

SETTLEMENT AGREEMENT, CONSENT TO ENTRY OF FINAL RULE AND ORDER, AND MUTUAL RELEASE

THIS SETTLEMENT AGREEMENT, CONSENT TO ENTRY OF FINAL RULE AND ORDER, AND MUTUAL RELEASE, (the “Settlement Agreement”) is made and entered into this _____ day of _____, 2016, by and between the CITY OF COMMERCE CITY, a Colorado home rule municipal corporation (the “City”), and H4 INVESTMENTS, LLLP, a Colorado limited liability limited partnership; COMMERCE PLACE, INC., a Colorado corporation; KREMMLING CENTER, INC., a Colorado corporation; DAVID W. HAMMER; and KAREN J. HAMMER; (collectively, “Hammer”).

RECITALS

A. The City and Hammer are parties to two separate litigation matters in Adams County Colorado; to wit, Adams County District Court Case No. 2015CV031157, an eminent domain proceeding initiated by the City against Hammer, and Adams County District Court Case No. 2015CV030575, civil litigation initiated by Hammer against the City, both matters pertaining to the City’s acquisition of certain Hammer-owned properties located generally at the intersection of E. 104th Avenue and Highway 85 in the City (collectively, the “Litigation”).

B. The City and Hammer have agreed that in order to avoid the additional expense and the uncertainty of litigation, it is in their respective best interests to enter into this Settlement Agreement to settle and resolve the Litigation, by way of the compromise set forth in this Settlement Agreement.

NOW, THEREFORE, in consideration of the foregoing premises and covenants, promises and agreements of each of the parties hereto, to be kept and performed by each of them, and in full compromise, settlement, and satisfaction of the claims that were or could have been asserted in the Litigation, the City and Hammer agree as follows:

1. Relocation of Belle Creek Blvd. & 104th Ave. Intersection (the “Intersection”). The City and Hammer agree to the relocation of the Intersection to a location to the west of the current location, as depicted in **Exhibit 1**, attached hereto and subject to the following:

A. City Obligations.

- i. The City shall exercise its police power to attempt to acquire at the City’s sole cost and expense the necessary property interests from the record owners of the property at the relocated Intersection as more particularly described in **Exhibit 2**, attached hereto and incorporated herein by this reference (the “Intersection Property Interests”), whether by negotiation or through the City’s exercise of its power of eminent domain. Such acquisition of the Intersection Property Interests is

necessarily based on the City's exercise of its legislative discretion. Provided however, the City has in anticipation of this Settlement Agreement commenced such a process of acquisition of the Intersection Property Interests by the adoption of Resolution No. 2016-53. Nothing herein shall be construed to be a waiver by the City of its police power or its legislative authority to make decisions regarding the exercise of its eminent domain authority. Nothing herein shall bind the City to exercise its power of eminent domain, or to in any other manner be precluded from making a legislative determination regarding how its eminent domain authority is exercised. Provided, however, that if the City fails to exercise eminent domain or otherwise acquire the property interests, the City shall compensate Hammer as set forth in Section 7, below.

ii. The City shall reimburse Hammer for the costs it has or will incur in creating the legal descriptions for the acquisition of the Intersection Property Interests and related maps. Such reimbursement shall occur within thirty (30) business days after receipt by the City of an invoice for the creation of the legal descriptions and map exhibits.

iii. The City shall initiate the process and reasonably assist Hammer in obtaining the requisite permits and approvals from the Colorado Department of Transportation ("CDOT") for the relocation of the Intersection as described in more detail herein. The City and Hammer have in good faith commenced this process, and met with CDOT to commence the process of obtaining the requisite approvals on May 13, 2016. Consistent with the meeting with CDOT, the City agrees that it shall make application to CDOT to relocate the existing Intersection to the new relocated location to the west. The City will respond to inquiries from CDOT within a reasonable time as required to obtain permits for the relocation of the Intersection.

iv. The City shall use its best efforts to obtain the right to possession of the Intersection Property Interests on or before January 30, 2017.

