



## RESOLUTION 2017-041

### APPROVING SETTLEMENT AGREEMENT AND MUTUAL RELEASE WITH CLEAN WATER SERVICES

**WHEREAS**, the City of Sherwood and Clean Water Services (CWS) entered into an Intergovernmental Agreement (IGA) on January 4, 2005 (and subsequently amended on March 17, 2006, July 1, 2008, and July 1, 2009) for the operation of sanitary sewer and surface water facilities; and

**WHEREAS**, the City enacted a Utility Facilities in Public Right-of-Way (ROW) Ordinance (Ordinance 2008-011) in September 2008 which imposed a ROW fee on utilities using the City's ROW; and

**WHEREAS**, CWS disputed that it could be subject to the ROW fee; and

**WHEREAS**, the City began withholding the 5% ROW fee from revenue collected by the City on behalf of CWS on July 1, 2010; and

**WHEREAS**, the City and CWS have been working together through the dispute resolution process as outlined in the IGA over the collection of ROW fees; and


**WHEREAS**, City and CWS staff have negotiated an agreement resolving this dispute, subject to approval of the respective governing bodies.

#### **NOW, THEREFORE, THE CITY OF SHERWOOD RESOLVES AS FOLLOWS:**

**Section 1.** The Sherwood City Council hereby authorizes the City Manager to sign a Settlement Agreement and Mutual Release with Clean Water Services, in a form substantially similar to the attached Exhibit A;

**Section 2.** This Resolution shall be effective upon its approval and adoption.

**Duly passed by the City Council this 6th of June, 2017.**

  
Krisanna Clark, Mayor

Attest:

  
Sylvia Murphy, MMC, City Recorder

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This SETTLEMENT AGREEMENT (“Agreement”), by and between Clean Water Services (“CWS”) and the City of Sherwood (“City”) is entered into as of the date both Parties have executed this Agreement (the “Effective Date”).

RECITALS

- A. CWS owns and operates certain sanitary sewer and surface water facilities throughout its service area, including within the City of Sherwood.
- B. City owns and operates certain sanitary sewer and surface water facilities within the City of Sherwood.
- C. City and CWS are parties to an intergovernmental agreement (IGA) for the operation of sanitary sewer and surface water facilities.
- D. City adopted Ordinance 2008-011, An Ordinance Amending Title 12 Streets, Sidewalks, and Public Places of the Sherwood Municipal Code by Adding a New Chapter 12.16 Relating to Utility Facilities in Public Right-of-Way; Deleting Chapters 5.16 Telecommunications Facilities and 5.30 Public Utility Fee; and Superseding Ordinance 2002-1140, on September 16, 2008, which, among other things, imposed a privilege tax on users of the City’s right-of-way. Under that Ordinance, City began to collect a Privilege Tax from CWS on July 1, 2010 and continuing through the present time.
- E. A dispute between the Parties exists with respect to the City’s imposition of its privilege tax on, and collection and retention of privilege taxes in relation to, CWS (the “Dispute”).
- F. In an effort to resolve the Dispute, the Parties entered into a Tolling Agreement, and also participated in a mediation process pursuant to the IGA.
- G. The Parties now wish to fully resolve the Dispute.

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the Parties agree as follows:

AGREEMENT

1. Settlement Payment and Other Obligations

- a. In consideration of CWS’s release of claims and the covenants contained herein, City shall contribute \$507,435.07 from City’s sanitary sewer fund to the CWS Onion Flats Project No. \_\_\_\_ by July 15, 2017 (the “Settlement Payment”).

