

## Memorandum

**TO:** HONORABLE MAYOR  
CITY COUNCIL

**FROM:** Richard Doyle  
City Attorney

**SUBJECT:** Kim Oanh-Nguyen Release

**DATE:** May 22, 2008

Council District: 4

### RECOMMENDATION

Approval of payment to claimant, Kim Oanh-Nguyen, in the amount of \$75,000 pursuant to a Release, approved by Council in Closed Session on May 6, 2008 and executed by claimant on May 14, 2008, which provides that claimant discharges and releases the City from any and all claims resulting from, or which may result from a sewer back-up that occurred on January 28, 2007 at claimant's property.

### OUTCOME

To release the City from liability from claims arising from, or relating to, the sewer back-up that occurred at claimant's property on January 28, 2007.

### BACKGROUND

On January 28, 2007, a back-up occurred in the City's sewer main that serviced claimant's property located at 3551 Rowley Dr. in San Jose. There was no backwater device installed in the sewer lateral connecting the sewer main to claimant's property. The claimant's home suffered intrusion of raw sewage into portions of the master bedroom, the bathrooms, the hall, the laundry room, the living room, the dining room, the garage and areas of landscaping. Following the incident, the claimant filed a claim with the City seeking compensation in the amount of \$360,000 for property damage and medical expenses due to a foot infection.

On May 6, 2008, the matter was taken to Closed Session and Council authorized settlement of the claim in exchange for claimant's release of the City, its officers, agents, servants, employees, successors and all other persons, from any and all claims, actions, causes of action, demands rights, damages, and costs which the claimant now has or may accrue on account of any and all bodily and personal injuries and property

damages resulting from the sewer backup. On May 14, 2008, the claimant signed such a release discharging the City from all liability for \$75,000.

### **ANALYSIS**

By law, the property owner is legally required to install a backwater device in the sewer lateral that connects the City's sewer main line to the property owner's property. Installation of a backwater device can prevent intrusion of raw sewage into the property owner's property in the event of a back-up in the sewer main. In this instance, the property was not equipped with a backwater device. City staff discovered that the sewer main was blocked by grease which likely caused the intrusion of raw sewage into the claimant's property. However, a backwater device could have prevented or significantly minimized the intrusion. In addition, City staff discovered there was significant grease in and near the claimant's sewer lateral suggesting that the claimant's property was the source of the grease that caused the blockage in the City's sewer main.

In light of these circumstances, the parties agreed to settle all claims. Since the City Council authorized settlement during Closed Session and the claimant signed the Release releasing and discharging the City as set forth above, staff recommends that the City Council approve payment to the claimant in the amount of \$75,000. A copy of the executed Release is attached.

### **EVALUATION AND FOLLOW-UP**

Not applicable.

### **PUBLIC OUTREACH/INTEREST**

Not applicable.

### **COORDINATION**

This memo has been coordinated with the Department of Planning, Building and Code Enforcement and the City Manager's Budget Office.

### **COST SUMMARY/IMPLICATIONS**

1. AMOUNT OF RECOMMENDATION: \$75,000
2. SOURCE OF FUNDING: 541-ESD: Sanitary Sewer Claims

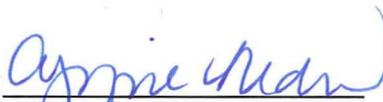
**BUDGET REFERENCE**

Fund #	Appn #	Appn. Name	Total Appn.	2007-2008 Adopted Budget (Page)	Last Budget Action (Date, Ord. No.)
541	3210	ESD: Sanitary Sewer Claims	\$600,000	XI-76	N/A

**CEQA**

Not a project.

Richard Doyle  
City Attorney

By:   
Angelique Gaeta Nedrow  
Deputy City Attorney

For questions please contact Angelique Nedrow, Deputy City Attorney at (408) 535-1991.

Attachment: Release

**RELEASE**

The undersigned, being of lawful age, for the sole consideration of Seventy Five Thousand and 00/100 (\$75,000.00) do/does hereby for myself, and my/our/its heirs, executors, administrators, successors and assigns, release, acquit and forever discharge the City of San José, its officers, agents, servants, employees, successors and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have, or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage, and the consequences resulting or to result from the accident, casualty or event which occurred on or about the 28 day of January, 2007, at or near 3551 Rowley Dr. in San José, California, when and where claimant alleges a sewer back-up into her home.

As part of this settlement, the undersigned agrees to install a backflow valve at the residence located at 3551 Rowley, San Jose, and the City of San Jose agrees to pay up to \$750.00 towards the installation of the backflow valve upon presentation of proof of the installation and cost of the valve.

It is understood and agreed that this settlement is the compromise of a doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released; and that said releasees deny liability therefor and intend merely to avoid litigation.

It is further understood and agreed that all rights under Section 1542 of the Civil Code of California and any similar law of any state or territory of the United States are hereby expressly waived. Said section reads as follows:

"1542. Certain claims not affected by general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

The undersigned further agrees to indemnify and save harmless the City of San José, its officers, agents, servants, and employees herein released from any loss, claim, expense, demand or cause of action of any kind or character which may ever be asserted or brought by any person or entity arising out of or in any way connected with the injury and/or the property damage of the undersigned from the accident, casualty or event which is the subject matter of this release.

The undersigned hereby declare(s) and represent(s) that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite, and in making this Release it is understood and agreed that the undersigned rely(ies) wholly upon the undersigned's judgment, belief and knowledge of the nature, extent, effect and duration of said injuries and liability therefor, and is made without reliance upon any statement or representation on the part of parties hereby released or their representatives or by any physician or surgeon by them employed.

The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT.

Signed and delivered this 14 day of May, 2008.

*Xuan Nguyen*

WITNESS

XUAN NGUYEN

*Kim Oanh Nguyen*  
Kim Oanh-Nguyen  
C/O Phan Law Firm  
115 East Gish Road, Suite 200  
San Jose, CA 95112  
Claim No.: C-10866-07 CM