work within that area pursuant to pending applications with the Corps and the Oregon Department of State Lands (“DSL”).
- C. Subsequent to the stop work order, the City and Caruso met on several occasions to discuss possible solutions for removal of the pipe and stabilization of the stormwater channel. Both parties have also met with the Corps and DSL concerning the same.
- D. On or about October 27, 2011, Caruso’s attorney filed a tort claim notice alleging damage to the Caruso property, allegedly caused by the City’s failure to adequately maintain the stormwater channel. On or about April 19, 2013, Caruso’s attorney filed a supplementary tort claim notice.
- E. The City and Caruso now desire to settle and resolve all existing disputes between them as relate to the foregoing removal of the unauthorized pipe and repair to the stormwater channel.

### Mutual Release

Now, therefore, in return for the consideration described in the next paragraph, the City and Caruso each release and forever discharge the other from any and all liabilities of any kind, shape, or description that attended or arose out of the conduct of either of them, their officers, agents, servants, or employees, whether known or unknown, as it exists today, related to the

stormwater channel and any damage related thereto or caused thereby. This Release does not apply to any future acts of either party or to any future damage caused to property or to the stormwater system by either party.

1. **Consideration.** The consideration for these mutual releases is as follows:

A. The City will remove the unauthorized pipe and fill on Caruso's behalf, at no charge to Caruso, as required by the Corps; and

B. The City will pay for the design and construction of a retaining wall on the Caruso property, as designed by the City's engineering consultant pursuant to those AKS Plans reviewed and approved by the parties, intended to help prevent future erosion of a potentially unstable slope area on the Caruso Property; and

C. The City will repair the stormwater channel and outfall structures pursuant to those AKS Plans reviewed and approved by the parties and in a manner as allowed by and approved by the Corps and DSL; and

D. Caruso will cooperate with the removal of the pipe, installation of the retaining wall, and repair of the stormwater channel by granting the City the Easement, attached hereto as **Exhibit A**, and incorporated by reference herein; and

E. Once the retaining wall is installed, Caruso agrees that Caruso will not make any alterations to the land surrounding the retaining wall without first consulting with the City in order to help ensure the effectiveness, integrity, and stability of the retaining wall and stormwater channel. The City will not be responsible for repair or maintenance of the wall if Caruso makes any alterations that impact the wall or the structural fill behind the wall without the City's express written consent; and

F. The parties agree to a tolling of the statute of limitations until the pipe and unpermitted fill is removed, the retaining wall is constructed, and the channel work is completed, as required by the Corps and DSL permits, and agree to execute a legally binding tolling agreement at the time of execution of this Agreement. As soon as the pipe and unpermitted fill are removed, the retaining wall is constructed, and the channel work is completed, as required by the Corps and DSL permits, Caruso, by and through his attorney, Jeff Kleinman, will immediately withdraw the tort claim notices and all claims associated therewith, including but not limited to the damage or alleged damage to the Caruso property and costs incurred by Caruso relating thereto, shall be deemed fully extinguished and settled by performance of this Agreement; and

G Caruso will promptly notify the City if Caruso discovers or suspects any problems with the retaining wall or stormwater channel impacting his property; and

H. The City will remain responsible to maintain and repair the stormwater channel and outfall structures. The City will also be responsible to repair any damage to the retaining wall caused by stormwater runoff from the channel. The City will not be responsible for any other repairs or maintenance of the retaining wall or the Caruso land; and

I. The City will maintain landscaping (including replanting if necessary) and water, as needed, for a period of two (2) years to ensure proper establishment; and

J. The City agrees that it will not encourage the Corps to cite Caruso for installation of the stormwater pipe or related fill materials.

2. **No Admission.** Both parties to this Agreement acknowledge and agree that neither party admits to any liability to the other. Both agree that this instrument represents a compromise and settlement of disputed claims and that neither shall construe this Agreement as an admission of liability by the other.

3. **Limitation on Release & Cooperation.** Nothing contained herein shall be construed to release either party from any future acts or omissions that cause harm to the other party. If the Corps or DSL fail to issue the City permits in time to allow the City to complete the work described in Paragraph 1 above before the end of 2013, the parties agree to work together in good faith to get the repairs made as quickly as possible during the next available in-water work period and to attempt to mitigate further damages during the 2013 rainy season, subject to constraints on mitigation imposed by DSL, NMFS, and the Corps.

