

**FIFTH AMENDMENT
TO
PROPERTY DISPOSITION AGREEMENT**

This Fifth Amendment to Property Disposition Agreement ("**Fifth Amendment**") is dated as of June 27, 2011, and is made and entered into by and among the CITY OF EVERETT, a municipal corporation of the State of Washington (the "**City**"); OLIVERMCMILLAN, LLC, a California limited liability company ("**OM**"), and two Affiliated Entities of OM: (i) OM EVERETT, INC., a Washington corporation ("**OM INC**"); and (ii) OMH TRANSFER AGENT, LLC, a Delaware limited liability company ("**OMH**").

A. OM INC and OMH (collectively "**Developer**") acquired the properties (collectively "**Properties**") described in that certain Property Disposition Agreement entered into on or about February 21, 2007 ("**Original PDA**"), between the City and Developer's predecessor-in-interest, OM, as amended by a First Amendment to Property Disposition Agreement dated September 28, 2007, a Second Amendment to Property Disposition Agreement dated February 20, 2008, Third Amendment to Property Disposition Agreement dated April 30, 2008 (the "**Third Amendment**"), and a Fourth Amendment to Property Disposition Agreement dated October 28, 2009 (the "**Fourth Amendment**") (the Property Disposition Agreement as amended by all such amendments, the "**PDA**").

B. Pursuant to the terms and conditions of the PDA, the City and Developer agreed to certain sequencing and time frames for their respective completion of certain tasks collectively described herein as the "**Work**".

C. The City and Developer have agreed that it is appropriate to modify certain provisions of the PDA and to extend time frames for completion of certain of the Work items as presently required by the PDA.

D. Accordingly, the parties have prepared this Fifth Amendment to acknowledge and evidence their agreement to affirm, modify and extend time frames for completion of certain of the Work items as set forth herein.

NOW THEREFORE, for and in consideration of the mutual promises as stated herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties to this Fifth Amendment agree as follows:

1. Roundabout and 41st Street Extension.

a. Developer Comment. Developer received the City's proposed design of the Roundabout and the 41st Street Extension on or about March 7, 2011. Developer reviewed and commented on the City's April 5, 2011 construction drawings for the Roundabout and the 41st Street Extension on or about April 22, 2011 (the "**Developer Comments**"). The City put construction of the Roundabout and 41st Street Extension to bid as the "41st Street Extension and Roundabout Project" with bid opening scheduled for May 3, 2011. City shall ensure that the final design and construction drawings for the Roundabout and 41st Street Extension (the "**2011 Construction Drawings**") incorporate the Developer Comments. Developer and City

Oliver McMillan

acknowledge that City has determined that it will likely proceed with the construction of the Roundabout and 41st Street Extension during Summer 2011.

b. Substantial Completion of Roundabout and 41st Street Extension. The deadlines under the PDA for the City to substantially complete construction of the Roundabout and 41st Street Extension are amended as follows:

(1) Roundabout. Developer shall use commercially reasonable judgment to determine on what date development of the Landfill Site or the Simpson Site will require the substantial completion of the Roundabout (this date, the "**Roundabout Deadline**"). When Developer determines the Roundabout Deadline, Developer shall deliver a notice to the City stating the Roundabout Deadline (the "**Roundabout Notice**"). The City shall substantially complete the Roundabout by the later of (a) the Roundabout Deadline or (b) the date that is sixteen (16) months after delivery of the Roundabout Notice.

