


CITY OF MARYSVILLE AGENDA BILL

EXECUTIVE SUMMARY FOR ACTION

CITY COUNCIL MEETING DATE: 7/27/15

AGENDA ITEM: Access and Temporary Work Area Easement with the Tulalip Tribe	
PREPARED BY: Brooke Ensor	DIRECTOR APPROVAL: 
DEPARTMENT: Public Works, Water Resources	
ATTACHMENTS: 1 signed original of the Access and Temporary Work Area Easement	
BUDGET CODE:	AMOUNT: \$0
SUMMARY:	

As part of the Qwuloolt Restoration Project tidal breach, several City owned stormwater outfalls and approximately 200 feet of the City's sewer force main have the potential to be inundated and adversely impacted during the 100 year flood water. As a condition of their City issued permit, the Tulalip Tribe is required to modify this infrastructure to alleviate potential problems. They have provided engineering plans to replace the ductile iron sewer pipe with a high density polyethylene pipe that can withstand brackish water and relocate the stormwater outfalls.

In order to complete these projects, the Tribe has requested the City issue them an Access and Temporary Work Area Easement for work that will occur on City owned property. This document has been reviewed and approved by the City Attorney.

RECOMMENDED ACTION: Staff recommends that Council authorize the Mayor to sign and execute the Temporary Access and Work Area Easement.
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After Recording Return to:

City of Marysville
1049 State Avenue
Marysville, WA 98270

ACCESS AND TEMPORARY WORK AREA EASEMENT

Grantor: CITY OF MARYSVILLE
Grantee: TULALIP TRIBES OF WASHINGTON
Legal Description: Ptn E1/2 SE ¼ 33-30-5, Tracts 990, 991, and 994 of Harbor View Village,
Snohomish County, WA
Tax Parcel: Ptn 00918500099000

WHEREAS, CITY OF MARYSVILLE, a municipal corporation of the State of Washington, ("City") is the owner of the following-described property:

See **EXHIBIT A**
attached hereto and incorporated herein by this reference

hereinafter the "Property"; and

WHEREAS, the TULALIP TRIBES OF WASHINGTON, a federally recognized Indian tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934, as amended, 25 U.S.C §476, governed by the Board of Directors of the Tulalip Tribes of Washington as provided in Article VI of the Constitution and Bylaws of the Tribes, and recognized as a "public agency" as defined in RCW 39.34.020, hereinafter "Grantee," requires an access and temporary work area easement in connection with the plans and specifications entitled Stormwater Qwuloolt Tidal Wetland Restoration Stormwater Infrastructure Retrofit, Marysville, Washington, on file with the City of Marysville Department of Public Works, dated May 19, 2014, or as hereafter amended by mutual agreement of the parties, (the "Plans"); and

WHEREAS, this easement is for access and temporary work area construction, in connection with the Qwuloolt Tidal Wetland Restoration Project, which is a primary element in the Marysville Shoreline Master Plan and for which the City approved a Shoreline Conditional Use Permit on October 10, 2011 pursuant to Resolution 2309; NOW, THEREFORE,

IN CONSIDERATION of the mutual benefits to the parties and the covenants contained

