



STAFF REPORT

DATE: October 1st, 2019

CONSENT

AGENDA ITEM: Settlement Agreement for the property located at 8120 Hill Trail N.
SUBMITTED BY: Ben Prchal, City Planner
REVIEWED BY: Kristina Handt, City Administrator

ISSUE BEFORE COUNCIL: Does the City Council approve the settlement agreement between the City and 8120 Hill Trail N?

PROPOSAL DETAILS/ANALYSIS:

Staff had initially responded to this property for code complaints. City Staff found there were miscellaneous items that had been piled up along the property line bordering the adjacent property at 8114 Hill Trail. After removing the items, a new pile or "fence" would appear. Since then the homeowners have installed a new fence that has not been permitted and is crossing over the property line. The Homeowners have refused to get a permit, refuse to remove the structure, and have refused to construct something that would be considered compliant by the City Code. Without compliance, the City Attorney became involved to assist in navigating the removal and compliance process. The property owners sought legal counsel and our attorney has been working directly with them on the agreement. The attached agreement has had several back and forth edits to which the language has now been agreed upon by both involved parties. At this point the City Attorney believes there is sufficient language in the agreement that would protect and give the City the right to mitigate the issues if left unresolved.

Details of the Agreement:

- The fence will be removed once the Bamboo, which has been attached to the structure by the resident at 8114 Hill Trail has been removed. The removal process is expected to start on September 30th, 2019.
- The residents at 8120 Hill Trail will notify the City when the structure has been removed and an inspection by the City will take place to confirm that the structure has in fact been removed.
- Failure to remove the fence provides the City the right to enter the property to remove the structure and levy the incurred costs against the property.
- The agreement will be terminated once the structure has been removed.

FISCAL IMPACT: None, costs would be captured through levies (if necessary). This is primarily explained in Sections 6 and 7 of the agreement.

RECOMMENDATION: Staff is recommending that the City Council approve, *as part of the Consent Agenda*, the Settlement Agreement that has been prepared by the City's legal counsel.

If removed from the consent agenda Staff is recommending the following motion;

"Motion to recommend approval of the settlement agreement between the City of Lake Elmo and the residents at 8120 Hill Trail as it has been drafted and approved by the Lake Elmo Representing Attorney"

ATTACHMENTS:

1. Settlement Agreement.

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (the “Agreement”) is made this ____ day of ____, 2019, by and between Plaintiff the City of Lake Elmo, a Minnesota municipal corporation (the “City”), and Defendants Brad and Amy Gustafson, owners of 8120 Hill Trail North, Lake Elmo, Minnesota (the “Defendants”). The City and the Defendants are hereinafter referred to collectively as “the parties.”

RECITALS

A. WHEREAS, the Defendants are the fee owners of certain real property at 8120 Hill Trail North, Lake Elmo, Minnesota, 55042, Property Identification Number 09.029.21.22.0009, legally described as:

Lots 511-518 & LOTS 621-628 Lane’s De Montreville Country Club Addition.

(the “Property”).

B. WHEREAS, the Defendants or their agents constructed a structure on the border between the Property and the property to the north (hereinafter, the “Structure”).

C. WHEREAS, the parties do not agree on whether the Structure constitutes a fence or a retaining wall.

D. WHEREAS, the City brought an action for declaratory judgment to require the Defendants to correct the City Code violations presented by the Structure, as more fully set forth in the City’s Complaint filed in state district court, Court File No. 82-CV-19-682 (hereinafter, the “Court Action”).

E. WHEREAS, the parties wish to enter into this Settlement Agreement in order to provide for the full settlement and discharge of all claims which the parties have asserted or might have asserted against each other, upon the terms and conditions set forth below.

F. WHEREAS, the parties declare that the provisions, terms and conditions set forth herein are the result of comprehensive, thorough negotiations undertaken in good faith. Further, the parties recognize and declare that each other’s actions in prosecuting and defending the claims mentioned hereinabove were undertaken in good faith as well.

NOW THEREFORE, the parties agree as follows:

1. **The Defendants are the owner of the Property.** The Defendants represent and warrant that they are the fee owners of the Property and that they have the legal power and authority to encumber the Property as herein provided and that there are no other liens or encumbrances against the Property except those of record.

