

RESOLUTION R-4789

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF KIRKLAND AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT FOR THE USE OF PORTIONS OF THE DILLARD PROPERTY AT 151 3RD STREET FOR PUBLIC PAY PARKING PURPOSES.

WHEREAS, the City of Kirkland is interested in securing additional public off-street parking to benefit commerce, activities visitors and employees in downtown Kirkland; and

WHEREAS, the owner of the former Antique Mall site at 151 3rd Street in Kirkland is interested in making portions of her property available for such public purposes; and

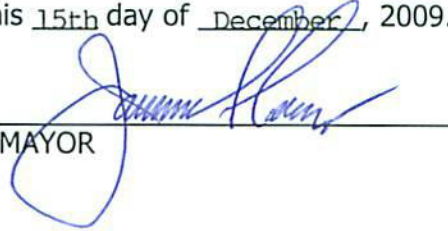
WHEREAS, the City of Kirkland and the property owner desire to enter into a parking agreement to provide the City with the use of a portion of the property for public pay parking.

NOW, THEREFORE, be it resolved by the City Council of the City of Kirkland as follows:

Section 1. The City Manager is hereby authorized and directed to execute on behalf of the City a parking agreement substantially similar to the Agreement attached as Exhibit A.

Passed by majority vote of the Kirkland City Council in open meeting this 15th day of December 2009.

Signed in authentication thereof this 15th day of December, 2009.



MAYOR

Attest:



City Clerk

**Exhibit A
PARKING AGREEMENT**

This PARKING AGREEMENT (this "Agreement"), is made and entered into on this _____ day of December, 2009, between Adrienne Alexandra LLC., a Washington limited liability company (herein referred to as "Owner") and the City of Kirkland, a municipal corporation of the State of Washington (herein referred to as "City").

WITNESSETH

WHEREAS, City is interested in securing additional off-street parking for business, activities and employees in downtown Kirkland; and

WHEREAS, Owner is interested in making portions of her property located at the Antique Mall site at 113 3rd Street in Kirkland, Washington (the "Property") available for such purposes; and

WHEREAS, Owner and City desire to enter into a parking agreement to provide City the use of up to 99 parking stalls at Owner's Property;

NOW THEREFORE, the parties agree as follows:

1. Description.

Owner hereby agrees for the term of this Agreement and subject to the conditions and provisions hereinafter set forth, to allow City the use of up to 99 parking stalls and the drive thru areas, (herein called the "Parking Lot") as shown on Attachment A. City accepts the Parking Lot in its "AS IS" condition as of the date of this Agreement, and Owner shall have no obligations to make any improvements or changes thereto, or the balance of the Property. City acknowledges this Agreement is a license to use only a portion of the Property, and that Owner shall retain the use of the building constructed thereon (the "Building") which is not the subject of this Agreement. City shall not create a nuisance, or in any way utilize the Parking Lot in such a way as to interfere with Owner's use of the Building or any parking stalls utilized by Owner after exercise of Owner's termination rights pursuant to Section 2 below. Any such interference shall be a breach under this Agreement. This Agreement does not constitute a lease or an easement for the benefit of City.

2. Term.

The term of this Agreement shall commence on January 1, 2010, and shall expire December 31, 2013. Owner shall use commercially reasonable efforts to remove the fencing from the Parking Lot as soon as is reasonably possible after the commencement date. Either party may terminate all or a portion of this Agreement at any time by giving sixty (60) days written notice to the other party.

3. Use and Management of the Parking Lot.

City shall use, manage and operate the Parking Lot for vehicular parking and for no other purpose and the City's use will be 24 hours a day, 7 days a week. Subject to Force Majeure, as defined below, the City will, at its expense, clean and prepare the Parking Lot for striping, stripe all of the 99 Stalls located in the Parking Lot, install the pay stations, install the signage required in Section 6 below, and will make the Parking Lot operational for use by the public on or before March 1, 2010. Owner shall be responsible for any restriping necessitated by Owner's exercise of the termination provision in Section 2 above. "Force Majeure", as used herein, shall mean war, inclement weather, natural catastrophe, contractor availability, civil disturbance, or any similar cause beyond the reasonable control of City.

Initially 93 of the 99 Stalls shall be charged on a daily/hourly basis (the "Daily Stalls") with payment made through two (2) pay stations located within the Parking Lot at mutually agreeable locations. The parties acknowledge that 6 of the parking stalls will not have any revenue as the City does not charge for the use of five (5) handicapped stalls or the one (1) motorcycle stall.

Upon mutual agreement by both parties, a portion of the Daily Stalls may be designated as monthly parking stalls (the "Monthly Stalls"). Monthly Stalls will be licensed to monthly parkers on an unassigned basis, City will designate an area within the Parking Lot for monthly parking, and City will issue monthly parking permits.

City, at its expense, will maintain normal and regular trash, debris, snow, ice and leaf removal from the Parking Lot. City shall ensure that their use of the 99 Stalls will not block any driveway, access point or drive lane located adjacent to the 99 Stalls, without approval of Owner. While using the 99 Stalls, City shall comply with all applicable federal, state and local laws, ordinances and regulations governing such use.

