



STAFF REPORT

DATE: October 11, 2022

DISCUSSION

AGENDA ITEM: First Amendment to WAC Prepayment Agreement

TO: Mayor and City Council

SUBMITTED BY: Kristina Handt, City Administrator

BACKGROUND:

In 2014 the City entered into a WAC Prepayment Agreement with EN Properties LLC. A copy is included in your packet. The annual \$50,000 payments were made in years 2015-2021. In July 2022, Terry Emerson, representing EN Properties LLC, sent a letter to the city requesting “that the city suspend or cancel current and future prepaid WAC payments” A copy is included in your packet.

ISSUE BEFORE COUNCIL:

Should the Council amend the Prepayment WAC Agreement with EN Properties?

PROPOSAL DETAILS/ANALYSIS:

At the request of the Mayor, the City Attorney updated the proposed amendment with the following language:

In the event that there remain unused WAC units attributable to the Property, Owner may make a written request to the City for a refund of the unused WAC units. The City shall refund the amount paid by Owner for the unused WAC units to Owner within 30 days of Owner making the request to the City. Unused WAC units will be refunded to Owner by City at the rate of \$3,000.00/unit, not to exceed 116 WAC or \$348,000.00.

A copy of the proposed First Amendment is included in your packet.

FISCAL IMPACT:

Depending upon direction, city may refund \$2,000-\$350,000 to the developer.

OPTIONS:

Provide direction to staff on how to proceed. If the Council wishes to approve the first amendment, staff would suggest a requirement that it is signed by the property owner prior to being placed on a council agenda for final adoption.

ATTACHMENT:

- Prepayment WAC Agreement
- July 12, 2022 Letter from EN Properties, LLC
- Proposed First Amendment

(reserved for recording information)

WAC PREPAYMENT AGREEMENT
(Public water payment agreement)

AGREEMENT dated June 3, 2014, by and between the **CITY OF LAKE ELMO** a Minnesota municipal corporation ("City"), and **EN PROPERTIES, LLC**, a Minnesota limited liability company (the "Owner"). The City is desirous of extending municipal water service to a terminus located at the northeast corner of the Air Lake property ("The Terminus") which lies near the Owner's property (legally described on Exhibit A hereto "The Property"). In order to induce the City to extend municipal water service, the Owner proposes to provide for advance payment and security for payment of a specified number of water availability charges to the City of Lake Elmo.

1. SUMMARY OF SECURITY REQUIREMENTS. Owner shall pay for 166 WAC units in the total amount of \$500,000.00 in connection with the placement of a municipal water services to The Terminus. To secure in advance, payment of these WAC units totaling \$500,000.00], Owner shall post and maintain at all times with the City an irrevocable letter of

credit in a form satisfactory to the City in an amount not less than \$500,000.00 to secure payment. The letter of credit may be drawn upon by the City if, within one (1) year of the date of this agreement, the Owner has not paid to the City a minimum of \$50,000.00 and paid \$50,000.00 per year thereafter until \$500,000.00 has been paid to the City. The payment shall be due July 1st of each year. Actual payments (because of development) for WAC fees will be deducted from the fees otherwise owed annually if WAC fees are more than the minimum amount owed of \$50,000.00 per year, a credit will be issued for the following year or years.

2. SANITARY SEWER AND WATER UTILITY AVAILABILITY CHARGES (SAC AND WAC). In addition to the minimum Wac unit charges set forth in paragraph 1 herein, the Owner shall be responsible for the payment of all sewer availability charges (SAC) and all water availability charges (WAC) with respect to any development actually constructed or performed on the Property identified on Exhibit A hereto, required by the City and any state or metropolitan government agency and any applicable Metropolitan Council sewer availability charge.

3. FEES NOT EXCLUSIVE. The minimum fee amount to be paid under the foregoing paragraph is not exclusive and owner acknowledges that other fees or costs will be charged to it and paid by it in connection with water service and sewer service including but not limited to hook up fees, METC fees and costs of installing utilities directly to the Property.