B. Hammer Obligations.

i. Hammer has previously caused the legal descriptions to be created for the acquisition of the Intersection Property Interests.

ii. Consistent with the May 13, 2016, meeting with CDOT, Hammer agrees that he shall make application to CDOT, with the City's support, to modify the Intersection in the new location to the west by adding a fourth leg to the Intersection as more particularly described in the preliminary design provide by Fox Engineering. Hammer will timely provide all submittals required to obtain the requisite permits and approvals from CDOT

iii. Contingent upon obtaining the requisite CDOT approvals as set forth above, Hammer shall undertake at Hammer's sole cost and expense to design and construct the relocation of the Intersection. Hammer will complete the design for the relocation of the Intersection on or before January 30, 2017, and will complete the construction of the relocated Intersection on or before October 31, 2017. Hammer shall obtain all necessary permits and approvals for these improvements and shall comply with all regularly applicable laws and policies.

2. East 104th Avenue Islands/Access. Hammer shall be compensated for repairs to the access and curb cuts to part of Hammer's East 104th Avenue property. The City shall compensate Hammer in the amount of Sixty Three Thousand Dollars (\$63,000.00) for such repairs within thirty (30) days of execution of this Agreement. Such obligation exists regardless of whether CDOT acquires any portion of the East 104th Avenue Property. Hammer shall not be required to complete the repairs to the access and curb cuts related to Hammer's East 104th Avenue Property if CDOT acquires the East 104th Avenue Property.

3. Payment of 50% of Costs of Fox Traffic Engineering. Hammer will obtain from Fox Traffic Engineering a comprehensive invoice for the work performed pursuant to the Possession and Use Agreement dated July 16, 2010, relating to the review and recommendations regarding access to Hammer's property, and said comprehensive invoice shall be provided to the City. Subject to offset for previous payments made by the City, the City will reimburse Hammer for fifty percent (50%) of such invoice. This reimbursement payment will be made by the City to Hammer within fourteen (14) days of receipt of such invoice.

4. Consent to Entry of Final Rule and Order; Just Compensation for Acquisition of Property by the City from Hammer for the East 104th Avenue and Highway 85 Project. The City and Hammer agree to entry of a Stipulated Final Rule and Order in Adams County District Court Case No. 2015CV031157, in the form attached hereto as **Exhibit 3**, and incorporated herein by this reference, upon satisfaction of the conditions set forth in Section 7 below. Such Stipulated Final Rule and Order shall convey clear title to the City from Hammer of the property interests sought to be acquired in Adams County District Court Case No. 2015CV031157 (the "Condemnation Property") pursuant to C.R.S. § 38-1-105(3), and shall include the following:

A. Just Compensation for the property acquired by the City from Hammer in the amount of Three Hundred and Ninety Eight Thousand and Seven Hundred and Sixty-Four Dollars (\$398,764.00) previously paid to Hammer by the City pursuant to that Possession and Use Agreement dated July 16, 2010, and an additional Five Hundred and Eighty Six Thousand Dollars (\$586,000.00) to be deposited into the Court Registry in Adams County District Court Case No. 2015CV031157 upon execution of this Settlement Agreement, for total Just Compensation for the property interests to be acquired in Adams

County District Court Case No. 2015CV031157 of Nine Hundred and Eighty Four Thousand and Seven Hundred and Sixty-Four Dollars (\$984,764.00); and

B. An obligation by the City that upon the City's receipt of stamped engineering assurance that the roadway improvements constructed at East 104th Avenue and Highway 85 have the necessary support and stability in the absence of the slope easement property acquired by the City, the City shall execute and record a release/relinquishment of the slope easements acquired by the City.

5. Development of Hammer Properties.

A. Within sixty (60) calendar days of the City's timely performance of its obligations hereunder, Hammer shall submit a Petition for Annexation to the City pursuant to the Municipal Annexation Act of 1965, C.R.S. § 31-12-101, *et seq.*, for the property owned by the H4 Investments, LLLP; Commerce Place, Inc.; Kremmling Center, Inc.; David W. Hammer; and Karen J. Hammer as their interests may appear located both west and east of Highway 85 along East 104th Avenue (collectively, the "Hammer Properties").

B. If the City does not timely perform its obligations hereunder, and to the extent permitted by law, the City shall provide letters of support for development in unincorporated Adams County so long as any land use application does not violate existing City agreements, rules or regulations.

