

RESOLUTION R-40-15

A RESOLUTION AUTHORIZING THE MAYOR TO SIGN A SETTLEMENT AGREEMENT BETWEEN THE CITY OF WHEATON AND THE BRIARCLIFFE KNOLLS MANOR HOMES HOMEOWNER'S ASSOCIATION

WHEREAS, there is currently pending litigation between the City of Wheaton (hereinafter "City") and the Briarcliffe Knolls Manor Homes Homeowner's Association (hereinafter "Association") pertaining to code violations for improperly installed fireplaces in Briarcliff Knolls Manor Homes; and

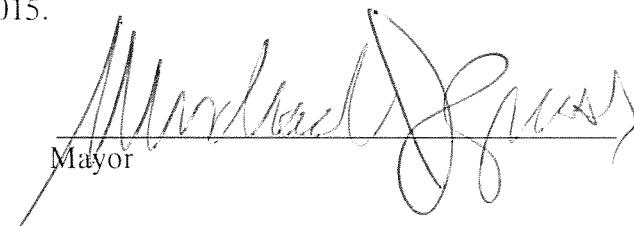
WHEREAS, the City and the Association have reached an interim settlement agreement allowing the Association to assume responsibility to prosecute claims against non-compliant and non-responsive owners of units within Briarcliffe Knolls for said code violations; and

WHEREAS, the settlement agreement relieves Wheaton's taxpayers of the responsibility to prosecute correction of the improper conditions for the installed fireplaces while ensuring that the code violations will be remedied in a manner consistent with the public health, safety and welfare.

NOW, THEREFORE, BE IT RESOLVED by the Mayor and City Council of the City of Wheaton that the Mayor is hereby authorized to sign and the City Clerk is hereby directed to attest to the settlement agreement between the City of Wheaton and Briarcliffe Knolls Manor Homes Homeowner's Association attached hereto as Exhibit 1.

ADOPTED this 6th day of July, 2015.

Mayor



ATTEST:

Athena Bennett-Hagan
City Clerk

Ayes:

Roll Call Vote:
Councilman Prendiville
Councilman Rutledge
Mayor Gresk
Councilman Saline
Councilman Scalzo
Councilman Suess
Councilwoman Fitch

Nays:

None

Absent:

None

Motion Carried Unanimously

This Settlement Agreement (the “Agreement”) is dated this 6th day of July, 2015 and is entered into by and between the City of Wheaton and the Briarcliffe Knolls Manor Homes (collectively referred to as the “Parties”).

In consideration of the recitals and mutual covenants and agreements set forth in this Agreement, the Parties agree as follows:

1. DEFINITIONS: The following definitions shall be material elements of this Agreement.

a. Complying Owners - Owners who have entered into contracts for, submitted permit applications for and received a permit for the repair or removal of the fireplace in their units, but have yet to bring the fireplaces into compliance with City Ordinance.

b. Noncompliant Owners - Owners who have entered into contracts for the repair or removal of the fireplace in their units, but have yet to obtain a permit for the same and have failed to bring the fireplaces into compliance with City Ordinance.

c. Nonresponsive Owners - Owners who have not entered into contracts and have not obtained a permit for the repair or removal of their fireplaces to bring them into compliance with City Ordinance.

d. Diligently pursue - to bring a claim in the Lawsuit or other proceeding against an Owner until either (1) the owner of a Fireplace Unit has brought the fireplace into compliance with City Ordinance by either repairing or removing said fireplace or (2) the Association has brought the fireplace into compliance with City Ordinance by either repairing or removing said fireplace, whichever occurs first.

e. Lawsuit - the case pending in the Circuit Court of DuPage County, as case number 2013 CH 3300.

f. Complaint - the 14 Count Amended Complaint filed by the City of Wheaton against the Association and the Noncompliant Owners and Nonresponsive Owners and which was filed on April 21, 2014.

g. Counterclaims - the 6 Count Counterclaims filed by the Association against the Nonresponsive Owners on July 31, 2014.

h. City - the City of Wheaton.

i. Association - the Briarcliffe Knolls Manor Homes acting through its Board of Directors.

j. Wiseman - Wiseman Construction Company, Inc.

k. Fireplace - a fireplace and the appurtenances serving the fireplaces

l. Fireplace Units - units within the Association that contain fireplaces.