4. REDUCTION OF SECURITY. Upon written request by the Owner and upon receipt of proof satisfactory to the City Engineer that financial obligations to the City have been satisfied, with City Engineer approval the security may be reduced as follows:

A. Up to 100%, or \$500,000.00 of the security provided herein, may be released when: (1) Owner's obligations under this Agreement have been completed in full or reduced each

year in an amount equal to the payments for WAC fees actually made to the City whether under this Agreement or because of development of the Property.

5. RESPONSIBILITY FOR COSTS.

A. The Owner shall reimburse the City for costs incurred in the administration and enforcement of this Contract, including reasonable engineering and attorneys' fees.

B. The Owner shall pay in full all bills submitted to it by the City for obligations incurred under this Contract within thirty (30) days after receipt. Bills not paid within thirty (30) days shall be assessed a late fee per the City of Lake Elmo adopted Fee Schedule. Upon request, the City will provide copies of detailed invoices of the work performed.

6. MISCELLANEOUS.

A. The Owner may not assign this Contract without the written permission of the City Council. The Owner's obligation hereunder shall continue in full force and effect even if the Owner sells the land, or any part of it.

B. This Contract shall run with the land and shall be recorded against the property in the office of the Washington County Recorder or Registrar of Titles. The Owner covenants with the City, its successors and assigns, that the Owner has fee title to the property being final platted and/or has obtained consents to this Contract, in the form attached hereto, from all parties who have an interest in the property; that there are no unrecorded interests in the property being final platted; and that the Owner will indemnify and hold the City harmless for any breach of the foregoing covenants. If the Property is developed, then a development agreement shall be executed which may amend, replace or terminate this Agreement, provided, however, that Owner shall always retain WAC's actually paid. At that time, the Owner/Developer will

provide an updated letter of credit to the City of the remaining amount of the WAC payments owed.

C. Each right, power or remedy herein conferred upon the City is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter arising, available to City, at law or in equity, or under any other agreement, and each and every right, power and remedy herein set forth or otherwise so existing may be exercised from time to time as often and in such order as may be deemed expedient by the City and shall not be a waiver of the right to exercise at any time thereafter any other right, power or remedy.

7. REMEDIES ON DEFAULT. Whenever any Event of Default occurs, the City, subject to any rights of third parties agreed to by the City pursuant to this Agreement, or otherwise by written, executed instrument of the City, may take any one or more of the following:

A. The City may suspend its performance under the Agreement until it receives assurances from Owner, deemed adequate by the City, that Owner will cure their default and continue their performance under the Agreement

B. The City may initiate such action, including legal or administrative action, as is necessary for the City to secure performance of any provision of this agreement or recover any amounts due under this Agreement from Owner, or immediately draw on the Letter of Credit, as set forth in this Agreement.


8. ENFORCEMENT BY CITY; DAMAGES. The Owner acknowledges the right of the City to enforce the terms of this Agreement against the Owner, by action for specific performance or damages, or both, or by any other legally authorized means. The Owner also acknowledges that their failure to perform any or all of their obligations under this Agreement may result in substantial damages to the City; that in the event of default by the Owner, the City may commence

legal action to recover all damages, losses and expenses sustained by the City; and that such expenses may include, but are not limited to, the reasonable fees of legal counsel employed with respect to the enforcement of this Agreement.

9. NOTICES. Required notices to the Owner shall be in writing, and shall be either hand delivered to the Owner, its employees or agents, or mailed to the Owner by certified mail at the following address: 11530 Hudson Boulevard North, Lake Elmo, MN 55042. Notices to the City shall be in writing and shall be either hand delivered to the City Administrator, or mailed to the City by certified mail in care of the City Administrator at the following address: Lake Elmo City Hall, 3800 Laverne Avenue N. Lake Elmo, Minnesota 55042.