(2) 41st Extension. Developer shall use commercially reasonable judgment to determine on what date development of the Simpson Site will require the substantial completion of the 41st Street Extension (this date, the "**41st Street Extension Deadline**"). When Developer determines the 41st Street Extension Deadline, Developer shall deliver a notice to the City stating the 41st Street Extension Deadline (the "**41st Street Extension Notice**"). The City shall substantially complete the 41st Street Extension by the later of (a) the 41st Street Extension Deadline or (b) the date that is sixteen (16) months after delivery of the 41st Street Extension Notice.

c. Paving. With respect to the Roundabout and the 41st Street Extension, the PDA is amended so that the City at its cost will construct in accordance with the 2011 Construction Drawings the full depth of roadway cross section except for the upper 1.5 inches of asphalt pavement. The upper 1.5 inches of asphalt pavement on the Roundabout and 41st Street Extension will be at the Developer's cost and will be completed by Developer. Prior to Developer's starting work on the upper 1.5 inches of asphalt pavement, the City shall be responsible for any repairs to the roadway cross section installed by the City to the extent such repairs have not been necessitated by the actions of the Developer or Developer's contractors, agents, lessees or invitees or by the actions of any Property owner or any Property owner's contractors, agents, lessees or invitees. Prior to Developer starting work on the upper 1.5 inches of asphalt, Developer will give the City a reasonable opportunity to inspect the condition of the roadway cross section as installed by the City.

d. Abutment Surcharge. The City will deliver about 16,350 yards of gravel barrow abutment surcharge material from the Roundabout and 41st Street Extension project to a mutually agreed location within the Simpson Site. This delivery is at the City's cost and will be completed no later than the date of completion of the 41st Street Extension. Upon delivery, (i) the abutment surcharge material is the property of Developer and (ii) except for any City obligations regarding hazardous materials that may be contained in the PDA or other agreements between the City and Developer, the City has no further obligations regarding the abutment surcharge material.

2. Main Road Extension / Stuchell and Newland Access.

a. Main Road Extension. The PDA is amended so that the City's deadline for substantially completing construction of the Main Road Extension and related improvements is amended as follows:

Developer shall use commercially reasonable judgment to determine on what date development of the Landfill Site, Mill Site, or Main Road will require the substantial completion of the Main Road Extension (this date, the "***Main Road Extension Deadline***"). When Developer determines the Main Road Extension Deadline, Developer shall deliver a notice to the City stating the Main Road Extension Deadline (the "***Main Road Extension Notice***"). The City shall substantially complete the Main Road Extension by the later of (a) the Main Road Extension Deadline or (b) the date that is sixteen (16) months after delivery of the Main Road Extension Notice.

b. Paving. With respect to the Main Road Extension, the PDA is amended so that the City at its cost will pave the full depth of asphalt pavement except for the upper 1.5 inches of asphalt pavement. The upper 1.5 inches of asphalt pavement on the Main Road Extension will be at Developer's cost and will be completed by Developer. Prior to Developer's starting work on the upper 1.5 inches of asphalt pavement, the City shall be responsible for any repairs to the roadway cross section installed by the City to the extent such repairs have not been necessitated by the actions of the Developer or Developer's contractors, agents, lessees or invitees or by the actions of any Property owner or any Property owner's contractors, agents, lessees or invitees. Prior to Developer starting work on the upper 1.5 inches of asphalt, Developer will give the City a reasonable opportunity to inspect the condition of the roadway cross section as installed by the City.

c. Stuchell and Newland Access. The following sentence from the second sentence of Section 8 of the Third Amendment is deleted:

The location of the driveway easement or dedication of the driveway areas shall be reasonably acceptable to OM or the then owner of the Mill Property and the City shall complete the driveway improvement work described herein by May 1, 2011 provided sufficient time is provided to the City after the conveyance of the interests necessary to connect the Stuchell and Newland Properties with the completed and dedicated Main Road across the Mill Property.

This sentence is replaced by the following sentence:

The location of the driveway easement or dedication of the driveway areas shall be reasonably acceptable to OM or the then owner of the Mill Property and the City shall complete the driveway improvement work described herein by the same date as the City's completion of the Main Road Extension, provided sufficient time is provided to the City after the conveyance of the interests necessary to connect the Stuchell and Newland Properties with the completed and dedicated Main Road across the Mill Property.

