

COMMITTEE OF THE WHOLE

11-0432R

RESOLUTION APPROVING SETTLEMENT IN THE MATTER OF CITY OF DULUTH V. GEORGE D. FOOTE AND DIANNE T. FOOTE IN THE AMOUNT OF \$18,000 AND APPROVING AN ASSESSMENT AGREEMENT.

CITY PROPOSAL:

RESOLVED, that the city council approves settlement in the amount of \$18,000 of all claims or causes of actions asserted by the city of Duluth in that matter venued in the District Court of Minnesota, Sixth Judicial District and identified as City of Duluth v. George D. Foote and Dianne T. Foote, court file no. 69DU-CV-10-3801, and further authorizes the proper city officials to execute an assessment agreement substantially the same as that on file in the office of the city clerk as Public Document No. \_\_\_\_\_ and all other documents necessary to conclude this matter on a full, final and complete basis.

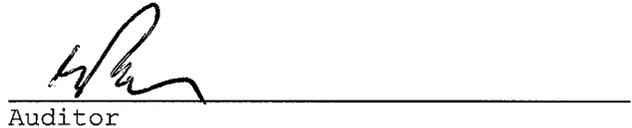
Approved for presentation to council:

  
\_\_\_\_\_  
Chief Administrative Officer

Approved as to form:

  
\_\_\_\_\_  
Attorney

Approved:

  
\_\_\_\_\_  
Auditor

ADM/ATTY MAL:dma 08/09/2011

STATEMENT OF PURPOSE: This resolution authorizes a settlement in the civil action commenced by the City of Duluth. This action arises out of the construction of a new section of 54<sup>th</sup> Avenue East. The Footes agreed to construct utilities and the road surface as part of the construction of a new home. The Footes did not complete construction of the road. The City completed the construction and commenced this action to recover its costs. The parties participated in mediation and agreed to the settlement amount and further agreed to allow the Footes to have the amount assessed against the property. The city attorney recommends this settlement.

**1008 North 54<sup>th</sup> Avenue East**  
**DEVELOPMENT AND ASSESSMENT AGREEMENT**  
**CITY PROJECT NO. 0652TR (formerly City Project #0454TR, Permit No 0454TR)**

THIS AGREEMENT, entered into this \_\_\_\_ day of July 2011 by and between the CITY OF DULUTH, a municipal corporation created and existing under the laws of the State of Minnesota, hereinafter referred to as "City" and GEORGE D. FOOTE and DIANNE T. FOOTE husband and wife as joint tenants, hereinafter referred to as "Owners".

WHEREAS, Owners are the owner of certain property having a street address of 1008 North 54<sup>th</sup> Avenue East, in the City of Duluth, County of St. Louis, State of Minnesota, which property is hereinafter referred to as the "Property" and is legally described as follows:

Lot 10 Block 7 EDGEBROOK DIVISION OF DULUTH and the  
Northerly 25 feet of Lot 9 Block 7 EDGEBROOK DIVISION OF  
DULUTH EXCEPT

and

WHEREAS, George D. Foote previously was issued Permit No.0454TR, Project Number 045TR ("Foote Project") which authorized George D. Foote to construct private improvements in the public right of way to wit: the construction of 54<sup>th</sup> Avenue East from Norwood Street northerly approximately 140 feet, including 8 inch water main;

WHEREAS, the Foote Project was not fully completed by George D. Foote and therefore the City completed the project as City Project No. 0652TR;

WHEREAS, after the City completed City Project No. 0652TR it initiated an action in the St. Louis County District Court entitled City of Duluth v George D. Foote and Dianne T. Foote, File No. 69DU-CV-10-3801 to recover the costs of the project;

WHEREAS, the parties to the aforementioned pending civil action have reached a settlement of that action and as part of the settlement the City is willing to assume ownership of

the improvements to 54<sup>th</sup> Avenue East and 8 inch water main constructed under the Foote Project and City Project No. 0652TR subject to George D. Foote and Dianne Foote to agreeing to be assessed for the City's costs of its Project No 0652TR in the amount of Eighteen Thousand Dollars (\$18,000) to be paid over a fifteen year period;

WHEREAS, George D. Foote and Dianne Foote are willing to agree to said assessment in the amount of Eighteen Thousand Dollars (\$18,000) to be paid over a fifteen year period.

NOW THEREFORE, in consideration of the mutual covenants and conditions hereinafter contained, the parties agree as follows:

#### Article I.

##### Definitions

The following terms and phrases shall have the meanings hereinafter ascribed to them:

- A. Assess or Assessment Procedure: shall mean the act or process of collecting all or a portion of the cost of certain public improvements, including street improvements by collecting the same from the owners of benefitted properties as provided for in Chapter IX of the Duluth City Charter.
- B. Engineer: shall mean the Duluth City Engineer or such other person as he may have designated from time to time in writing.
- D. Plans: shall mean the plans and specifications on file in the office of the Engineer bearing City Project No. 0652TR.
- E. Project: shall mean the project commenced as a private improvement by the Owners under Permit No 0454TR and completed by the City as City Project No. 0652TR and providing for the construction of 54<sup>th</sup> Ave. E. from Norwood Street northerly approximately 140 feet and 8 inch water main.
- F. Property: shall mean the property in St. Louis County, Minnesota described above.

