

ORDINANCE NO. F-0476

AN ORDINANCE OF THE CITY OF WHEATON, DUPAGE COUNTY, ILLINOIS,  
AUTHORIZING THE MAYOR AND CITY CLERK TO EXECUTE CERTAIN  
SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS REGARDING  
LITIGATION BETWEEN WAYNE MARTH, DOING BUSINESS AS ARCLINE  
ASSOCIATES LIMITED, AND THE CITY OF WHEATON

WHEREAS, Wayne Marth, doing business as Arcline Associates Limited (hereinafter referred to as Marth) was retained by Anderson Wheaton Limited Partnership to serve as architect under the Downtown Wheaton Redevelopment Project approved by Wheaton Ordinance No. F-0080; and

WHEREAS, Anderson Wheaton Limited Partnership defaulted in its obligations to timely perform under said Downtown Wheaton Redevelopment Project; and

WHEREAS, the City of Wheaton terminated the rights of Anderson Wheaton Limited Partnership under said Downtown Wheaton Redevelopment Agreement, and said termination was in accordance with Wheaton's contractual rights under the terms of said Downtown Wheaton Redevelopment Agreement; and

WHEREAS, Marth filed a Complaint in Chancery for Accounting and Other Relief ("Complaint") in the Circuit Court of DuPage County on July 24, 1997 with said matter assigned Case No. 97 CH 0749; and

WHEREAS, the Complaint named the City as a defendant in Count IV, under a Third Party Beneficiary theory; and

WHEREAS, Marth was subsequently granted leave to file an Amended Count IV against the City and said Amended Count IV against Wheaton was filed on or about September 25, 1998; and

WHEREAS, the City filed a Motion for Summary Judgment on Third Party Beneficiary Claims by Wayne Marth d/b/a Arcline Associates, Ltd. on or about August 26, 1999; and

WHEREAS, after briefing and hearing arguments, the court issued an Opinion on December 17, 1999 granting the City's Motion for Summary Judgment against Marth and an Order was also entered on December 17, 1999 granting the City's Motion for Summary Judgment against Marth; and

WHEREAS, in its Order of December 17, 1999 the court found there was no just reason for delay of enforcement or appeal of the Order pursuant to Supreme Court Rule 304(a); and

WHEREAS, the Parties have now agreed to settle and terminate this litigation with prejudice.

WHEREAS, Marth has proposed a Settlement Agreement and Mutual Release of Claims, and has tendered a signed and executed copy of said Settlement Agreement and Mutual Release of Claims which is attached to this Ordinance as Exhibit A; and

WHEREAS, it is desirable and in the best interest of the citizens of the City of Wheaton to enter into the Settlement Agreement and Mutual Release of Claims and put an end to litigation between the parties.

NOW THEREFORE, BE IT ORDAINED by the City Council of the City of Wheaton, DuPage County, Illinois, as follows:

**SECTION 1:** That the Mayor and City Clerk be and the same are hereby authorized to execute the Settlement Agreement and Mutual Release of Claims attached hereto as Exhibit A in substantially the form attached hereto, and as incorporated herein.

**SECTION 2:** That all ordinances and resolutions, or other parts thereof in conflict with the provisions of this Ordinance are, to the extent of such conflict, hereby repealed.

**SECTION 3:** That the City staff and City attorneys are hereby authorized to file the necessary documents within Case No. 97 CH 0749 to effectuate the entry of the Final Judgement Order based upon the Settlement Agreement and Mutual Release of Claims.

**SECTION 4:** The City Treasurer is authorized to issue a check in the amount of \$15,000 made payable to Arcline Associates Limited, in performance of the City's obligations under said Settlement Agreement.

**SECTION 5:** That this Ordinance shall be in full force and effect from and after the date of its adoption, approval, and signature as provided by law.

PASSED AND APPROVED by the Mayor and City Council of the City of Wheaton, Illinois, this 5th day of June, 2000.



\_\_\_\_\_  
Mayor

ATTEST:



\_\_\_\_\_  
City Clerk

AYES: Councilman Eckhoff; Councilman Gresk; Mayor Carr; Councilman Johnson; and Councilman Mork.

NAYS: None.

ABSENT: Councilwoman Davenport and Councilwoman Johnson.

Passed: June 5, 2000

Published: June 6, 2000

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

This Settlement Agreement and Mutual Release of Claims (the "Agreement") is entered into by and between Wayne Marth d/b/a Arcline Associates, Ltd. ("Marth") represented by Marty J. Schwartz, P.C. and the City of Wheaton, an Illinois Home Rule Municipality, (the "City"), represented by Day & Robert, P.C. Marth and the City are hereafter sometimes individually referred to as a "Party" and collectively referred to as the "Parties".