3. Landfill Pad North of 41st Street: All-Weather Surface / Compaction. The final three sentences of Section 22.e of the Third Amendment are hereby deleted and replaced with the following:

Except as otherwise provided in this Section 22.e, any fill material shall be compacted in accordance with the Grading/Surcharge Plans, including any surcharge materials that remain on the Landfill Pad following surcharge activities. Except in the areas marked as “6-Inch Thick All-Weather Surface” or “No All-Weather Surface” on Attachment A to this Fifth Amendment, the upper 18 inches of soil at the finished grade following surcharge shall be of all-weather surface and to a 95% compaction standard. This upper 18 inches of soil may be cement augmented in order to achieve the all-weather and 95% compaction standards.

The area marked as “6-Inch Thick All-Weather Surface” in the attachment to the Fifth Amendment will be of all-weather surface. The City will use the same methods of compaction (including cement augmentation) in the “6-Inch Thick All-Weather Surface” area as the City uses in the areas of the Landfill Pad that are compacted to a 95% compaction standard, but the City does not guarantee that the “6-Inch Thick All-Weather Surface” area will meet a 95% compaction standard. The City has no obligation to use additional compaction methods in the “6-Inch Thick All-Weather Surface” area.

4. Landfill Pad Lot 16: Grading, Fill and Surcharge.

a. Grading, Fill and Surcharge. Developer and City acknowledge that they have agreed to the following regarding grading, fill, and surcharge on that certain portion of the Landfill Pad south of 41st Street and more specifically identified as Lot 16 (the “Parcel”):

The City shall complete all grading, filling, and surcharging of the Parcel, including clearing and grubbing. The amount of that fill material shall be approximately 230,000 yards, and the fill material shall be placed and compacted in accordance with Everett Riverfront Surcharge Phase #3 Project Plans dated April 9, 2010. Upon completion of City’s work on the Parcel in conformance with this Section 4.a: (i) except for organic surcharge material as described in Section 4.b below, Developer shall own all fill and surcharge material on the Parcel and (ii) except for any City obligations regarding hazardous materials that may be contained in the PDA or other agreements between the City and Developer, City shall have no further obligations regarding fill and surcharge material on the Parcel.

b. Removal of Organic Surcharge Material. The City shall remove approximately 10,000 yards of organic surcharge material from the Parcel by the earlier of (i) June 30, 2012 or (ii) the commencement date of surcharge removal on the Parcel by Developer.

5. Agreed Additional City Work on Landfill Pad. The City shall complete the work listed on Attachment B to this Fifth Amendment no later August 31, 2011.

6. Mill Site: Second Amendment to Amended KLB License.

a. Amendment to Scope of Work Required Under Amended KLB License.

City and Developer agree that the Amended KLB License, a copy of which is attached as Exhibit F to the Third Amendment, may be further amended by the parties thereto as follows:

Subsections IV. 3. C(2) through C(5) of the Amended KLB License shall be deleted and replaced with the following sections with all work to be completed no later than August 31, 2011:

C(2) KLB shall place on the Mill Site a minimum 2-foot thick layer of Structural Fill or Site Grading Fill (approximately 50,000 cu yds +/-) or 2-foot-thick layer of Cement Stabilized Soil to an elevation not less than on average two feet above the 100-Year Flood Elevation. Structural Fill or Site Grading Fill shall be placed in maximum 12-inch horizontal loose lifts and compacted to at least 95% of its maximum dry density as determined by test method ASTM D 1557 (Modified Proctor). The Cement-Stabilized Soil shall be evenly spread in 12-inch maximum lifts and thoroughly mixed using appropriate soil-cement mixing equipment, as approved by the City, such that the amended soil may be compacted to at least 95% of the maximum dry density (Modified Proctor).

C(3) Following completion of the work described in Subsections IV.3.C.(1) and (2), all material existing on the Mill Site must be cut down so that such material is about one (1) foot below the grade shown on the grading plan dated June 11, 2010, by Magnusson Klemencic Associates.

C(4) After cutting down such excess material, exposed subgrade must be proof-rolled with a loaded haul truck or scraper. GeoEngineers and/or OM must be notified prior to proof-rolling. Identified soft areas must be removed and replaced with suitable processed Structural Fill, as reasonably approved by Developer.