10. EVIDENCE OF TITLE. Owner shall furnish the City with evidence of fee ownership of the property being platted by way of an attorney's title opinion or title insurance policy dated not earlier than thirty (30) days prior to the execution of the plat.

CITY OF LAKE ELMO

BY: 
Mike Pearson, Mayor

(SEAL)

AND 
Adam Bell, City Clerk

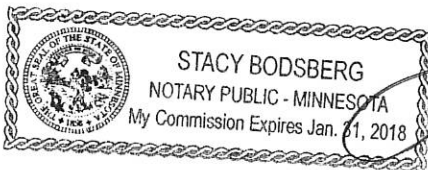
OWNER:

EN PROPERTIES, LLC

By: Terry Emerson
Its: President

STATE OF MINNESOTA)
) ss.
COUNTY OF WASHINGTON)

The foregoing instrument was acknowledged before me this 3 day of June, 2014, by Mike Pearson and by Adam Bell, the Mayor and City Clerk of the City of Lake Elmo, a Minnesota municipal corporation, on behalf of the corporation and pursuant to the authority granted by its City Council.

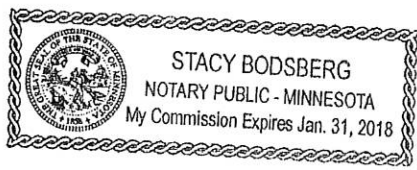


Stacy Bodsberg
NOTARY PUBLIC

STATE OF MINNESOTA)
) ss.
COUNTY OF Washington)

The foregoing instrument was acknowledged before me this 3 day of June, 2014, by Terry Emerson, respectively the President of EN Properties, LLC, a Minnesota limited liability company, on behalf of the company.

Stacy Bodsberg
NOTARY PUBLIC



DRAFTED BY:
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901

**MORTGAGE CONSENT
TO
WAC PREPAYMENT AGREEMENT**

Premier Bank, which holds a mortgage on the subject property, the development of which is affected by the foregoing WAC Prepayment Agreement, agrees that the agreement shall remain in full force and effect even if it forecloses on its mortgage.

Dated this _____ day of _____, 2____.

PREMIER BANK

By: _____

Its: _____

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ day of _____, 2014, by _____, respectively the _____ of Premier Bank, a Minnesota corporation, on behalf of the corporation.

NOTARY PUBLIC

DRAFTED BY:
City of Lake Elmo
3800 Laverne Avenue North
Lake Elmo, MN 55042
(651) 747-3901

EXHIBIT "A"
TO
DEVELOPMENT CONTRACT

PROPERTY LEGAL DESCRIPTION

PID: 36.029.21.43.0001

That part of the South Half of the Southeast Quarter of Section 36, Township 29 North, Range 21 West, Washington County, Minnesota, lying easterly of the West 33.00 feet (2 rods) thereof, EXCEPT that part designated as PARCEL 44 ON MINNESOTA DEPARTMENT OF TRANSPORTATION RIGHT OF WAY PLAT NO. 82-35, State Project No. 8282 (94-392) 904, recorded as Document No. 424557 in the office of the County Recorder, Washington County, Minnesota.

Subject to highway easements in favor of Washington County as described in Book 258 of Deeds, page 91 and Book 309 of Deed, page 831, of record and on file in the office of the County Recorder.

Also, subject to highway easements in favor of the State of Minnesota as described in Book 109 of Deeds, page 622, Book 109 of Deeds, page 638, and Book 220 of Deeds, page 11, of record and on file in said office of the County Recorder.

IRREVOCABLE LETTER OF CREDIT

No. _____

Date: _____

TO: City of Lake Elmo

Dear Sir or Madam:

We hereby issue, for the account of _____ (Name of Owner) and in your favor, our Irrevocable Letter of Credit in the amount of \$ _____, available to you by your draft drawn on sight on the undersigned bank.