2. **Acknowledgement of Neighbor prerequisite action.** The Parties acknowledge that the neighbor to the north of the Defendants property (the “Neighbor”) has installed a bamboo fence affixed to the north side of the Structure (the “Bamboo Fence”), which must be removed from the Structure before the Structure can be disassembled and moved.
3. **Deadline to complete the Work.**
 - a. If the Neighbor removes the Bamboo Fence from the Structure by September 30, 2019, the Defendants shall have until October 30, 2019 to disassemble the Structure from its current location and move all of the Structure materials to a new location on the Property at least 20 feet from the northern property line (the “Work”).
 - b. If the Neighbor fails to remove the Bamboo Fence from the Structure by September 30, 2019, the City will notify Defendants by certified mail to the Property when the Bamboo Fence is removed. Defendants shall then have 60 days from the date of the notice to complete the Work. If the notice is sent to Defendants between October 15 and March 31 (the “Winter”), the time to complete the Work will not begin to run until after the Winter ends.
4. **Completion of the Work.** Upon completion of the Work by Defendants, they shall notify Ben Prchal at the City by certified mail - return receipt requested, that the Work is completed. The Defendants shall have seven (7) days following completion of the Work to complete delivery of the notice., after which the City may then inspect the Property to verify completion.
5. **Inspection and follow-up.** Upon receipt of the notice of completion under paragraph 4, the City shall then inspect the Property to verify completion of the Work. The inspection may only be conducted between the hours of 8 a.m. and 4:30 p.m., Monday through Friday, and only after the City first provides Defendants 24 hours’ notice, by certified mail to the Property, of the City’s intended date and time of inspection. If the inspection verifies completion of the Work, the City will notify the Defendants regarding same by certified mail and its attorneys will prepare a Notice of Dismissal with Prejudice of the court case pursuant to paragraph 14 below. If the inspection disputes completion of the Work, the City will notify the Defendants regarding same by certified mail, which notification will describe specifically what items of the Work has yet to be completed. The Defendants will thereafter have a period of 10 days to address any aspect of the Work that the City has noted as yet to be completed, and deliver a notice of completion of such described item to Ben Prchal at the City by certified mail. Upon receipt of this second notice of completion, the City shall then inspect the property to verify completion of the Work. Notification of the date and time of that inspection and reporting regarding the results of that inspection shall again be provided to Defendants in the manner previously outlined in this paragraph above.
6. **Failure to perform the Work.** In the event that the Defendants do not perform the Work and provide the notification outlined in paragraphs 3, 4, and 5 above within the time limit established in said paragraphs, the Defendants agree that the City may locate and engage a licensed contractor to completely remove the Structure from the Property. The costs incurred by the contractor to perform the work shall hereinafter be referred to as the

“Removal Costs.” The Defendants hereby grant the City and its contractor(s) permission to enter the Property to remove the Structure.

7. **Assessment of Removal Costs.** The City is authorized pursuant to Minnesota Statutes Chapter 429 to assess the expenses that it incurs as a result of engaging a contractor to remove the Structure, specifically the Removal Costs not to exceed \$3,000. The Defendants hereby waive notice of hearing and hearing on the special assessment levied for the Removal Costs pursuant to Minn. Stat. Section 429.061 and specifically request that the Removal Costs be levied against the Property without notice of hearing or hearing. The Defendants hereby waive their right to object to the City’s assessment of 100 percent (100%) of the Removal Costs incurred by the City. The Defendants hereby further waive their right to appeal the levy of the special assessment pursuant to Minnesota Statutes Section 429.081, or reapportionment thereof upon land division pursuant to Minnesota Statutes Section 429.071, subdivision 3, or otherwise; and further specifically agree with respect to such special assessment against the Property that:
 - a. Any requirements of Minnesota Statutes Chapter 429, with which the City does not comply are hereby waived by the Defendants;
 - b. The increase in fair market value of the Property resulting removing the Structure is at least equal to the amount of the special assessment levied against the Property and that such increase in fair market value is a special benefit to the Property.
 - c. The Defendants’ waiver of their right to object to the City’s assessment of 100 percent of the Removal Costs against the Property as outlined above is reasonable, fair and equitable and there are no other properties against which the Removal Costs should be assessed; and
 - d. It is the intention of the City to provide for the payment of such special assessment in one annual installment in the year 2020, with interest at the annual rate of five percent accruing from the date of the resolution approving the assessment.
8. **Run with the Land.** The waivers and agreements contained in this Agreement shall bind the Defendants and their successors and assigns and shall run with the Property. It is the intent of the parties hereto that this Agreement be in a form which is recordable in the land records of Washington County, Minnesota and the Defendants and the City agree to make any changes in this Agreement which may be necessary to effect the recording and filing of this Agreement against the title of the Property. If the Defendants fail to perform the Work pursuant to this Agreement, the City will record this Agreement against the Property in the land records of Washington County.
9. **No Admission.** It is understood and agreed by the parties that this settlement is a compromise of disputed claims, and that neither the settlement, nor the presentation or execution of this Agreement are to be construed as an admission of unlawful conduct by the City or the Defendants, on any theory or in any manner whatsoever by whom any and all liability is expressly and vigorously denied.