6. Old Brighton and 104th Avenue Intersection: Hammer shall construct a signal at the intersection of Old Brighton and East 104th Avenue in accordance with the general plans set forth in **Exhibit 4**, attached hereto and incorporated herein by this reference. Hammer shall complete the final design for the signalization of the intersection by January 30, 2017 and shall complete the construction of such signalization improvements by October 31, 2017, provided permits are issued by the City and CDOT within thirty (30) days of execution of this Agreement. If permits are issued later, Hammer will finalize design and complete construction within twelve (12) months of the date of such permits. The City shall reimburse Hammer a total amount not to exceed of Three Hundred Thousand Dollars (\$300,000.00) for the actual costs of such construction, including any advance payment. The City will provide an advance payment of \$100,000 to Hammer within thirty (30) days of the issuance of permits and will make subsequent payment to Hammer within thirty (30) days of the submission of invoices, submitted not more frequently than monthly, reflecting the actual costs of such work.

7. Additional Deadlines for the Obligations Set Forth in this Agreement:

A. Within seven (7) days of execution of this Settlement Agreement, the City and Hammer shall file a stipulation with the Adams County District Court in both Case Nos. 2015CV031157 and 2015CV030575 advising the Court of the within settlement and requesting a stay to allow for performance of the obligations set forth herein and a continuance of the valuation trial current set to commence on November 14, 2016.

B. So long as the City timely obtains possession of the Intersection Property Interests by January 30, 2017, the parties agree to submit an Unopposed Motion for Request for Entry of the Stipulated Final Rule and Order in Adams County District Court Case No. 2015CV031157, in the form attached hereto as **Exhibit 5** no later than February 15, 2017, whereby the Condemnation Property will be conveyed to the City for total Just Compensation for the Condemnation Property of Nine Hundred and Eighty Four Thousand Dollars (\$984,764.00), and such proceeds as set forth herein shall be deposited into the Court Registry in Adams County District Court Case No. 2015CV031157. Notwithstanding the foregoing, if the requisite approval from CDOT for the relocation of the Intersection has not been obtained by February 15, 2017, the motion shall be submitted upon the issuance of the approval, subject to Section 8, below.

C. Subject to the provisions of subsection D. of this Section 7, if the City does not obtain possession of the Intersection Property Interests on or before January 30, 2017, the parties agree to submit an Unopposed Motion for Request for Entry of the Stipulated Final Rule and Order in Adams County District Court Case No. 2015CV031157, in the form attached hereto as **Exhibit 5** no later than February 15, 2017, except that the Condemnation Property will be conveyed to the City in exchange for additional payment of One Million, Fifteen Thousand and Two Hundred and Thirty-Six Dollars (\$1,015,236.00), for total Just Compensation for the Condemnation Property of Two Million Dollars (\$2,000,000.00), and any payments made by the City thereunder shall be deposited into the Court Registry in Adams County District Court Case No. 2015CV031157.

D. Notwithstanding the foregoing, if the City is unable to obtain possession of the Intersection Property Interests on or before January 30, 2017, but is proceeding in good faith to obtain such possession, the City will be given an additional three (3) months, to and including April 28, 2017, to obtain possession of the Intersection Property Interests. If this paragraph applies, and the City obtains possession of the Intersection Property Interests on or before April 28, 2017, an Unopposed Motion for Request for Entry of the Stipulated Final Rule and Order, in the manner called for in subsection B. of this Section 7, no later than May 15, 2017, and any payments made by the City thereunder shall be deposited into the Court Registry in Adams County District Court Case No. 2015CV031157.

E. If the City fails to obtain possession of the Intersection Property Interests on or before April 28, 2017, the parties will immediately submit an Unopposed Motion for Request for Entry of the Stipulated Final Rule and Order in exchange for the additional payment of One Million, Fifteen Thousand and Two Hundred and Thirty-Six Dollars (\$1,015,236.00).

F. Adams County District Court Case No. 2015CV030575, will be dismissed with prejudice upon the entry by the Adams County District Court of the Stipulated Final Rule and Order in Case No. 2015CV031157.

8. Settlement Agreement Expressly Contingent upon Obtaining Requisite Approvals from the Colorado Department of Transportation.