2. RECITALS:

WHEREAS, the City is a municipal corporation organized and existing pursuant to the laws of the State of Illinois; and

WHEREAS, the Association is a condominium association and a not-for-profit corporation organized and existing pursuant to the laws of the State of Illinois; and

WHEREAS, the Association is located within the municipal limits of the City; and

WHEREAS, the Association was established by Wiseman and continues to exist; and

WHEREAS, the Association is subject to a Declaration of Easements, Covenants and Restrictions for Briarcliffe Knolls Manor Homes; and

WHEREAS, the Association is governed by its Board of Directors; and

WHEREAS, Wiseman constructed many of the units within the Association with fireplaces; and

WHEREAS, the fireplace as originally constructed did not comply with City ordinance; and

WHEREAS, there have been two fires in units within the Association that are reasonably believed to have been caused by the fireplaces in those units; and

WHEREAS, on or about August 29, 2011, the City sent a notice to the owners of Fireplace Units that the fireplaces were in violation of City Ordinance; and

WHEREAS, on or about December 19, 2011, the City issued a notice condemning the fireplaces in the Fireplace Units; and

WHEREAS, on or about February 6, 2013, the City sent a Notice of Final Deadline for Fireplace Permitting and Remediation to the owners of the Fireplace Units, setting a deadline of August 1, 2013 to submit a permit application to remedy the fireplace violations; and

WHEREAS, many owners of Fireplace Units submitted permit applications, received permits and remedied the violations by the August 1, 2013 deadline; and

WHEREAS, a number of owners of Fireplace Units are Complying Owners as they have entered into contracts, submitted permit applications and received permits to remedy the violations but have not yet brought their units into compliance; and

WHEREAS, several owners of Fireplace Units are Noncompliant Owners as they have entered into contracts but have failed to obtain the necessary permits to remedy the violations; and

WHEREAS, a few owners are Nonresponsive Owners as they have failed to enter into contracts and have failed to obtain the necessary permits to remedy the violations; and

WHEREAS, on or about November 27, 2013, the City filed a lawsuit against the Association and Noncompliant Owners and Nonresponsive Owners who had not pulled permits

as of that date in the Circuit Court of DuPage County, in case number 2013 CH 3300 (the "Lawsuit"); and

WHEREAS, on or about April 21, 2014, the City filed a 14 Count Amended Complaint (the "Complaint") against the Association and the remaining Compliant, Noncompliant Owners and Nonresponsive Owners, who collectively owned twelve units within the Association; and

WHEREAS, since that Lawsuit was filed, several owners who were named in the Complaint have brought their units into compliance and others have pulled permits or indicated that they will pull permits; and

WHEREAS, the Association has filed Counterclaims against the Nonresponsive Owners, who collectively own three Fireplace Units within the Association, for their failure to enter into a contract for the removal of the fireplace, pull permits and work with the Association in resolving the disputes; and

WHEREAS, because of the Complaint, it has become difficult for owners to sell and prospective purchasers to purchase units within the Association unless it is a cash deal; and

WHEREAS, the Association desires to be dismissed from the Lawsuit as a Defendant; and

WHEREAS, the City is willing to dismiss the Association from the Lawsuit and not assert further claims against the Association related to the Complaint under certain terms, including the Association diligently pursuing Nonresponsive Owners and, if necessary, Noncompliant Owners and Complying Owners who fail to bring their units into compliance; and

WHEREAS, the Association and the City desire to resolve their disputes pursuant to the terms specified herein; and

NOW THEREFORE, the following shall be the Agreement between the Association and the City:

3. Recitals: The foregoing definitions and recitals are incorporated by reference in this Paragraph 3.

4. Pursuit of Nonresponsive Owners: The Association shall diligently pursue its Counterclaims against each individual Nonresponsive Owner in the Lawsuit or, if severed, in any other proceeding until (1) the Nonresponsive Owner has brought his or her fireplace, either through repairs or removal, into compliance with City Ordinance or (2) the Association has either made repairs or removed the Nonresponsive Owner's fireplace and bringing it into compliance with City Ordinance.

5. Pursuit of Noncompliant Owners: The Association shall diligently pursue claims against each Noncompliant Owner who fails to obtain a permit to repair or remove his or her fireplace within ninety (90) days of the effective date of this Agreement unless additional time is granted by the City, which may be granted on a case-by-case basis. In the event a Noncompliant Owner obtains a permit in compliance with this Paragraph 5, the Association shall thereafter treat the Noncompliant Owner as a Complying Owner pursuant to Paragraph 6.

6. Pursuit of Complying Owners: The Association shall diligently pursue claims against Complying Owners who fail to bring their fireplaces into compliance with City Ordinance, either through repairs or removal, within one hundred and eighty (180) days after the effective date of this Agreement unless additional time is granted by the City, which may be granted on a case-by-case basis.

7. Periodic Updates: The Association shall provide a written update to the City of Wheaton on its progress of obtaining Fireplace compliance for all of the Owners recited in

paragraphs 4, 5, and 6 of this Agreement and shall do so every sixty (60) days until all Fireplaces have been brought into full compliance. This written update shall be directed to the attention of the Director of Building Code Enforcement for the City of Wheaton via e-mail.

8. Fines: The City agrees to not pursue any fines related to the Lawsuit against the Association provided that it diligently pursues Owners as required under the terms of this Agreement.