#### ARTICLE I

##### Construction Obligations

The parties agree that the Project is fully completed in accordance with the plans for both the Owners' original Project under Permit No. 0454TR and the City's Project No. 0652TR.

#### ARTICLE II

##### Costs of Project

- A. Benefits of and Payment for the Project

Owners agree that the construction of the Project constitutes public improvements which confer special benefits accruing to the Property which equals or exceeds the amount of Eighteen Thousand (\$18,000) Dollars. It is hereby stipulated and agreed that value of the benefits conferred upon the

Property are equal to or exceed the amounts to be assessed against the Property, without reference to any benefits conferred upon other benefitted properties.

B. Owners Agree to Assessment

Because the Owners agree that the value of the benefits to the Property arising out of the construction of the Project equals or exceeds the actual costs thereof, Owners agree to accept and to pay an Assessment in the amount of Eighteen Thousand Dollars (\$18,000) levied against the Property by the City to defray the costs of said improvements. Said Assessment shall run for a term of fifteen (15) years at the City's standardized rate for special assessments then in effect which rate is currently estimated to be Five (5.00%) percent per annum.

C. Waiver of Defenses

Owners, for themselves and their successors and assigns and for any other affected party, specifically waives, without limitation, all defenses of any kind whatsoever, including, but not limited to, procedural defenses to the Assessments to be levied pursuant to this Article and agrees that Owners and their successors and assigns, if any, shall be bound thereby.

### ARTICLE III

#### General Defaults by Owners and Remedies Therefore

A. General Events of Default

The following shall be deemed to be general events of default by Owners under the terms and conditions of this Agreement to which the remedies set forth in Subparagraph B. below shall be applicable as otherwise set forth in this Agreement:

1. Failure to Make Payments

Owner shall fail to make any payment on any Assessment levied against the Property pursuant to Article II above, or any installment thereof in a timely manner and in full; provided, however, that to the extent only an installment or a portion of said Assessment(s) is due, then "in full" shall only mean such installment or portion then due.

B. General Remedies

Except as otherwise set forth in this Agreement, City shall have the following remedies in the event of a default by Owner:

1. Seek and be entitled to monetary damages, including consequential damages from Owners for any damages, including consequential damages incurred by City as a result of Owners' default.
2. Seek and be entitled to injunctive or declaratory relief as is necessary to prevent Owners' violation of the terms and conditions of this Agreement or to compel Owners' performance of their obligations hereunder.
3. Enforce the assessment against the benefitted property and collect any sums due and owing thereunder.
4. Seek such other legal or equitable relief as a court of competent jurisdiction may determine is available to City.

C. Non-Waiver

The waiver by City of any default on the part of Owners or the failure of City to declare default on the part of Owners of any of its obligations pursuant to this Agreement shall not be deemed to be a waiver of any subsequent event of default on the part of the defaulting party of the same or of any other obligation of the defaulting party hereunder. And, to be effective, any waiver of any default by the defaulting party hereunder shall be in writing by the non-defaulting party.

D. Remedies Cumulative

Except as specifically set forth herein, the remedies provided under this Agreement shall be deemed to be cumulative and non-exclusive and the election of one remedy shall not be deemed to be the waiver of any other remedy with regard to any occasion of default hereunder.

E. Attorneys' Fees

In the event that either party is in default of any of the terms and conditions of this Agreement and the other party shall successfully take legal action to enforce said rights herein, in addition to the foregoing, such non-defaulting party shall be entitled to reimbursement for its reasonable attorneys' fees and costs and otherwise for its costs and disbursements occasioned in enforcing its rights hereunder.

ARTICLE IV

Force Majeure

Under the terms of this Agreement, neither the City nor Owner shall be considered in default or in breach of any of the terms with respect to the performance to their respective obligations under this Agreement in the event of enforced delay in the performance of its obligations due to unforeseeable causes beyond its control and without its fault or negligence, including but not limited to acts of God, acts of a public enemy, acts of the federal government, acts of another party, fire, floods, epidemics, strikes or embargoes, or for delays of subcontractors due to such causes. In the event of any such delay, any time for completion or delivery under this Agreement shall be extended for the period of any such delay upon written notice from the party seeking the extension to the other party.

ARTICLE V

Term

The term of this Agreement shall run from the date first above shown and for so long as is necessary to give effect to its provisions.

Article VI

Runs With the Land

This Agreement shall be deemed to run with the land and shall inure to the benefit of the parties hereto and to their successors and assigns.

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ARTICLE VII

Notices

Any notice, demand or other communication under this Agreement by either party to the other shall be deemed to be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid or deposited with a nationally recognized overnight courier service for next business day delivery to:

In the case of City:

City of Duluth  
Office of the City Clerk  
Room 326, City Hall  
Duluth, MN 55802

In the case of Owners:

George D. Foote & Dianne Foote  
1008 N. 54<sup>th</sup> Ave. E.  
Duluth, MN 55804.

ARTICLE X

Applicable Law

This Agreement together with all of its Articles, paragraphs, terms and provisions is made in the State of Minnesota and shall be construed and interpreted in accordance with the laws of the State.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first shown above.

CITY OF DULUTH, a Minnesota  
Municipal Corporation

By \_\_\_\_\_  
Its Mayor

\_\_\_\_\_  
George D. Foote

\_\_\_\_\_  
Dianne T. Foote

Attest:

