

ORDINANCE NO. F-0494

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 ANDERSON WHEATON
LIMITED PARTNERSHIP AND THE CITY OF WHEATON

WHEREAS, the City of Wheaton, an Illinois Home Rule Municipality (hereinafter "City") entered into a Development Agreement for the Downtown Wheaton Redevelopment Project, as approved by Wheaton Ordinance No. F-0080, on or about August 7, 1995 with Anderson Wheaton Limited Partnership, an Illinois Limited Partnership (hereinafter "Anderson"), ; and

WHEREAS, the City then entered into an Amended and Restated Development Agreement on or about November 25, 1997 with Anderson; and

WHEREAS, Anderson retained Wayne Marth, doing business as Arcline Associates Limited (hereinafter "Marth") to serve as architect under the Downtown Wheaton Redevelopment Project; and

WHEREAS, Anderson 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 (hereinafter "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 Anderson as a defendant in Counts I, II and III and named the City as a defendant in Count IV; and

WHEREAS, on or about May 23, 1998, Anderson filed an Amended Answer and Counterclaim, which included a one count counterclaim against the City alleging a breach of contract; and

WHEREAS, on or about August 2, 1999 Anderson filed an Amended Counterclaim against the City; and

WHEREAS, the City filed a Motion for Summary Judgment against Anderson on or about September 21, 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 Anderson and an Order was also entered on December 17, 1999 granting the City's Motion for Summary Judgment against Anderson; 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, Anderson 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: 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 17 day of ~~June~~^{July}, 2000.



Mayor

ATTEST:



City Clerk

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

NAYS: None.

ABSENT: Councilwoman Johnson.

Motion Carried Unanimously

Passed: July 17, 2000

Published: July 18, 2000

**SETTLEMENT AGREEMENT AND
MUTUAL RELEASE OF CLAIMS**

This Settlement Agreement and Mutual Release of Claims (the "Agreement") is entered into by and between Anderson Wheaton Limited Partnership, an Illinois limited partnership ("Anderson") represented by Hoogendoorn, Talbot, Davids, Godfrey & Milligan and the City of Wheaton, an Illinois Home Rule Municipality, (the "City"), represented by Day & Robert, P.C. Anderson and the City are hereafter sometimes individually referred to as a "Party" and collectively referred to as the "Parties".

I. RECITALS

WHEREAS, Wayne Marth, d/b/a Arcline Associates, Ltd. 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 Anderson as a defendant in Counts I, II and III and named the City as a defendant in Count IV; and

WHEREAS, on or about May 23, 1998, Anderson filed an Amended Answer and Counterclaim, which included a one count counterclaim against the City alleging a breach of contract; and

WHEREAS, on or about August 2, 1999 Anderson filed an Amended Counterclaim against the City; and

WHEREAS, the City filed a Motion for Summary Judgment against Anderson on or about September 21, 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 Anderson and an Order was also entered on December 17, 1999 granting the City's Motion for Summary Judgment against Anderson; 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, Anderson filed its Notice of Appeal on or about January 18, 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. Anderson, in consideration for the City agreeing to waive any claim the City may have against Anderson, or any of its partners, for payment of the City's attorney fees and costs, does hereby agree to dismiss the counterclaim filed by Anderson against the City in Case No. 97 CH 0749 currently pending in the Circuit Court of DuPage County.
3. In further consideration of the aforementioned, Anderson shall also dismiss the appeal currently pending in the Illinois Appellate Court, Second District, originally assigned Appeal No. 2-00-0100, and now consolidated as Appeal No. 2-00-0080.
4. 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.
5. Upon entry of the Order of Dismissal of Anderson's counterclaim against the City in Case No. 97 CH 0749 and entry of an order dismissing Appeal No. 2-00-0080, Anderson, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and intending to be legally bound to agree to on behalf of itself, its attorneys, employees, agents, representatives and assigns, including any of its partners, or any persons acting on its behalf including, but not limited to all subcontractors and potential claimants under the Mechanic's Lien Act, (collectively referred to as "Anderson's Releasors") 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 Releasors") 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,

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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 Anderson's Releasors may have against any of the City's Releasors for any matter whatsoever, including, but not limited to the matters which are currently the subject of litigation in this lawsuit.

6. 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 Releasors") forever release and discharge Anderson and each of its officers, directors, shareholders, successors, agents, employees, attorneys, representatives and assigns, any of its partners, or any person or entity acting on its behalf (collectively referred to as "Anderson's Releasors"), 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 Anderson's Releasors may have against any of the City's Releasors for any matter whatsoever, including, but not limited to the matters which are currently the subject of litigation in this lawsuit.

7. 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;

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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.

8. 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.

9. 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.

10. 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.

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

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

13. 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:

ANDERSON WHEATON LIMITED

PARTNERSHIP, an Illinois Limited Partnership, *Fox Homes, Inc,*
on General Partner

By: *J. K. Anderson*

Its: *Pres*

CITY OF WHEATON, an Illinois Home
 Rule Municipality

By: *James Carr*
MAYOR

Attest: *Emily M. Connelley*
 City Clerk