10. **Waiver of Claims.** If the Defendants fail to perform the Work pursuant to this Agreement and it is necessary for the City to remove the Structure pursuant to paragraph 3, the Defendants agree to hold harmless the City, its officials, employees, contractors, and agents from and against any and all liability, loss, costs, damages, expenses, claims, actions, or judgments, including reasonable attorneys' fees which they, or their agents or contractors may hereinafter sustain, incur, or be required to pay, arising out of or by reason of this Agreement or the Work, except for personal injury, gross negligence, intentional behavior, and or actions arising from wanton disregard for the property or personal rights of the Defendants. Nothing in this Agreement shall be construed as a waiver by the City of any immunities, defenses, or other limitations on liability to which the City is entitled by law, including but not limited to the maximum monetary limits on liability established by Minnesota Statutes Chapter 466 or otherwise.
11. **General Provisions.** This Agreement represents the entire agreement between the parties and supersedes in all respects all prior agreements of the parties, whether written or otherwise, with respect to the Property. No change, modification or waiver of any provisions of this Agreement will be binding unless it is in writing and signed by both parties. This Agreement shall be construed according to the laws of the state of Minnesota. Any provision of this Agreement which is void or unenforceable may be severed from the remaining provisions without affecting the enforceability of the remaining provisions.
12. **Execution in Counterparts.** This Agreement may be executed and delivered in two or more counterparts, each of which, when so delivered, shall be an original, but such counterparts shall together constitute but one and the same instrument and agreement. This Agreement shall be deemed to be effective on the last such day any such counterpart is executed.
13. **Attorney Representation.** The parties acknowledge that they have been represented by counsel in connection with the execution of this Agreement and intend that no rules construing provisions of this Agreement against the position of the drafter shall be applied. The parties further represent and declare that in executing this document they have relied solely upon their own judgment, belief and knowledge, or the advice and recommendation of their own independently selected counsel, and that they have not been influenced to any extent whatsoever in executing this document by any representations or statements except those expressly contained or referred to in this Agreement.
14. **Notification to Court.** Upon execution of this Agreement, the City shall notify the Court of a tentative resolution of Court File No. 82-CV-19-682 and request the Court stay the court case. Upon completion of the Work by the Defendants or removal of the Structure by the City's contractor, the City agrees to dismiss Court File No. 82-CV-19-682, with prejudice.
15. **Termination.** This Agreement shall terminate upon either (a) completion of the Work by the Defendants or (b) the final payment of the assessment levied against the Property for the Removal Costs. If the City has recorded a copy of this Agreement in the land records of Washington County, upon full payment under (b) the City will prepare and record an appropriate document acknowledging termination of this Agreement.

IN WITNESS WHEREOF, the parties have set their hands the day and year first written above.

OWNERS OF 8120 Hill Trail North, Lake Elmo, Minnesota

By: _____
Brad Gustafson

By: _____
Amy Gustafson

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

The foregoing instrument was acknowledged before me this _____ day of _____, 2019, by Brad Gustafson and Amy Gustafson, married to each other.

Notary Public

CITY OF LAKE ELMO

By: _____
Mike Pearson, Mayor

By: _____
Kristina Handt, City Administrator

STATE OF MINNESOTA)
) ss
COUNTY OF WASHINGTON)

The foregoing instrument was acknowledged before me this _____ day of _____, 2019, by Mike Pearson and Kristina Handt, the mayor and city administrator, respectively, of the city of Lake Elmo, a municipal corporation under the laws of the state of Minnesota, on behalf of the City.

Notary Public