M-12-077/temporary work easement 5/2015

here, the CITY OF MARYSVILLE does hereby grant to TULALIP TRIBES OF WASHINGTON (“the Tribes”), and its employees, contractors, agents, permittees and licensees: (1) a nonexclusive access easement across the land described in Exhibit A (Tracts 990, 991 and 994 of Harbor View Village Planned Residential Development for Barclays North , Inc., May 1999) for ingress and egress in, on, over, and across the land described in Exhibit A as an access route for vehicles and equipment to modify the trail and to replace and modify stormwater outfalls within lands described Exhibit A; and (2) a temporary work area easement on the lands described in Exhibit A (Temporary Work Area Easement), in, on, over, and across the land described in Exhibit A for a period not to exceed one year, beginning on June 18th 2015. The easement is granted to the Tribes, for use by the Tribes, its representatives, agents, and contractors as a work area, with the right to clear vegetation, the right to borrow and/or deposit fill, spoil, and waste material thereon, to move, store, and remove equipment and supplies, and erect and remove stormwater structures and portions of the trail incident to the stormwater improvements, remove temporary structures on the land and to perform any other work necessary and incident to the construction of the Qwuloolt Tidal Restoration Project, together with the right to trim, cut, fell, and remove trees, underbrush, obstructions, and any other vegetation, structures, or obstacles within the limits of the tract., however, tree removal should be minimized whenever possible. The landowners, their heirs and assigns, retain all such rights and privileges as may be used without interfering with or abridging the rights and easement hereby acquired; subject however, to existing easements for public roads and highways.

This access and temporary work area easement is subject to the following terms and conditions:

1. PURPOSE.

The access easement is granted to permit the Grantee a temporary right for the access, ingress and egress in, on, over, and across the land described in Exhibit A for the operation, maintenance, monitoring, alteration, and replacement of features associated with the Qwuloolt Tidal Wetland Restoration Project and as an access route for vehicles and equipment, together with the right to clear vegetation and obstructions within the limits of the right-of-way, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

The temporary work area easement is granted to permit the Grantee, its contractors, representatives, agents, and permittees, to enter upon the temporary work area easement for the purpose of constructing, maintaining, repairing, altering, renewing or reconstructing stormwater features within the tracts in support of the Qwuloolt Tidal Wetland Restoration Project. Grantee shall have the right to park vehicles, machinery, and store materials on the temporary work area easement. Grantee shall have the right to fence all or a portion of the temporary work area easement from time to time during the Term of construction. Grantee’s rights to use the temporary work area easement shall be exclusive at such times

and or such duration as Grantee's construction requires, in Grantee's discretion. At all other times, Grantee's right to use the temporary work area easement shall be non-exclusive.

The Easement Area shall be restored or replaced in as good a condition as it existed immediately before Grantee entered the temporary work area easement.

2. OWNERSHIP. The underlying fee of the access and temporary work area easement shall remain the property of Grantor.

3. RIGHTS RESERVED. Grantor hereby reserves unto Grantor the sole right to maintain a public park on the parcels burdened by the easements, subject to the easement rights granted herein.

4. PERMITS. Construction and any other rights exercised under this Easement shall not commence until all required permits shall have been secured from all applicable governmental authorities, including the State, County, and City. The current construction and all other activities under this easement exercised currently or in the future, shall be in strict conformance with all permits, the Plans, and all applicable laws, rules, regulations, construction standards and codes.

5. EXPENSES OF CONSTRUCTION. City shall have no liability for any expenses of construction whatsoever. All expenses incurred in the exercise of Grantee's rights hereunder shall be the sole obligation of Grantee. Grantee shall have no authority to incur any debt or obligation on City's behalf. Grantee shall allow no liens or encumbrances to attach to the Property as a result of Grantee's exercise of its rights hereunder, and in the event thereof, shall promptly pay the same and cause the Property to be released therefrom.

6. GRANTEE'S EMPLOYEES, CONTRACTORS AND SUBCONTRACTORS. All administrative staff, independent contractors, engineers, consultants, and workers of any type or nature, and all contractors and subcontractors employed by Grantee to perform any activity in connection with the Project shall be the employees, independent contractors, engineers, consultants, contractors and subcontractors of the Grantee, and City shall have no liability or responsibility whatsoever with respect to such persons or entities.

7. ACCESS CONTROL. During construction Grantee, its contractors and subcontractors, shall provide such access control to the premises, including flagging, fencing and signage as required to protect adjacent City facilities and the public from hazards occasioned by the exercise of Grantee's rights hereunder.