4. **Future Disputes.** The parties agree that in the event of any disagreement over the terms of this Agreement, or should any claims arise out of this Agreement, the parties will enter into nonbinding mediation in an attempt to settle any such claims. If such claims cannot be settled within three months of either party requesting mediation, with both parties making a good faith effort to settle the claim through mediation, then either party may bring an action against the other in Clackamas County Circuit Court.

5. **Notices.** Any notice required or permitted under this Contract shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after having been deposited in the United States mail as certified or registered mail, addressed to the addresses set forth below, or to such other address as one party may indicate by written notice to the other party.

To City: City of Wilsonville  
Attn: Community Development Director  
29799 SW Town Center Loop East  
Wilsonville OR 97070

To Caruso: Christine and Sam Caruso  
31394 SW Olympic Drive  
Wilsonville OR 97070

With a Copy to: Jeffrey L. Kleinman  
Attorney at Law  
1207 SW 6<sup>th</sup> Avenue  
Portland OR 97204

6. **Miscellaneous Provisions.**

a. Integration. This Agreement, including all exhibits attached hereto, contains the entire and integrated agreement between the parties and supersedes all prior written or oral discussions, representations, or agreements.

b. Legal Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, personal representatives, successors, and assigns. This Contract may be enforced by an action at law or in equity.

c. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of Oregon. Venue for any dispute will be in Clackamas County Circuit Court.

d. Nonwaiver. Failure by either party at any time to require performance by the other party of any of the provisions of this Agreement shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

e. Severability. If any provision of this Agreement is found to be void or unenforceable to any extent, it is the intent of the parties that the rest of the Agreement shall remain in full force and effect, to the greatest extent allowed by law.

f. Modification. This Agreement may not be modified except by written instrument executed by Caruso and the City.

g. Time of the Essence. Time is of the essence in the performance of this Agreement.

h. Headings. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Agreement.

i. Number, Gender and Captions. In construing this Agreement, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural, the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships.

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

k. Interpretation. The City and Caruso acknowledge that this Agreement shall be deemed and construed to have been prepared mutually by each party and it shall be expressly agreed that any uncertainty or ambiguity existing therein shall not be construed against any party.

l. Entire Agreement. This Agreement and all documents attached hereto or referenced herein represent the entire Agreement between the parties.

m. Counterpart. The parties agree that this Agreement may be executed in counterpart. Each individual executing this instrument warrants the authority to execute it on behalf of the party for which that individual executes the instrument.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013.

City of Wilsonville

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

Print Name: \_\_\_\_\_

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

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013.

Sam Caruso

\_\_\_\_\_

Christine Caruso

\_\_\_\_\_

Approved as to Form:

\_\_\_\_\_  
Jeff Kleinman, Attorney for Caruso

\_\_\_\_\_  
Barbara Jacobson, Assistant City Attorney

*After recording return to:*  
City of Wilsonville  
Attn: City Recorder  
29799 SW Town Center Loop E.  
Wilsonville OR 97070

## **STORMWATER FACILITIES EASEMENT**

THIS STORMWATER FACILITIES EASEMENT (“Agreement”) is effective as of this \_\_\_\_ day of \_\_\_\_\_, 2013 between Grantors **Samuel J.A. and Christine A. Caruso** (collectively “Owner”), and Grantee **City of Wilsonville**, a municipal corporation of the State of Oregon (the “City”).

### **RECITALS**

- A. Owner is the holder of title to certain real property located in the City of Wilsonville, Clackamas County, Oregon, legally described and depicted on **Exhibit A**, attached hereto (the “Property”).
- B. The Property is located in an area commonly known as the Morey’s Landing Subdivision.
- C. When the Morey’s Landing Subdivision (“Subdivision”) was built in approximately 1998, the developer of the Project installed a stormwater runoff system adjacent to Owner’s Property that has proven to be inadequate to handle the stormwater run-off directed into it from the Subdivision.
- D. Contrary to current City requirements, when the Subdivision was created the City did not require the developer and, thereafter, the Homeowner’s Association to be responsible for the repair, maintenance, and adequacy of the stormwater system.
- E. Based on the foregoing, and in order to protect the Property and neighboring properties from erosion or other water damage, the City has agreed to reconstruct the current stormwater system to enhance capacity and to help prevent erosion caused by stormwater flow.
- F. In order to help prevent water damage to the Property, Owner has agreed to grant this Stormwater Facilities Easement (“Easement”) to the City so that the City may install a new stormwater system with enhanced capacity (“Stormwater Facilities”).