9. Dismissal: The City agrees to dismiss the Association from the Lawsuit without prejudice and with leave to reinstate, provided that the City shall not reinstate the Association as long as it diligently pursues Owners as required under the terms of this Agreement. Regardless of the Association's diligence, the City shall have the right but not the obligation, to reinstate the Lawsuit if all the Fire Place Units are not in full compliance with applicable codes twelve months from the date of this Agreement. The City agrees that prior to reinstating this action, it will provide the Association with written notice at least fourteen (14) days in advance so that the Association can take any necessary steps to avoid reinstatement of the case. When all owners have brought their units into compliance, said dismissal shall automatically convert to a dismissal with prejudice. The Association shall notify the City when it believes there has been full compliance.

10. City Support: The City shall provide a list to the Association every sixty (60) days, which identifies the owners of Fireplace Units within the Briarcliffe Knolls Complex and the status of their compliance. Said list shall indicate the following information related to each unit: (i) when a permit was issued (ii) the dates of any inspections that have been completed and (iii) whether a notice lifting the condemnation has been issued. The City shall also support the

Association by making its personnel available to testify about the existing of violations and actions taken by or not taken by owners of Fireplace Units to bring their units into compliance.

11. Reliance. The Parties hereby warrant and represent that they have relied upon their own judgment and that of their legal counsel regarding the terms and provisions of this Agreement, and that no statements or representations made by another Party or their directors, officers, members, residential owners, agents, employees or legal counsel, other than those contained herein, have been relied upon by any of the Parties, or have influenced or induced them to execute this Agreement. The Parties further warrant and represent that they have signed this Agreement under their own free will and not under any duress or coercion of any kind.

12. Amendments. This Agreement shall not be modified or amended except by an instrument executed by all Parties hereto.

13. Counterparts. This Agreement may be executed in one or more counterparts, any one of which need not contain the signatures of more than one Party, but all such counterparts taken together shall constitute one and the same Agreement.

14. Electronic Signatures. The Agreement and all other agreements or instruments entered into in connection with the Agreement and any amendments, hereto or thereto, to the extent delivered by means of facsimile or electronic mail shall be treated and deemed in all manner and respects as an original version thereof delivered in person. At the request of any Party hereto or to any such agreement or instrument, a Party shall re-execute original forms thereof and deliver them to all other Parties. No Party shall raise the use of facsimile or electronic mail to deliver a signature or the fact that any signature, agreement or instrument was transmitted or communicated in such a way as a defense to the formation of a contract and each

such Party forever waives any such defense, except to the extent such defense related to the lack of authenticity.

15. No Admission of Liability. Notwithstanding anything to the contrary herein, this Agreement is a compromise of disputed claims and the Parties' decision to enter into this Agreement shall not be construed as an admission of any fact or legal conclusion on the part of any Party.

16. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be held invalid, inoperative or unenforceable, the remainder of this Agreement, or the application of such provision, to any other person or circumstance shall not be affected thereby, and the remainder of this Agreement shall be given effect as if such invalid or inoperative portion had not been included.

17. Applicable Law and Forum. This Agreement shall be construed in accordance with the laws of the State of Illinois without regard to conflicts of law principles. In the event any legal proceedings are commenced to enforce this Agreement or that otherwise relate to this Agreement, the Parties hereby agree that the sole forum in which such proceedings shall take place shall be in DuPage County, Illinois.

18. Construction. The Parties acknowledge and agree that each of them has participated in the drafting of this Agreement. The Parties therefore acknowledge and agree that the rule that a written instrument is to be strictly construed against the drafter shall not apply to this Agreement, and that none of the Parties shall be deemed as, or construed to be, the drafter of this Agreement.

19. Headings. The section headings in the Agreement are for the convenience and reference only and shall not in any way affect the meaning or interpretation of this Agreement.

20. Entire Agreement. The Parties acknowledge that this Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof, and all prior and contemporaneous agreements, negotiations and understandings with respect to the subject matter hereof are cancelled and superseded by this Agreement. This Agreement, therefore, is fully integrated.

21. Notices. Any notice to either party must be sent via certified mail, postage prepaid or personally delivered to the following:

On behalf of Briarcliffe Knolls Manor Homes:

Ms. Gabriella R. Comstock
Keough & Moody, P.C.
1250 E. Diehl Road, Suite 405
Naperville, IL 60563

On behalf of the City of Wheaton:

Mr. Bradley N. Pollock
Walsh, Knippen, Pollock & Cetina, Chtd.
2150 Manchester Rd., Suite 200
Wheaton, Illinois 60187

The parties agree that notice sent via certified mail or personal delivery shall be deemed delivered on the date it is received by the recipient.

CITY OF WHEATON

By: Michael J. Kelly
Its: Mayor
Date: 7-6-15

BRIARCLIFFE KNOLLS MANOR HOMES

By: Diane S. Hatch,
Its: President
Date: 7/6/15

ATTEST:

By: Alvin Brumitt, Jr.
Its: Notary Public