8. GRANTEE'S PERSONAL PROPERTY. Grantee and its contractors and subcontractors shall be solely responsible for securing its tools, equipment, materials and other property. No tools, equipment, materials or other property of Grantee, or its contractors or subcontractors, shall be stored on the Property except within the temporary work area easement. All such tools, equipment, materials and other property stored at the Property shall be at the sole risk of Grantee and its contractors and subcontractors. City shall have no liability whatsoever for damage to said property from vandalism, theft, the elements, flood, or any other cause.

9. RESTORATION. Except for any permanent improvements or modifications to the Property provided for under the Plans, upon completion of Grantee's construction activities or Grantee's exercise of any other rights hereunder, Grantee shall promptly restore any portion of the Property impacted by Grantee's activities, provided such restoration obligation shall not be construed to be inconsistent with the continuing work necessary to complete, operate and maintain the Qwuloolt Tidal Restoration Project.

10. ENVIRONMENTAL CONTAMINATION. Grantee, its contractors and subcontractors, shall take all reasonable and necessary precautions to ensure that no hazardous substances or contaminants are released in the exercise of Grantee's rights hereunder. In the event of any such release, or the discovery by Grantee or its contractors or subcontractors of any hazardous substance or contaminant in or under the Property, Grantee shall notify City, verbally the same day and in writing, no later than 5:00 p.m. of the next business day after the release or discovery. Grantee and/or its contractors or subcontractors shall, at their sole expense, take all actions as may be necessary or advisable for the cleanup of any hazardous substance contamination occasioned by the exercise of Grantee's rights hereunder including, without limitation, all removal, containment and remedial actions in accordance with all applicable laws and in all events in a manner satisfactory to City, and shall further pay or cause to be paid all cleanup, administrative and enforcement costs of governmental agencies if obligated to do so by contract or law. Grantee shall indemnify, defend and save City harmless from any and all of the costs, fees, penalties and charges assessed against or imposed upon City (as well as City's attorneys' fees and costs) as a result of the use, handling, disposal, transportation and/or generation, and cleanup of any hazardous substances on the Property by Grantee or Grantee's contractor's or subcontractors. Grantee shall be solely liable for any hazardous substance contamination resulting from the exercise of

Grantee's rights hereunder, whether by Grantee, its employees, or its contractors or subcontractors. The definition of the term "hazardous substance" shall be those used in applicable state and federal regulations, provided that the definition of the term "hazardous substance" shall include petroleum and related byproducts and hydrocarbons.

11. INSURANCE. Prior to commencing any construction activity permitted under this temporary work area easement Grantee and all contractors and subcontractors employed by Grantee shall file with the City certificates of insurance coverage to be kept in force continuously during the term of the activity, in a form acceptable to the City. The Grantee and its contractors and subcontractors shall procure and maintain for the duration of the term of the activity, insurance against claims for injuries to persons or damage to property which may arise from or in connection with exercise of the rights granted to Grantee and the activities performed hereunder by the Grantee, its agents, contractors, subcontractors, representatives or employees. Said certificates shall name the City, its officers, agents, employees and elected officials, as an additional named insured with respect to all coverages except for L & I. The minimum insurance requirements shall be as follows:

- (a) Comprehensive General Liability. \$2,000,000.00 combined single limit per occurrence for bodily injury, personal injury and property damage; \$2,000,000.00 general aggregate. Commercial General Liability insurance shall be written on Insurance Services Office (ISO) occurrence form CG 00 01 and shall cover liability arising from premises, operations, independent contractors and personal injury and advertising injury. The City shall be named as an insured under the Grantee's Commercial General Liability insurance policy with respect to the work performed for the City.
- (b) Automobile Liability. \$300,000 combined single limit per accident for bodily injury and property damage; Automobile Liability insurance covering all owned, non-owned, hired and leased vehicles. Coverage shall be written on ISO form CA 00 01 or a substitute form providing equivalent liability coverage. If necessary, the policy shall be endorsed to provide contractual liability coverage.
- (c) Excess Policy Coverage. A policy of Excess Liability insurance, providing excess limits over both the above General Liability and Automobile Liability, written on a following form basis shall be maintained by Grantee and its contractors and subcontractors with limits not less than \$2,000,000.00 each occurrence and \$2,000,000.00 annual aggregate.
- (d) Workers' Compensation. Workers' compensation limits as required by applicable law.