4. Rate.

City shall pay to Owner a monthly Daily Stall Fee (the "Daily Stall Fee"). The Daily Stall Fee shall be equal to the amount of monthly revenues resulting from use of the Daily Stalls, less any sums paid by City to third parties for the ability to accept credit cards in parking pay stations and any applicable existing taxes (the "Daily Stall Net Revenue"), up to an amount equal to \$100.00 multiplied by 93 Stalls (or the total number of Daily Stalls available to the City, should Owner exercise its termination rights pursuant to Section 2 above) (the "Maximum Daily Stall Fee"). Notwithstanding the foregoing, while no monthly Daily Stall Fee shall exceed the Maximum Daily Stall Fee, to the extent a Maximum Daily Stall Fee is not paid in any given month, the unpaid portion of that Maximum Daily Stall Fee shall be added to the amount available for payment in the next succeeding month's Maximum Daily Stall Fee, with such additional amount available for payment in each subsequent month until fully paid. [For example, if the Parking Lot is operational on March 1, 2010, the Maximum Daily Stall Fee for March,

2010 will be \$9,300. Should Daily Stall Net Revenues in March, 2010 equal \$8,300; the Maximum Daily Stall Fee for April, 2011 shall be \$10,300. Should Daily Stall Net Revenues in April, 2010 equal \$8,300; the Maximum Daily Stall Fee for May 2011 shall be \$11,300.] The City shall retain the amount, if any, by which the Daily Stall Net Revenue exceeds the Maximum Daily Stall Fee.

City shall pay to Owner a monthly Monthly Stall Fee (the "Monthly Stall Fee"). The Monthly Stall Fee shall be equal to the amount of monthly revenues resulting from use of the Monthly Stalls, less any applicable existing taxes (the "Monthly Stall Net Revenue"), up to an amount equal to \$100.00 multiplied by the number of Monthly Stalls (the "Maximum Monthly Stall Fee"). In no event shall the City charge less than \$110 per month for any Monthly Stall. Notwithstanding the foregoing, while no Monthly Stall Fee shall exceed the Maximum Monthly Stall Fee, to the extent a Maximum Monthly Stall Fee is not paid in any given month, the unpaid portion of that Maximum Monthly Stall Fee shall be added to the amount available for payment in the next succeeding month's Maximum Monthly Stall Fee, with such additional amount available for payment in each subsequent month until fully disbursed. [For example, should the City and Owner designate 10 Monthly Stalls; the Maximum Monthly Stall Fee shall be \$1,000. Should Monthly Stall Net Revenues in March, 2011 equal \$900; the Maximum Monthly Stall Fee for April, 2011 shall be \$1,100. Should Monthly Stall Net Revenues in April, 2011 equal \$900; the Maximum Monthly Stall Fee for May 2011 shall be \$1,200. In this example, the Daily Stalls would then be reduced to 83 Stalls in calculating the Daily Stalls Maximum Fee in those months.] City shall retain the amount, if any, by which the Monthly Stall Net Revenue exceeds the Maximum Monthly Stall Fee.

5. Payments.

For Daily Stalls, City agrees to pay Owner, without invoice, at 2053 Minor Ave. E., Seattle, WA 98102, or such other person or entity as directed in writing by Owner, the Daily Stall Fee payable on or before the thirtieth day following the month for which payment is due. All past due Daily Stall Fee payments shall be assessed a \$100 late payment charge and the late payment charge and outstanding Daily Stall Fees shall accrue interest at 12% per annum. Failure to pay the Daily Stall Fee by the 35th day following the month for which payment is due shall be a breach under this Agreement.

For Monthly Stalls, City agrees to pay Owner, as above, except that the Monthly Stall Fee shall be payable on or before the fifteenth day following the month for which payment is due. Failure to pay the Monthly Stall Fee by the 20th day following the month for which payment is due shall be a breach under this Agreement.

6. Signage.

City, at its expense, shall install and maintain public parking signage at location(s) to be mutually agreed by both parties. Owner shall be responsible for any relocation of signage necessitated by Owner's exercise of the termination provision in Section 2.

7. Assignment. It is agreed that this Agreement is personal to the City, and that City may not assign its rights under this Agreement to any other party without the prior written consent of Owner, which consent may be withheld in Owner's sole discretion.

8. Enforcement.

City reserves the right to determine and enforce applicable parking restrictions and to have any vehicle towed from the 99 Stalls that does not comply with parking restrictions, handicap permit, or display the monthly parking permit, if applicable.