The draft must:

- a) Bear the clause, "Drawn under Letter of Credit No. _____, dated _____, 2 _____, of _____ (Name of Bank)";
- b) Be signed by the Mayor or City Administrator of the City of Lake Elmo stating that full WAC payments have not been made as required.
- c) Be presented for payment at _____ (Address of Bank) _____, on or before 4:00 p.m. on July 1st annually.

This Letter of Credit shall automatically renew for successive one-year terms unless, at least forty-five (45) days prior to the next annual renewal date (which shall be November 30 of each year), the Bank delivers written notice to the Lake Elmo City Administrator that it intends to modify the terms of, or cancel, this Letter of Credit. Written notice is effective if sent by certified mail, postage prepaid, and deposited in the U.S. Mail, at least forty-five (45) days prior to the next annual renewal date addressed as follows: City Administrator, City Hall, 3800 Laverne Ave. N. Lake Elmo Minnesota 55042 and is actually received by the City Administrator at least thirty (30) days prior to the renewal date.

This Letter of Credit sets forth in full our understanding which shall not in any way be modified, amended, amplified, or limited by reference to any document, instrument, or agreement, whether or not referred to herein.

This Letter of Credit is not assignable. This is not a Notation Letter of Credit. More than one draw may be made under this Letter of Credit.

This Letter of Credit shall be governed by the most recent revision of the Uniform Customs and Practice for Documentary Credits, International Chamber of Commerce Publication No. 500.

We hereby agree that a draft drawn under and in compliance with this Letter of Credit shall be duly honored upon presentation.

BY: _____

Its _____



Who we are.
Where we've been.
Where we're destined.
We travel together.
Donald B. Regan
Chairman

2866 WHITE BEAR AVENUE • MAPLEWOOD, MINNESOTA 55109-1384 • PHONE 651-777-7700 • FAX 651-777-3761 • www.premierbanks.com

IRREVOCABLE LETTER OF CREDIT

No. 978

Date: July 1, 2014

TO: City of Lake Elmo

Dear Sir or Madam:

We hereby issue, for the account of EN Properties, LLC and in your favor, our Irrevocable Letter of Credit in the amount of \$500,000.00 (Five Hundred Thousand and no/100), available to you by your draft drawn on sight on the undersigned bank.

The draft must:

- a) Bear the clause, "Drawn under Letter of Credit No. 978, dated July 1, 2014, of Premier Bank
- b) Be signed by the Mayor or City Administrator of the City of Lake Elmo stating that full WAC payments have not been made as required
- c) Be presented for payment at 2866 White Bear Ave, Maplewood, MN 55109, on or before 4:00 p.m. on July 1st annually.

This Letter of Credit shall automatically renew for ten (10) successive one-year terms or until \$500,000.00 in WAC charges (from development of payment) have been paid to the City by Owner unless, at least forty-five (45) days prior to the next annual renewal date (which shall be July 1 of each year), the Bank delivers written notice to the Lake Elmo Administrator that it intends to modify the terms of, or cancel, this Letter of Credit. Written notice is effective if sent by certified mail, postage prepaid, and deposited in the U.S. Mail, at least forty-five (45) days prior to the next annual renewal date addressed as follows: City Administrator, City Hall, 3800 Laverne Ave. N., Lake Elmo, Minnesota 55042 and is actually received by the City Administrator at least thirty (30) days prior to the renewal date. This Letter of Credit will be reduced by



\$50,000.00 every year when that sum (due by July 1 of each year) is deposited with the City each year of in the amount otherwise paid in actual WAC fees.

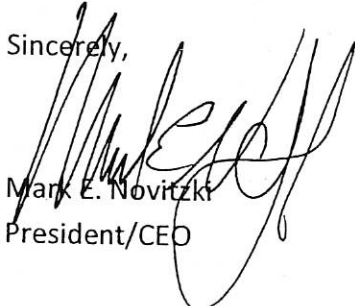
This Letter of Credit sets forth in full our understanding which shall not in any way be modified, amended, amplified, or limited by reference to any document, instrument, or agreement, whether or not referred to herein.