- (e) Pollution Cleanup Legal Liability. A policy of insurance covering the costs of cleanup of environmental contamination and losses caused by pollution conditions that arise from the exercise of Grantee's rights hereunder. The Pollution Cleanup and Legal Liability insurance shall be written in an amount of at least \$1,000,000 per loss, with an annual aggregate of at least \$1,000,000. Coverage shall be on an occurrence basis.

Each insurance policy shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

Insurance to be provided by Grantee shall be with an A.M. Bests rating of no less than A:VII, or if not rated by Bests, with minimum surpluses the equivalent of Bests' VII rating.

The Grantee's insurance coverage shall be primary insurance as respects the City. Any insurance, self-insurance, or insurance pool coverage maintained by the City shall be excess of the Grantee's insurance and shall not contribute with it.

Maintenance of insurance by Grantee, its contractors and subcontractors, as required by this Easement shall not be construed to limit the liability of Grantee and/or its contractors or subcontractors to the coverage provided by such insurance or otherwise limit the recourse to any remedy available at law or in equity.

Unless approved by the City, all insurance policies shall be written on an "Occurrence" policy as opposed to a "Claims-made" policy. The City may require an extended reporting endorsement on any approved "Claims-made" policy.

12. INDEMNIFICATION. Grantee agrees to defend, indemnify and hold the City, its officers, officials, employees, and volunteers harmless from any and all claims, injuries, damages, losses, or suits including attorney fees, arising out of or in connection with the exercise of Grantee's rights under this access and temporary work area easement including claims for environmental cleanup, except for injuries and damages caused by the negligence of the City.

Should a court of competent jurisdiction determine that this access and temporary work area easement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the Grantee or its contractors or subcontractors and the City, its officers, officials, employees, and volunteers, the Grantee's liability hereunder shall be only to the extent of the Grantee's negligence. It is further specifically and expressly understood that the indemnification provided herein constitutes the Grantee's waiver of immunity under Industrial Insurance, Title 51 RCW, solely for the purposes of this indemnification. This waiver has been mutually negotiated by the parties. Nothing

contained in this section or Contract shall be construed to create a liability or a right of indemnification by any third party. The provisions of this section shall survive the expiration or termination of this access and temporary work area easement with respect to any event occurring prior to such expiration or termination.

13. LEGAL RELATIONS / DISPUTE RESOLUTION / MEDIATION / ARBITRATION. The Grantee, its contractors and subcontractors shall comply with all federal, state, and local laws and ordinances applicable to the exercise of Grantee's rights under this access and temporary work area easement. This access and temporary work area easement shall be interpreted and construed in accordance with the laws of Washington.

The parties agree that any and all disputes, claims, or controversies arising out of or relating to this access and temporary work area easement shall be resolved by mediation with a mediator jointly selected by the parties. If the parties are unable to reach a negotiated resolution through mediation, then the parties agree to submit the same to JAMS, or its successor, for final and binding arbitration.

Any dispute, claim or controversy that cannot be resolved through mediation that arises out of this access and temporary work area easement, shall be determined by arbitration before a sole arbitrator. The arbitration shall be administered by JAMS pursuant to its Streamlined Arbitration Rules and Procedures. The arbitrator's decision is final. The costs of mediation and/or arbitration shall be shared equally and each party shall be responsible for its own legal fees. The Arbitration decision shall be final and may be enforced by the Federal District Court.