C(5) After proof-rolling and removing or repairing any soft subgrade areas, the exposed subgrade must be compacted to at least 95 percent of the maximum dry density per ASTM D 1557.

C(6) After such subgrade compaction, cap material must be placed on the subgrade and compacted to at least 95 percent of the maximum dry density per ASTM D 1557. The cap material must consist of 3-inch minus screened recycled crushed concrete uniformly blended with the sand that is stockpiled on the site. Metal, wire, rebar and other deleterious debris must be removed from the cap fill material. After compaction, the cap material must be at least 12 inches thick and may be as thick as 16 inches.

C(7) City must be provided reasonable documentation that the compaction requirements and grade elevations of the grading plan dated June 11, 2010 by Magnusson Klemencic Associates have been met. City must be provided reasonable documentation that the requirements of the KLB Amended License, as amended, have been met.

C(8) Enough material must be stock piled to fill the eastern wetland at the Mill Site at a later date.

C(9) All material remaining on the Mill Site that is not Site Grading Fill or Structural Fill must be removed from the Mill Site.

City shall provide Developer with a copy of the final executed Second Amendment to Amended KLB License incorporating the terms and conditions of this paragraph 6.a. In the event that City and KLB Construction, Inc. fail to execute the Second Amendment as described herein, then the terms and conditions of the Amended KLB License shall remain in full force and effect as set forth therein. All capitalized terms have the meaning given to them in the Amended KLB License.

b. Revisions to Certain Mill Property Fill Provisions.

(1) If City and KLB Construction, Inc. execute the Second Amendment to Amended KLB License in the form as described above, then the reference to the “Amended KLB License” in the first sentence of Section 23 of the Third Amendment shall thereupon be deemed a reference to the Amended KLB License as amended pursuant to the Second Amendment to Amended KLB License.

(2) The words “on average” are added to the first sentence of Section 23 of the Third Amendment, so that it reads as follows:

The City, as part of its License to Use City Property with KLB Construction, Inc. dated October 7, 2005, which was later amended by an Amendment dated on or about April 9, 2008 (the “**Amended KLB License**”), shall place engineered fill material on the Mill Site consistent with the terms of the Amended KLB License attached to the Third Amendment to this Agreement (the “**Mill Site Development Area**”) to a level that is on average 2 feet above the 100 year floodplain elevation established by FEMA although the profile of the Main Road extension through to Pacific Avenue shall be constructed at the 100 year flood plain elevation.

(3) The second-to-last sentence of Section 19.7.7 of the Original PDA is deleted.

7. Sanitary Sewer/Stormwater Sewer System. The City’s deadlines for the substantial completion of the sanitary sewer system, stormwater sewer system, and related improvements described in Section 22(g) and 22(h) of the Third Amendment (these improvements collectively, the “**Sewer Improvements**”) are amended as follows:

a. Landfill Site Sewer Improvements. At such time that Developer commences development of the Landfill Site in accordance with the PDA, Developer shall use commercially reasonable judgment to determine on what date such development will require the substantial completion of the Sewer Improvements serving the development (this date, the "**Landfill Sewer Deadline**"). When Developer determines the Landfill Sewer Deadline, Developer shall deliver a notice to the City stating the Landfill Sewer Deadline (the "**Landfill Sewer Notice**"). The City shall substantially complete such Sewer Improvements by the later of (a) the Landfill Sewer Deadline or (b) the date that is twenty (20) months after delivery of the Landfill Sewer Notice. Developer and City acknowledge that, if the Landfill Site is developed in phases, it may be commercially reasonable to also phase the construction of the Sewer Improvements, in which case Developer shall deliver to the City a Landfill Sewer Notice containing a Landfill Sewer Deadline for each phase.

b. Simpson Site Sewer Improvements. At such time that Developer commences development of the Simpson Site in accordance with the PDA, Developer shall use commercially reasonable judgment to determine on what date such development will require the substantial completion of the sewer and other improvements necessary to connect the Simpson Site to the City's main sewer system (collectively, the "**Simpson Site Sewer Improvements**") and (this date, the "**Simpson Sewer Deadline**"). When Developer determines the Simpson Sewer Deadline, Developer shall deliver a notice to the City stating the Simpson Sewer Deadline (the "**Simpson Sewer Notice**"). The City shall substantially complete the Simpson Site Sewer Improvements by the later of (a) the Simpson Sewer Deadline or (b) the date that is eighteen (18) months after delivery of the Simpson Sewer Notice. Developer and City acknowledge that, if the Simpson Site is developed in phases, it may be commercially reasonable to also phase the construction of the Simpson Site Sewer Improvements, in which case Developer shall deliver to the City a Simpson Sewer Notice containing a Simpson Sewer Deadline for each phase.

8. Wetlands Restoration. Section 18.1 (i) of PDA states the following:

(i) Restore the wetland area studied to the standards set forth in the *Snohomish Riverfront Properties at Bigelow Creek: Conceptual Enhancement Program* study (the "**Wetland Restoration**"). Substantial completion of the major elements of the Wetland Restoration shall occur within thirty-six (36) months after the City obtains the required non-City governmental permits and approvals, which the City agrees to reasonably diligent efforts to obtain.

This section is deleted and replaced with the following:

(i) Restore the wetland areas to the standards set forth in the Riverfront Development Public Amenities Master Plan approved by City Council on March 31, 2010 or as otherwise required under any other permits or agreements obligating the City to perform wetland restoration on the Property (including but not limited to any agreement between the City and any neighborhood groups or any Tribe) (the "**Wetland Restoration**"). The City agrees to use reasonably diligent efforts to obtain the required non-City governmental permits and approvals for Wetland Restoration. Whenever the City receives the required non-City governmental permits and approvals for a portion of the Wetland Restoration, the City shall commence work on that portion of the Wetland

Restoration within thirty-six (36) months after receipt of such permits and shall substantially complete that work within twelve (12) months thereafter.

9. Fill Material. Section 16.12 of the PDA is deleted.

10. Early Completion Permitted. The notice and deadline procedures in this Fifth Amendment for substantial completion of the Roundabout, the 41st Street Extension, the Main Road Extension Deadline, and the Sewer Improvements are not intended to hinder the City from completing such City Work prior to such notices or deadlines. The City may commence or complete all or a portion of the City Work prior to such notices or deadlines.

11. New Markets Tax Credits. Developer acknowledges that the City has received an allocation of twenty-five million dollars (\$25,000,000) of New Markets Tax Credits (the "**Allocation**"). The Memorandum of Understanding between Developer and the City dated March 4, 2009, recites that it was the parties' intention that "the bulk of [the Allocation] would be used for the development of the Riverfront District." Developer expended substantial time and effort and incurred significant third party costs ("**Developer Costs**") in connection with the effort to obtain the Allocation for the City, however, because of the deadlines for use of New Markets Tax Credits under applicable law, use of the Allocation for the Riverfront Project is no longer feasible. Accordingly, City and Developer agree that the City may use the entire Allocation for other projects, and that City shall collect from any project developer or owner who receives any portion of the Allocation (each a "**Recipient**") a pro rata portion of the Developer Costs to be reimbursed to Developer. The amount to be collected by the City from each Recipient shall be the amount of the Allocation awarded to such Recipient divided by the total Allocation multiplied by the Developer Costs which for the purpose of the paragraph 11. are defined as \$106,494.46. For example, if the Recipient receives \$10,000,000 of the Allocation, then the amount to be collected by the City from the Recipient and reimbursed to Developer is $(\$10,000,000/\$25,000,000 \times \$106,494.46)$ or \$42,597.78.

12. Capitalized Terms. All capitalized terms used herein and not otherwise defined shall have the meaning set forth in the PDA.

13. Other. Except as expressly modified in this Fifth Amendment, the PDA shall remain in full force and effect and the parties hereto acknowledge, confirm and ratify all of the terms and conditions of the PDA. All other deadlines for work to be completed by the parties shall remain unchanged as set forth in the PDA.