## AGREEMENT

NOW, THEREFORE, incorporating all of the above Recitals by reference herein and in consideration of the City performing upgraded stormwater work in and around Owner's Property that is intended to protect Owner's Property, and in further consideration of removal and disposal of a large drainage pipe and related materials installed by Owner, the City and Owner agree as follows:

1. **Granted Easement Uses.** The City or the City's qualified contractors shall be allowed to enter onto those areas of the Property depicted on **Exhibit B** ("Easement Area") to construct, plant, maintain, and repair the Stormwater Facilities in good working order, condition, and repair. This Easement shall also allow Grantee to construct and repair a retaining wall with safety fencing ("Retaining Wall"), as shown on the AKS Plans, dated May 29, 2013 ("Plans"). Work shall be done in compliance with all applicable federal, state, and local laws, rules, regulations, and guidelines, including those adopted by the Oregon Department of Environmental Quality and the federal Environmental Protection Agency. The Stormwater Facilities and Retaining Wall will be constructed as substantially shown in the Plans, which have been reviewed and approved by Owner and Owner's engineer, and will include the planting and landscaping components shown in the Plans.

2. **Easement Area.** Owner hereby grants the City, its employees, contractors, and designees a nonexclusive easement for ingress and egress over, across, and under the Easement Area in order to install and thereafter periodically inspect and repair the Stormwater Facilities and Retaining Wall, as needed for the purposes described above in **Section 1** and below in **Section 3**, including but not limited to cleaning, repairing, and/or replacing components of the Stormwater Facilities. Access to the Property is limited to the area depicted on **Exhibit B**. Except in the case of an emergency, the City shall provide reasonable notice to Owner when wishing to come onto the Easement Area for the purposes described in this Easement.

3. **Maintenance and Repair Responsibilities.** The City shall maintain the Stormwater Facilities in good working order, and shall maintain landscaping and water, as needed, for a period of two (2) years, to establish the planting and landscaping components shown in the Plans, and shall reasonably repair defects in the Stormwater Facilities or damage to the Stormwater Facilities unless caused by Grantor. The City will also repair future damage caused to Grantor's property due to any failure on the part of the City to properly maintain the stormwater channel, provided that Grantor promptly notifies the City of any observed problems or potential problems and takes no action to alter the Property before the City can examine the damage. Should the City damage Owner's Property in conjunction with its exercise of these Easement rights and responsibilities, the City will promptly repair such damage and reasonably restore Owner's Property (including lawn area and stone pathway) to its then preexisting condition. The City will repair any damage to the Retaining Wall caused by the stormwater channel the City maintains or due to defective installation. Grantor will be responsible for any cosmetic maintenance of the wall Grantor wishes to perform and for any repairs or replacements necessary except those for which the City is responsible. Before undertaking any excavation in

the structural area behind the Retaining Wall deeper than one (1) foot, Grantor shall notify the City so that the parties may work together to ensure the integrity of the wall is not compromised. Normal planting around the wall above this depth does not require notification to the City.

4. **Owner's Retained Rights.** Owner retains all rights to use the Easement Area in any way that will not damage or interfere with the Stormwater Facilities or the rights granted herein. Owner shall not remove or alter any of the Stormwater Facilities without first receiving written approval from the City to do so.

5. **Run with the Land; Successors and Assigns.** The rights and obligations contained herein shall run with the Property, burden the Property, and shall inure to the benefit of, and shall be binding upon, the City and its successors and assigns and Owner and Owner's respective heirs, successors, and assigns in ownership of the Property. This Easement is intended to be a property interest that would transfer by operation of law to a subsequent purchaser of Owner's Property or any portion thereof.

6. **Indemnification.** To the extent permitted by Oregon law, the City and its successors and assigns hereby agree to indemnify, defend, and hold Owner harmless from and against any and all claims of third persons for any losses, damages, liabilities, costs, or expenses (including but not limited to attorney's fees) arising from use of or activities on the Property by the City and its successors and assigns, and their respective contractors, licensees, invitees, agents, and employees.

7. **Default and Remedies.** In the event a party fails to perform its obligations under this Agreement, the non-defaulting party shall be entitled to require such performance by suit for specific performance or, where appropriate, through injunctive relief. Such remedies shall be in addition to any other remedies afforded under Oregon law.