### I. RECITALS

WHEREAS, Marth filed a Complaint in Chancery for Accounting and Other Relief ("Complaint") in the Circuit Court of DuPage County on July 24, 1997 with said matter assigned Case No. 97 CH 0749; and

WHEREAS, the Complaint named the City as a defendant in Count IV under a third party beneficiary theory; and

WHEREAS, Marth was subsequently granted leave to file an Amended Count IV against the City and said Amended Count IV against Wheaton was filed on or about September 25, 1998; and

WHEREAS, the City filed a Motion for Summary Judgment on Third Party Beneficiary Claims by Wayne Marth d/b/a Arcline Associates, Ltd. on or about August 26, 1999; and

WHEREAS, after briefing and hearing arguments, the court issued an Opinion on December 17, 1999 granting the City's Motion for Summary Judgment against Marth and an Order was also entered on December 17, 1999 granting the City's Motion for Summary Judgment against Marth; and

WHEREAS, in its Order of December 17, 1999 the court found there was no just reason for delay of enforcement or appeal of the Order pursuant to Supreme Court Rule 304(a); and

WHEREAS, Marth filed his Notice of Appeal on or about January 7, 2000 and a briefing schedule has been set by the Appellate Court; and

WHEREAS, the Parties have now agreed to settle and terminate this litigation with prejudice.

## II. TERMS AND CONDITIONS

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. The Parties adopt the foregoing Recitals and affirm that the construction of this Agreement shall be guided thereby.
2. Marth, being of lawful age, for the sole consideration of the sum of \$15,000, the receipt and sufficiency of which is hereby acknowledged, does hereby agree to dismiss, with prejudice, the City from Case No. 97 CH 0749 currently pending in the Circuit Court of DuPage County.
3. In further consideration of the aforementioned payment of \$15,000, Marth shall also dismiss the appeal currently pending in the Illinois Appellate Court, Second District, Appeal No. 2-00-0080.
4. The City shall pay to Marth the \$15,000 within thirty (30) days after both the dismissal of 97 CH 0749 and Appeal No. 2-00-0080. Said payment shall be without interest.
5. The Parties agree that the Court shall retain jurisdiction over this case to enforce the terms of this Agreement and also to enter the Order of Dismissal once the terms and conditions of this Agreement have been complied with in a satisfactory manner by both Parties.
6. **A.** Upon entry of the Order of Dismissal in Case No. 97 CH 0749 and entry of an order dismissing Appeal No. 2-00-0080, Marth and Arcline Associates, Ltd., for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by each and intending to be legally bound to both agree to on behalf of themselves, their attorneys, employees, agents, representatives and assigns, or any persons acting on their behalf (collectively referred to as "Marth's Releasees") forever release and discharge the City and each of its officers, directors, shareholders, successors, agents, employees, attorneys, representatives and assigns, or any person acting on its behalf (collectively referred to as "the City's Releasees") from all claims, obligations, actions, demands, rights, costs, expenses, compensation or causes of action of any nature whatsoever, whether based on tort, contract, statutory or other theory of recovery, and whether for compensatory, punitive, statutory or other forms of damage or relief, whether legal or equitable, whether asserted or unasserted, that have accrued from the beginning of the world to the date hereof, including but not limited to, any and all claims for damage or loss arising out of any claims the Marth's Releasees may have against any of the City's Releasees for any matter whatsoever, including, but not limited to the matters which are currently the subject of litigation in this lawsuit.

B. Notwithstanding anything contained herein to the contrary:

(1) Marth and Arcline Associates, Ltd. do not release or discharge any claims they have against Mark Anderson or the Anderson Wheaton Limited Partnership, or their predecessors, successor, assigns, affiliates and partners (excluding the City). Marth and Arcline Associates, Ltd. expressly reserves all claims and causes of action they have against Mark Anderson or the Anderson Wheaton Limited Partnership, their predecessors, successors, assigns, affiliates and partners (excluding the City).

(2) Marth and Arcline Associates, Ltd. do not release their lien on public funds pursuant to 770 ILCS 60/23 (1998) as alleged in Count I of the Complaint in Case No. 97 CH 0749, and do not release the city in the event the City hereinafter makes payment to Mark Anderson or the Anderson Wheaton Limited Partnership, their predecessors, successors, assigns, affiliates and partners in violation of the lien rights of Marth and Arcline Associates, Ltd. The parties hereby acknowledge that the City's release of its claim for attorney fees against Mark Anderson or the Anderson Wheaton Limited Partnership shall not be a violation of the lien rights of Wayne Marth or Arcline Associates, Ltd., provided the City does not transfer or convey any property or funds to Mark Anderson, the Anderson Wheaton Limited Partnership, its predecessors, successors, assigns, affiliates and partners.