- b. The Settlement Payment, together with the covenants contained herein, fully resolves the Dispute with regard to all privilege taxes that have been or may be collected by the City in relation to CWS through June 30, 2017.
  - c. The Parties have separately agreed to an amendment of their IGA that fully resolves the Dispute with regard to privilege taxes which may be collected by the City in relation to CWS from July 1, 2017 forward pursuant to the amended IGA.
  - d. It is the intent of the Parties that City will continue to collect and retain privilege taxes in relation to CWS in the same manner as is currently the status quo through June 30, 2017, and that thereafter the collection and retention of privilege taxes by City in relation to CWS will be pursuant to the terms of the amended IGA.
  - e. In consideration of City's release of claims and the covenants contained herein, CWS agrees that all issues relating to City's imposition of privilege taxes on, and collection and retention of privilege taxes in relation to, CWS, and any other amounts which may otherwise be due from City to CWS, are fully resolved and satisfied.
  - f. CWS agrees that it will not in any manner, other than as explicitly set forth in this Agreement, attempt to recoup, from the City or from City ratepayers, the amount of any privilege taxes collected or retained by the City for periods prior to July 1, 2017.
  - g. The Parties hereby agree to terminate their Tolling Agreement.
2. Mutual Release of Claims. Each Party (for itself and its successors and assigns) hereby unconditionally releases and forever discharges the other Party and its successors and assigns, from any and all claims (including, but not limited to, claims for attorney fees), demands, losses, damages, liabilities or causes of action (known or unknown), arising out of or related to the Dispute, including any claims based on an agreement between the Parties, and/or any claims under federal, state, or local law, rule or regulation. This Agreement resolves any claim for relief that could have been alleged, no matter how characterized, including, without limitation, compensatory damages, damages for breach of contract, bad faith damages, reliance damages, liquidated damages, and punitive damages. The Parties release only those claims arising out of or related to the Dispute and do not release any claims arising out of or related to the Parties' conduct or activities subsequent to, and in violation of, the amendment of the IGA as contemplated herein.
3. Acknowledgement of Settlement. The Parties acknowledge that the consideration set forth in this Agreement, which includes, but is not limited to, the Settlement Payment, is in full settlement of all claims or losses of whatever kind or character that they have, or may have ever had, against the other Party relating to the Dispute. By signing this Agreement, the Parties accept the consideration provided herein and the benefits of it, and acknowledge that they are giving up forever any right to seek further monetary or other relief from the other Party for any acts or omissions up to and including the Effective Date and as otherwise specified herein.
4. Non-Disparagement. The Parties agree that, unless required to do so by legal process, the Parties and their agents will not make any disparaging statements or representations,

either directly or indirectly, whether orally or in writing, by word or gesture, to any person whatsoever, about the other Party or any of its directors, officers, employees, attorneys, agents or representatives with respect to the Dispute. For purposes of this paragraph, a disparaging statement or representation is any communication which, if publicized to a reasonable third party, would cause or tend to cause the recipient of the communication to question the business condition, integrity, competence, good character or product quality of the person or entity to whom the communication relates.

5. Authority and Enforceability. Each Party hereby represents and warrants to the other Party that (a) it has full power, authority and legal right to enter into this Agreement; (b) the execution and delivery of this Agreement has been duly authorized; and (c) this Agreement is a legal, valid and binding obligation and is enforceable in accordance with its terms.
6. No Previous Assignment. Each Party hereby agrees, represents and warrants to the other Party that it has not previously assigned to any third party any of the claims released hereunder.
7. No Admissions. The Parties hereby agree that this Agreement shall not be deemed or construed as an admission of liability by any Party released by the terms hereof, and each Party hereby expressly denies liability of any nature whatsoever arising from or related to the subject matter of this Agreement.
8. Successors and Assigns. This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns.
9. Section Titles. Section titles have been inserted solely for the convenience of the Parties and shall not be considered a part of this Agreement for interpretation and construction.
10. Execution in Counterparts/Facsimile Signatures. This Agreement may be executed in one or more counterparts, each of which shall be deemed original, but all of which together shall constitute one and the same instrument. Original signatures delivered via facsimile shall be deemed originals.
11. Entire Agreement. This Agreement constitutes the entire and final agreement of the Parties with respect to the subject matter hereof and supersedes all other undertakings, oral or written, with respect to the subject matter hereof. This Agreement may be modified only by a written document signed by all of the Parties.
12. Attorney Fees and Costs. In the event a suit or arbitration is brought to enforce any of the terms and provisions contained herein, the prevailing Party shall be entitled to recover its reasonable attorney fees and costs, as may be allowed by a court of competent jurisdiction or by an arbitrator, as the case may be, including such fees and costs as may be incurred upon appeal.

13. Governing Law and Severability. This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon. If any term or provision of this Agreement shall to any extent be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby. Each term and provision of this Agreement shall be valid and be enforced as written to the fullest extent permitted by law.
14. Advice of Counsel. Each Party hereby agrees, represents and warrants to the other Party that it has consulted with and relied upon the advice of counsel of its own choosing in negotiating and preparing this Agreement, has read this Agreement and is fully aware of its contents and legal effect, and that the Agreement shall not be construed against either Party solely because the Party drafted all or part of the language in the Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the day and year set forth below.

CLEAN WATER SERVICES

CITY OF SHERWOOD

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

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

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Its: \_\_\_\_\_

Its: \_\_\_\_\_

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

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