EXECUTED as of the date first above written by duly authorized officers of the parties hereto, intending to be legally bound hereby.

CITY:

OM:

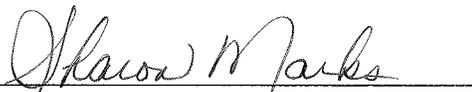
CITY OF EVERETT

OLIVERMCMILLAN, LLC

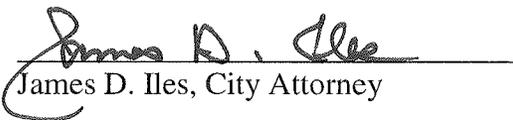
By: 
Ray Stephanson, Mayor

By: 
Name: Richard Paul Buss
Title: President

ATTEST:

By: 
Sharon Marks, City Clerk

APPROVED AS TO FORM:

By: 
James D. Iles, City Attorney

OM INC:

OMH:

OM EVERETT, INC.

OMH TRANSFER AGENT, LLC

By: 
Name: Richard Paul Buss
Title: President

By: 
Name: Richard Paul Buss
Title: President

ATTACHMENT A



ATTACHMENT A: ALL-WEATHER SURFACE REDUCTION AREA

LEGEND

-  NO ALL-WEATHER SURFACE
-  6-INCH THICK ALL-WEATHER SURFACE

ATTACHMENT B

Repairs to Landfill Eastern Slope

1. The City will excavate soft and or eroded soils on the Eastern and Northern slopes from the rivulets and from the soft areas below the standing water, at locations to be determined by the field engineer that will eliminate existing soft areas and erosion features while armoring the slope against future erosion.
2. The areas will be repaired by replacing the excavated soil with a combination of geosynthetic filter fabric and 2 to 4 inch Quarry Spalls. The filter fabric would be placed at the base of each excavation and the Quarry Spalls would be placed and compacted over the fabric to return the slope to its original configuration. The filter fabric will keep the underlying soils from migrating into the Quarry Spalls during high flow events and the Quarry Spalls would provide armored spillway down the slope at location that we know already experience concentrated flows.
3. The approximate locations rivulets and soft areas to be reconstructed are indicated in Figures 1 and 2 of the HWA February 15, 2011 Recommendation letter. It should be noted that these areas are approximate and that their location, lateral extent, and depth of excavation will be determined by the engineer in the field during reconstruction.
4. The geosynthetic filter fabric should consist of a 4 oz per cubic yard needle punched non-woven geotextile such as a Mirafi MiraGreen D4 or equivalent. The filter fabric should be placed on a benched slope surface, as indicated in Figure 3, and the Quarry Spalls should be compacted firmly into the fabric to reduce the potential for the fabric to slide down the slope. Under no circumstances should the filter fabric be placed on a smooth 2H to 1V slope.
5. The City will complete minor re-grading of the top of slope at the two locations where standing water exists. Preventing future standing water at the top of the slope will prevent future softening of the underlying soil. If re-grading requires substantial removal of cement treated soil to facilitate drainage, the removed material should be replaced with the same Quarry Spalls material used on the slope.
6. Excavation work should be completed in such a way as to limit disturbance to slope areas and associated vegetation not be reconstructed.
7. Material that has accumulated at the base of the slope, as a result of the above described erosion, should be re-graded or removed in such a way as to provide a surface conducive to uniform flow away from the base of slope.
8. All disturbed areas around and adjacent to the work being performed will be hydroseeded in the Spring and Summer following the work.

ATTACHMENT B – continued

9. Any area that does not comply with the specifications will be re-hydro seeded.
10. Conduct selected grading at the top of the slope to promote surface water drainage to the quarry spill spillways.
11. If additional erosion has occurred since issuing the memo, those areas should also be repaired.
12. The City will provide OliverMcMillan notice prior to the repairs commencing to allow OliverMcMillan to observe that the repairs are acceptable prior to the contractor leaving the site.