This Letter of Credit is not assignable. This is not a Notation Letter of Credit. More than one draw may be made under this Letter of Credit.

This Letter of Credit shall be governed by the most recent revision of the Uniform Customs and Practice for Documentary Credits, 2007 Revision, International Chamber of Commerce Publication No. 600.

We hereby agree that a draft drawn under and in compliance with this Letter of Credit shall be duly honored upon presentation.

Sincerely,



Mark E. Novitzki
President/CEO

EN PROPERTIES, LLC

2204 Legion Lane Cir N
LAKE ELMO, MN 55042
612-845-3373

July 12, 2022

Mayor, Council Members, Kristina:

Due to the City's decision to impose the moratorium on my property along I-94 and Manning Avenue, I would request that the City suspend EN Properties requirement to pay its yearly payment of \$50,000.00 for prepaid WAC fees. In my agreement with the City, I pay \$50,000.00 per year for 10 years totaling \$500,000.00. To date EN has paid the City for 7 years equaling \$350,000.00 for prepaid WAC fees interest free. These payments were made so that the City would extend water to the I-94 area. The Moratorium stops the agreed upon extension of water. While the Moratorium currently states that it is for one year, we know it can be longer and quoting Kristina... "A new well... takes 3 years to be online". EN Properties should not be required to continue to make payments while the City enacted Moratorium stops the City from upholding its end of the deal.

I have over 3 million dollars paid out to bring sewer and water to my property which the City has put a Moratorium on. At the April 5, 2022 council meeting when the moratorium was approved Kristina said the City was not holding any other fees of EN's. This is false. The City is holding \$3,092.40 in engineering administration escrow for Phase II Park and Ride, which was lost due to City's actions. EN also paid \$250,000.00 for a future stop light (which EN agreed to pay with its selling property to the School District and Met Council for a Park and Ride) and \$150,000.00 of payments in lieu of taxes (\$75,000.00 for Phase I School District property \$75,000.00 for the Phase II Park and Ride property) which the City has been holding since October 24th 2018. EN also paid the City an additional \$168,910.00 for fees related to applications, engineering, inspections and attorneys to complete this project. These numbers add up to \$918,910.00 EN Properties paid the City. These numbers do not account for the amounts incurred by EN Properties to accommodate the City's desire to realign Hudson Boulevard, the improvements to Hudson Boulevard, or the amounts paid to adjacent landowners to extend sewer and water to and through their properties.

Kristina also stated that the sewer and water was only to Phase I property line, the School District's property. She again gave you false information. The sewer and water was extended through the School District's property and INTO the Phase II property. Kristina is correct the sewer and water is not to Manning Avenue, but again this is the case because Phase II was lost due to the City's actions.

Additionally, the City Attorney said the property owners who agreed to do the prepaid WACs were charged at a reduced rate. This was also false information. There was no reduction in rate

for EN. From the information I have been provided, EN is paying twice the WAC fees of the other property owners.

Finally, it was brought up by several council members at the April 5th meeting that it is not so much the low-pressure area, it is being able to supply the existing residents with water in the whole City. If this is true there should be a moratorium on the entire City, which should include the City property they are selling or have sold. The low-pressure issue could be fixed with a pumping station and filtering any existing polluted well which the 3M settlement should pay for.

The property owners that prepaid WAC fees to the City are Launch Properties which are now being developed. Trinity who is not planning anything at this time, but has sewer and water to his property at no cost to him. EN has spent over 3 million bringing sewer and water to its property, water that does not exist. The fourth property Maplewood Development purchased the property North of EN Properties last year, has done a small amount of planning. His sewer and water will come from EN Property. I met with Mario the owner of Maplewood Development he thought EN should not be in the Moratorium but thought his property would be. Lennar has not done any prepaid WAC fees is working on purchasing property West of Lake Elmo Avenue in the area set up for development in 2030-2040 Comp Plan. There is no sewer and water to that property.