7. The City for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and intending to be legally bound, agrees to on behalf of itself, its attorneys, its employees, agents, representatives and assigns, or any persons acting on its behalf (collectively referred to as "the City Releases") forever release and discharge Marth and Arcline Associates, Ltd. and each of its officers, directors, shareholders, successors, agents, employees, attorneys, representatives and assigns, or any person acting on its behalf (collectively referred to as "Marth's Releases"), from all claims, obligations, actions, demands, rights, costs, expenses, compensation or causes of action of any nature whatsoever, whether based on tort, contract, statutory or other theory of recovery, and whether for compensatory, punitive, statutory or other forms of damage or relief, whether legal or equitable, whether asserted or unasserted, that have accrued from the beginning of the world to the date hereof, including but not limited to, any and all claims for damage or loss arising out of any claims the City Releases may have against any of the Marth's Releases for any matter whatsoever, including, but not limited to the matters which are currently the subject of litigation in this lawsuit.

8. In the event the City is not able to settle with Anderson Wheaton Limited Partnership ("Anderson") and obtain the dismissal of the counterclaim filed by Anderson in Case No. 97 CH 0749, Marth represents and warrants that he will testify consistently with his deposition testimony including without limitation, the portion of his deposition testimony referenced in the City's Motion for Summary Judgment filed against Marth and against Anderson.

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9. Each Party represents and warrants to the other, and agrees with the other as follows:

A. It has received independent legal advice from attorneys of its own choice with respect to the advisability of making the settlement provided for herein and with respect to the advisability of executing this Agreement prior to the execution of this Agreement by the Parties;

B. It is not relying on any statement, representation, or promise of the other Party in executing this Agreement or in making the settlement provided for herein, except as expressly stated in this Agreement;

C. It has made such investigation of the facts pertaining to the settlement and this Agreement, and of all the matters pertaining hereto, as it deemed necessary;

D. The terms of this Agreement are contractual and not a mere recital and this Agreement is the result of negotiations between the Parties;

E. It has carefully read the contents contained herein and affirms that the Agreement is entered into in good faith and freely signed by it;

F. The unenforceability or invalidity of any provision or provisions of this Agreement shall not render any other provision or provisions unenforceable or invalid; and

G. Whenever the context requires or permits the singular shall include the plural, the plural shall include the singular and the masculine, feminine and neuter shall be freely interchangeable.

10. To the extent permitted by law, this Agreement shall inure to the benefit of, and shall be binding upon its present, former and subsequent affiliated subsidiary and parent companies, corporations, partnerships and wholly owned divisions, if any, and all of their present, former and subsequent trustees, agents, attorneys, directors, employees, heirs, officers, partners, representatives, shareholders, assignors and assignees, if any, except as expressly provided herein.

11. This Agreement constitutes the entire Agreement between the Parties pertaining to the subject matter hereof and of the final, complete and exclusive expressions of the terms and conditions hereof. All prior agreements, representations, negotiations and understandings of the Parties whether oral, written, expressed or implied are superseded and merged herein.

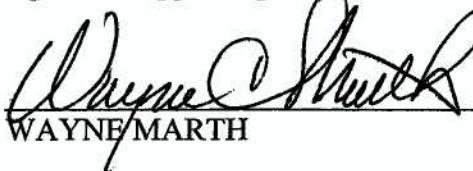
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12. No addition to or modification of any provision contained in this Agreement shall be effective unless fully set forth in writing and signed by both Parties.

13. This Agreement shall be construed and enforced in accordance with the laws of the State of Illinois.

14. In any action to enforce this Agreement, the prevailing Party shall be entitled to recover its reasonable attorney fees and costs of litigation.

15. This Agreement is subject to, and must be approved by, the Mayor and City Council of Wheaton.

IN WITNESS WHEREOF, the Parties hereto have approved and executed this Settlement Agreement and Mutual Release of Claims by setting forth the authorized signatures appearing below:

  
WAYNE MARTH

ARCLINE ASSOCIATES, LTD.

By: Wayne C. Marth

Its: PRESIDENT.

CITY OF WHEATON, an Illinois Home Rule Municipality

By: John C. Carr

Attest: John M. Consalvo  
City Clerk