A. Consistent with Section 1 of this Settlement Agreement, the City and Hammer jointly acknowledge and agree that the obligations hereunder are contingent upon approval by CDOT of certain approvals/access permits for the relocated Belle Creek Intersection, which approvals must be obtained on or before April 28, 2017. The City and Hammer agree to continue to negotiate in good faith regarding the Litigation in the event CDOT refuses to provide such approvals of the relocated Belle Creek Intersection. Provided, however, the City and Hammer agree that the terms and conditions of this Settlement Agreement shall be of no force or effect in the event CDOT refuses to issue the requisite approvals for the relocation or construction of the Intersection. In addition, to the extent the terms of this Settlement Agreement are extinguished by a refusal by CDOT to issue the requisite approvals for the relocation or construction of the Intersection, Hammer shall be required to refund the amounts paid hereunder with the exception of the amount of Three Hundred and Ninety Eight Thousand and Seven Hundred and Sixty-Four Dollars (\$398,764.00) previously paid to Hammer by the City pursuant to that Possession and Use Agreement dated July 16, 2010, and except those amounts paid pursuant to Section 1.A.ii and Section 3 of this Settlement Agreement.

B. CDOT has also informed both the City and Hammer of its potential intent to acquire the larger parcel generally known as Hammer's East 104th Avenue property. CDOT has further indicated its intent to commence discussions regarding this potential acquisition expeditiously.

9. Mutual Release. Except for compliance with the obligations set forth in this Settlement Agreement, the City and Hammer each agree to release and forever discharge the other and each of their respective current and former officers, directors, officials, employees, attorneys, and agents from any and all liability whatsoever, known or unknown, whether at law or in equity, that each ever had or may now have, resulting from, arising out of, or related in any way to the claims, events, and transactions involved in the Litigation.

10. Fees and Costs. Each party is to bear its own attorneys' fees, costs and expenses incurred in connection with the Litigation and this Settlement Agreement.

11. Independent Legal Advice. Each party has received independent legal advice from its attorneys with respect to the advisability of entering into and executing this Settlement Agreement.

12. Authority to Execute. Each party has the full power and legal authority to execute, deliver, and perform the obligations in this Settlement Agreement, and each of them has taken all necessary steps for the execution and delivery of this Settlement Agreement.

13. No Assignment. Hammer represents and warrants that they are the sole and lawful owners of all right, title and interest in and to every claim and cause of action released by them pursuant to this Agreement and every matter which this Agreement purports to release, and that Hammer has not sold, assigned, transferred, hypothecated, pledged or encumbered, or otherwise disposed of, in whole or in part, voluntarily or involuntarily, any such claims or causes of action.

14. Appropriation. Consistent with Article X, Section 20 of the Colorado Constitution, any financial obligations of the City not to be performed during the current fiscal year are subject to annual appropriation, and thus any obligations of the City hereunder shall extend only to monies currently appropriated. Provided however, the City agrees to appropriate and set aside the necessary funds to pay all amounts under this Settlement Agreement, and to the extent necessary, carry over such funds as part of the 2017 budget and appropriation of the City.

15. Miscellaneous.

A. Entire Agreement. This Settlement Agreement constitutes the full and complete understanding and agreement of the parties with respect to the subject matter covered herein. No addition, deletion or amendment shall have any force or effect, except as mutually agreed to in writing signed by all of the parties.

B. Successors and Transferees. This Agreement shall be binding upon and inure to the benefit of each of the parties' successors, assigns, and transferees.

C. No Admission. This Settlement Agreement effects the settlement of claims in two separate contested Adams County District Court matters, and nothing in this Settlement Agreement shall constitute an admission of liability or wrongdoing by any party.

D. No Construction Against Drafter. The City and Hammer have cooperated in the drafting and preparation of this Settlement Agreement. Thus, in any construction to be made of any terms of this Settlement Agreement, the same shall not be construed against either party.

E. Counterparts. This Settlement Agreement may be executed in counterparts and shall be fully effective when executed by all parties.

F. Headings. The headings and subheadings contained in this Settlement Agreement are for convenience only and shall not control or affect the meaning, construction, or interpretation of any provision of this Settlement Agreement.

G. Governing Law. This settlement Agreement shall be construed in accordance with the laws of the State of Colorado.

The Parties have executed the Agreement as of the dates set forth below.

CITY OF COMMERCE CITY

Brian K. McBroom, City Manager

ATTEST:

Laura J. Bauer, MMC, City Clerk

**H4 INVESTMENTS, LLLP;
COMMERCE PLACE, INC.;
KREMMLING CENTER, INC.;
DAVID W. HAMMER; and
KAREN J. HAMMER**

By: David Hammer

By: Karen Hammer