I have had 4 interested parties in portions of my property, those conversations are on hold and one party walked due to the City's actions. The Moratorium has crippled my ability to sell or develop for what it sounds like up to 4 years. I have the ability to connect to Sewer and Water within my property and I cannot do anything. Despite the EN Property being within the 2020-2030 Comp Plan, the City has deprived it water.

I was told as property owner that the water would not be brought to I-94 if I did not agree to pre pay WAC fees. Four developments have occurred because of the property owners who paid the prepaid WAC fees. Other developers benefitted but only one property owner that paid the prepaid WAC fees actually received water. EN Properties' property has been rendered unsellable due to the Moratorium. As such, my request that the City suspend or cancel current and future prepaid WAC payments is not unreasonable.

Respectfully,

A handwritten signature in black ink that reads "Terry Emerson". The signature is written in a cursive, flowing style.

Terry Emerson

FIRST AMENDMENT TO WAC PREPAYMENT AGREEMENT

THIS FIRST AMENDMENT TO WAC PREPAYMENT AGREEMENT is made and entered into as of _____, 2022 by and between the **City of Lake Elmo, Minnesota**, a municipal corporation and political subdivision under the laws of the State of Minnesota (“**City**”) and **EN Properties LLC.**, a Minnesota limited liability company (“**Owner**”):

RECITALS

- A. The City and Owner entered into an Agreement dated June 3, 2014, where Owner would provide advance payment and security for a specified number of water availability charges (“WAC”) to the City (the “Agreement”).
- B. The Agreement called for Owner to pay for 166 WAC in the total amount of \$500,000.00 over the course of ten years at a rate of \$50,000 per year.
- C. As of the date herein, Owner has paid a total of \$350,000.00 toward WAC which entitles owner to credit for 116 WAC with \$2,000.00 remaining.
- D. Owner wishes to terminate payments under the Agreement, retain credit for 116 WAC, and receive payment from the City for the \$2,000.00.

NOW THEREFORE, in consideration of the mutual promises and covenants contained in this First Amendment, the City and Owner agree as follows:

- 1. Paragraph 1 of the Agreement is deleted and replaced with the following:

SUMMARY OF SECURITY REQUIREMENTS. Owner shall pay for 116 WAC units in the total amount of \$348,000.00 in connection with the placement of a municipal water services to The Terminus. To secure in advance, payment of these WAC units totaling \$348,000.00, Owner shall post and maintain, until full payment has been received by the City, an irrevocable letter of credit in a form satisfactory to the City in an amount not less than \$500,000.00 to secure payment. The letter of credit may be drawn upon by the City if, within one (1) year of the date of this agreement, the Owner has not paid to the City a minimum of \$50,000.00 and paid \$50,000.00 per year thereafter until \$348,000.00 has been paid to the City. The payment shall be due July 1st of each year. Actual payments (because of development) for WAC fees will be deducted from the fees otherwise owed annually if WAC fees are more than the minimum amount owed of \$50,000.00 per year, a credit will be issued for the following year or years.

- 2. The City agrees to release 100% of the Security upon execution of this First Amendment.
- 3. The City will credit 116 WAC to Owner to be credited to any WAC owed for the Property upon development of the Property. The City will pay to Owner \$2,000 in overpayment

for 116 WAC. In the event that there remain unused WAC units attributable to the Property, Owner may make a written request to the City for a refund of the unused WAC units. The City shall refund the amount paid by Owner for the unused WAC units to Owner within 30 days of Owner making the request to the City. Unused WAC units will be refunded to Owner by City at the rate of \$3,000.00/unit, not to exceed 116 WAC or \$348,000.00.

4. The remaining terms of the Agreement remain in effect.

EN PROPERTIES, LLC
a Minnesota limited liability company

CITY OF LAKE ELMO, MINNESOTA

By _____

By _____
Charles Cadenhead, Mayor

Its _____

By _____
Julie Johnson, City Clerk

By _____

Its _____