Limited Waiver of Sovereign Immunity: The Grantee neither waives, limits nor modifies its sovereign immunity from any lawsuit, except as expressly provided in this Dispute Resolution / Mediation / Arbitration Section. The Grantee hereby expressly and irrevocably waives its sovereign immunity (and any defense based thereon) for arbitration of claims arising out of or related to this access and temporary work area easement but only pursuant to the provisions of this Dispute Resolution / Mediation / Arbitration section, and only for judicial proceedings in Federal Court for the purposes of compelling mediation or arbitration of a Claim, confirming an arbitration award or collecting sums due and owing pursuant to, and otherwise enforcing any award or judgment by the arbitrator(s). The Grantee hereby consents to and submits itself to the jurisdiction of any arbitration proceeding convened pursuant to the terms of the access and temporary work area easement. This limited waiver of sovereign immunity is solely for the benefit of the City, and the Grantee, by granting this limited waiver to City, does not otherwise waive its sovereign immunity.

14. ATTORNEYS' FEES: In any proceeding brought to enforce this agreement or to determine the rights of the parties under this agreement, the prevailing

party shall be entitled to collect, in addition to any judgment awarded by a court, a reasonable sum as attorneys' fees, and all costs and expenses incurred in connection with such proceeding, including attorneys' fees, costs, and expenses of any appeal of a judgment. For purposes of this agreement, the prevailing party shall be that party in whose favor final judgment is rendered or who substantially prevails, if both parties are awarded judgment. The term "proceeding" shall mean and include arbitration, administrative, bankruptcy and judicial proceedings including appeals.

15. NOTICES.

Notices to the City shall be sent to the following address:

City of Marysville
ATTN: Gloria Hirashima, Chief Administrative Officer
1049 State Avenue
Marysville, WA 98270

Notices to the Grantee shall be sent to the following address:

TULALIP TRIBES OF WASHINGTON
6406 Marine Drive
Tulalip WA 98271

Receipt of any notice shall be deemed effective on the date personally served, or three (3) days after deposit of written notice in the U.S. mail with proper postage and address.

16. NONWAIVER. Waiver by the City of any provision of this access and temporary work area easement or any time limitation provided for in this Easement shall not constitute a waiver of any other provision.

17. AUTHORITY TO EXECUTE. The parties signing below represent and warrant that they are authorized to execute this access and temporary work area easement and have the requisite authority to bind their respective parties.

18. BINDING COVENANT. The covenants herein shall run with the land and shall be binding on City and Grantee, their heirs, successors and assigns.

19. RECORDATION. This access and temporary work area easement and any amendment thereto shall be recorded in the records of the Snohomish County Auditor.

20. **COUNTERPARTS.** This access and temporary work area easement may be executed in several identical counterparts, each of which shall be deemed to be an original copy, all of which together shall constitute one Easement, binding upon all parties hereto, notwithstanding that all the parties shall not have signed the same counterparts.

DATED this _____ day of _____, 2015.

CITY OF MARYSVILLE

By _____
JON NEHRING, Mayor

TULALIP TRIBES OF WASHINGTON

By Melvin R Sheldon
Melvin R Sheldon (print name)
Chairman (title)

STATE OF WASHINGTON)
)ss.
COUNTY OF SNOHOMISH)

I certify that I know or have satisfactory evidence that JON NEHRING is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Mayor of the CITY OF MARYSVILLE to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

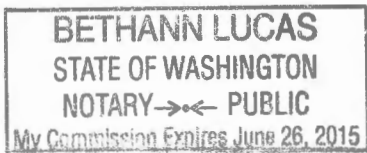
DATED this _____ day of _____, 2015.

(Legibly print name of notary)
NOTARY PUBLIC in and for the State of
Washington, residing at _____
My commission expires _____

STATE OF WASHINGTON)
)ss.
COUNTY OF SNOHOMISH)

I certify that I know or have satisfactory evidence that Melvin R. Sheldon is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the Chairman of the TULALIP TRIBES OF WASHINGTON to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

DATED this 17th day of June, 2015.



Bethann Lucas

BETHANN LUCAS
(Legibly print name of notary)
NOTARY PUBLIC in and for the State of
Washington, residing at Everett WA
My commission expires 6/26/2015