9. Hold Harmless Agreement.

Owner shall not be liable to City for injury to any person, or for the loss of or damage to any property (including, but not limited to, the property of City) occurring in or about the 99 Stalls (or however many parking stalls the City is then using in the Parking Lot), the Parking Lot, or the Property from any cause whatsoever, unless caused by the sole negligence of Owner. City hereby releases, and agrees to indemnify, defend and hold Owner and the Other Users harmless from, any and all loss, claims, injuries, charges, liabilities, obligations, penalties, causes of action, liens, damages, costs and expenses (including attorneys' fees and costs) claimed, charged, incurred or arising from City's use of the 99 Stalls (or however many parking stalls the City is then using in the Parking Lot), the Parking Lot or the Property, unless caused by the sole negligence of Owner. City shall defend Owner and the Other Users from the same at City's expense by counsel reasonably satisfactory to both Owner and the Other Users. This Section shall survive any termination or expiration of this Agreement. City shall give prompt notice to Owner in the case of casualty or accidents on or about the 99 Stalls (or however many parking stalls the City is then using in the Parking Lot), the Parking Lot, or the Property.

10. Insurance.

City shall maintain liability coverage via City's membership in the Washington Cities Insurance Authority, a municipal insurance pool, for liabilities contractually assumed by City in this Agreement, and, arising out of the activities pertaining to this Agreement.

By requiring such liability coverage, Owner shall not be deemed to, or construed to, have assessed the risks that may be applicable to City in this Agreement. City shall assess its own risks and, if it deems appropriate and or/prudent, maintain greater limits or broader coverage than is herein specified.

Coverage shall be at least as broad as Commercial General Liability with a limit of not less than: \$2,000,000 combined single limit per occurrence, \$3,000,000 aggregate. The coverage agreement shall include, but not be limited to coverage for premises and operations, contractual liability (including specifically liability assumed herein), and

Employers Liability or "Stop-Gap" coverage.

To the extent of City's negligence as herein assumed, City's liability coverage shall be primary coverage as respects Owner, its officers, officials, employees, and agents. Any insurance and/or self-insurance maintained by Owner, its officers, officials, employees, and agents shall not contribute with City's coverage or benefit City in any way.

Coverage shall not be suspended, voided, canceled, materially reduced in coverage or in limits except by the reduction of the applicable aggregate limit by claims paid, until thirty (30) days prior written notice to the Owner.

City shall furnish Owner with Evidence of Coverage, evidencing general liability coverage, to be received and accepted by Owner prior to the commencement of activities associated with this Agreement.

11. Surrender.

Upon termination of this Agreement, City shall at its sole cost and expense remove any and all fencing; materials, equipment or other items stored or left on the 99 Stalls (or however many parking stalls the City is then using in the Parking Lot) and shall return said stalls to Owner in the same or better condition they were in on the commencement date of this Agreement. Further, City shall be responsible for repairing and or replacing, if necessary any damage to the 99 Stalls (or however many parking stalls the City is then using in the Parking Lot), the Parking Lot, or the Property.

12. Defaults.

Neither party shall be deemed to be in Default under this Agreement unless the other party provides it with a written notice of a specific breach thereof, and unless the failure to comply with any monetary obligation is not cured within ten (10) days after such notice or the failure to comply with any nonmonetary obligation is not cured within thirty (30) days after such notice.

13. Waiver of Breach.

No waiver of any breach of any covenant or condition herein contained shall operate as a waiver of any subsequent breach of the same or any other covenant or condition.

14. Notices.

All notices, demands, and requests to be given by either party to the other shall be in writing. All notices, demands and requests by City to Owner shall be sent by United States registered or certified mail, postage prepaid, addressed to Marilyn Dillard, 2053 Minor Avenue E, Seattle, WA 98102, or at such other place as Owner may from time to time designate by notice to City. All notices, demands, and requests by Owner shall be sent by United States registered or certified mail, postage prepaid address to

City at City of Kirkland, Parking Coordinator, City Hall, 123 Fifth Avenue, Kirkland, WA 98033-6189, or at such other place as City may from time to time designate by notice to Owner.

15. Interpretation and Venue.

Washington law shall govern the interpretation of this Agreement. King County shall be the venue of any mediation, arbitration, or lawsuit arising out of this Agreement.

16. Time of Performance. Time is of the essence in the performance of each obligation set forth in this Agreement.

17. Successors. The covenants and conditions herein contained shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

18. Counterparts. This Agreement may be executed in counterparts, each of which shall be considered an original and but one and the same contract.

19. Severability.

If one or more clauses of this Agreement is found to be unenforceable, illegal, or contrary to public policy, the Agreement will remain in full force and effect except for the clauses that are unenforceable, illegal or contrary to public policy.

20. Legal Expenses.

If any litigation in connection with this Agreement (including an injunction, assertion of any counterclaim or cross-claim instituted by a party hereto or by others), the substantially prevailing party shall recover the costs and expenses, including reasonable attorneys' fees, which it incurred in connection with such proceeding, including those on any appeal therefrom.

21. Entire Agreement.

This Agreement constitutes the complete and final agreement of the parties, replaces and supersedes all oral and/or written proposals and agreements heretofore made on the subject matter, and may be modified only by a writing signed by both parties.

IN WITNESS WHEREOF, the parties hereto have executed this document as of the day and year first above written.

CITY OF KIRKLAND

ADRIENNE ALEXANDRA LLC

By: _____
David Ramsay
City Manager

By: _____
Marilyn D. Dillard
Manager

APPROVED AS TO FORM:

Kirkland City Attorney