8. **Nonwaiver.** Any failure to enforce any provision of this Agreement will not be deemed a waiver of the right to enforce that provision or any other provision of this Agreement.

9. **Attorneys Fees and Costs.** If a suit, action, or other proceeding is instituted in connection with any controversy arising out of this Agreement or to interpret or enforce any rights hereunder, the prevailing party shall be entitled to recover its reasonable attorney's fees and its costs and disbursements actually incurred in connection therewith, as determined by the judge at trial or on appeal or review, in addition to all other amounts provided by law.

10. **Severability.** If any provision of this Agreement is found to be void or unenforceable, it is the intent of the parties that the rest of the Agreement shall remain in full force and effect, to the greatest extent allowed by law.

11. **Modification.** This Agreement may not be modified unless signed by both parties and the modification is recorded.

12. **Entire Agreement.** This Agreement, including all documents attached to this Agreement and all documents incorporated by reference herein, represents the entire Agreement with respect to the use and operation of the Easement.

13. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon.

IN WITNESS WHEREOF, Owner and the City have executed this instrument effective as of the date first written above.

**OWNER:**

\_\_\_\_\_  
Samuel J.A. Caruso

\_\_\_\_\_  
Christine A. Caruso

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_)

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_,  
by Samuel J.A. Caruso.

\_\_\_\_\_  
Notary Public – State of Oregon

STATE OF OREGON            )  
  ) ss.  
County of \_\_\_\_\_)

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_,  
by Christine A. Caruso.

\_\_\_\_\_  
Notary Public – State of Oregon

**CITY OF WILSONVILLE**

By: \_\_\_\_\_  
Bryan Cosgrove  
As Its: City Manager

STATE OF OREGON            )  
  ) ss.  
County of Clackamas        )

This instrument was acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_,  
by Bryan Cosgrove, as the City Manager of the City of Wilsonville.

\_\_\_\_\_  
Notary Public – State of Oregon

ATTESTED TO:

\_\_\_\_\_  
Sandra C. King, MMC, City Recorder

APPROVED AS TO FORM:

\_\_\_\_\_  
Barbara A. Jacobson, Assistant City Attorney  
City of Wilsonville, Oregon

APPROVED AS TO LEGAL DESCRIPTION:

\_\_\_\_\_  
Nancy J.T. Kraushaar, P.E., City Engineer  
City of Wilsonville, Oregon

**EXHIBIT A**  
**LEGAL DESCRIPTION**

Lot 190, MOREY'S LANDING 4, in the City of Wilsonville, County of Clackamas, and State of Oregon.

EXHIBIT B  
PLACEHOLDER

JEFFREY L. KLEINMAN  
ATTORNEY AT LAW  
THE AMBASSADOR  
1207 S.W. SIXTH AVENUE  
PORTLAND, OREGON 97204  
TELEPHONE (503) 248-0808  
FAX (503) 228-4529

June 10, 2013

**Via Email (kohlhoff@ci.wilsonville.or.us) and First Class Mail**

Michael E. Kohlhoff  
City Attorney  
City of Wilsonville  
29799 SW Town Center Loop E.  
Wilsonville, OR 97070

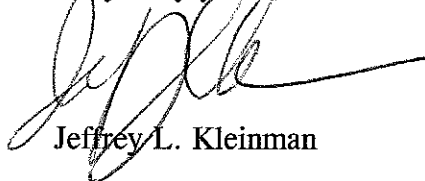
Re: **Tolling Agreement as to Matters Set out in Tort Claim Notice of Samuel J.A. Caruso and Christine Caruso Dated October 27, 2011**

Dear Mike:

Pursuant to the Release and Settlement Agreement into which the City and Mr. and Mrs. Caruso are now entering, kindly acknowledge a tolling agreement as set out below.

Thank you again for your courtesies.

Very truly yours,



Jeffrey L. Kleinman

I am the attorney for the City of Wilsonville. I am specifically authorized to toll, and do hereby agree to toll, the statute of limitations on behalf of my client until the subject pipe and unpermitted fill is removed, the subject retaining wall is constructed, and the subject channel work is completed, as required by the subject permits from the Army Corps of Engineers and the Oregon Department of State Lands.

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

Michael E. Kohlhoff, OSB #690940  
Attorney for the City of Wilsonville

JLK:cme  
cc: clients