



City Council Memorandum

To: Mayor Fasbender and City Council
From: John Hinzman, Community Development Director
Date: April 5, 2021
Item: Authorize Signature: Settlement Agreement and Release of Claims - Froth and Cork (110 East 4th Street)

Council Action Requested:

Authorize Signature of the attached Settlement Agreement and Release of Claims pertaining to the Froth and Cork and the installation of a non-compliant backflow preventer. A simple majority is necessary for action.

Background Information:

On March 20, 2020 the City's former Building Official authorized the use of a back flow preventer at the Froth and Cork coffeeshop and wine bar that is not compliant with the Minnesota State Building Code. The existing back flow preventer increases the possibility of contamination to the water supply. The agreement obligates the City to reimburse the property owners for the cost of the back flow preventer and installation of the part.

Financial Impact:

Total cost for parts and labor should not exceed \$400.

Advisory Commission Discussion:

N\A

Council Committee Discussion:

N\A

Attachments:

- Settlement Agreement and Release of Claims

**SETTLEMENT AGREEMENT
AND RELEASE OF CLAIMS**

THIS SETTLEMENT AGREEMENT (“Agreement”) is entered into and effective as of the ____ day of April, 2021 (“Agreement Date”), by and between the City of Hastings, a Minnesota municipal corporation (“City”), and Jim and Corie Biermaier, owners of Froth & Cork, LLC, a Minnesota limited liability company (“Owners”), d/b/a Froth and Cork. The City and Owners shall be collectively referred to herein as “the Parties.”

RECITALS

WHEREAS, the Owners own Froth & Cork, a coffeehouse and wine bar located at 110 4th Street East in the City of Hastings, Dakota County, State of Minnesota (“Property”);

WHEREAS, during construction at the Property, Owners installed a back-flow preventer that did not meet the legal requirements under the Minnesota State Building Code;

WHEREAS, on March 20, 2020, the City’s former Building Official authorized the Owners’ use of the non-compliant back-flow preventer at the Property;

WHEREAS, on June 29, 2020, City issued a Certificate of Occupancy to Owners pursuant to the requirements of MN Chapter 1300 of the Minnesota State Building Code, indicating the Property had been inspected for compliance with the requirements of the Minnesota State Building Code for the occupancy, division of occupancy, and the use for which was proposed;

WHEREAS, as of the date of this Agreement, the non-compliant back-flow preventer remains installed at the Property;

WHEREAS, the Parties mutually desire to bring the Property and the non-compliant back-flow preventer into compliance with the Minnesota State Building Code;

WHEREAS, this Agreement is intended to resolve any dispute between the Parties regarding the replacement of the non-compliant back-flow preventer installed on the Property;

WHEREAS, the terms and conditions of the Agreement between the Parties are set forth below.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

**ARTICLE I
THE AGREEMENT**

Section 1.01 Purpose. The purpose of this Agreement is to memorialize the agreement between the City and Owners with regard to the costs associated with bringing the Property and the non-compliant back-flow preventer into compliance with the Minnesota State Building Code.

Section 1.02 Cooperation. The City and Owners shall cooperate and use their respective best efforts to ensure the most expeditious implementation of this Agreement.

Section 1.03 Incorporation of Recitals. The above recitals are true and correct as of the date hereof and are incorporated herein by this reference as if fully set forth herein and shall constitute an expression of the intent of the Parties to aid in the construction of this Agreement.

ARTICLE II
AGREEMENTS OF THE CITY AND OWNERS

Section 2.01 Agreements of the City. The City agrees with the Owners that:

- a. City Execution of Agreement. In consideration of this Agreement, the City agrees to execute this Agreement and implement its terms as they relate to the Property.
- b. City Settlement. As full and final settlement to resolve any dispute between the Parties regarding the non-compliant back-flow preventer, the City agrees to reimburse Owners for the cost of parts and labor to install the Minnesota State Building Code compliant back-flow preventer on the Property. City shall review the invoice and reimburse Owners for all undisputed expenses only after the newly installed back-flow preventer passes an inspection conducted by the City. City will inspect and accept or reject any of the Owner's contracted work under this Agreement upon notice from Owners of the work's completion. City shall accept or reject the work by a timely written response, which shall detail how the City reached its determination. Any loss, damage or cost of repair to the Property from the work performed under this Agreement based on unforeseen circumstances or unusual obstructions or difficulties encountered during installation shall be covered by the Owners.

Section 2.02 Agreements of the Owners. The Owners agree with the City that:

- a. Agreement Execution and Processing. Owners warrant that they have good right, title and interest in the Property to enter into this Agreement and Owners agree to execute this Agreement and deliver said executed copy to the City.
- b. Owners Settlement. As full and final settlement to resolve any dispute between the Parties regarding the non-compliant back-flow preventer, the Owners agree to the following:
 - i. Owners will hire a professional plumber to perform the work and services necessary to properly install the back-flow preventer provided by the City to the requisite standard under the Minnesota State Building Code.
 - ii. Owners shall furnish to City an original invoice for all work performed and expenses incurred during the installation of the back-flow preventer provided by the City. The invoice must detail the charges for all necessary and actual expenses for labor in the installation of the back-flow preventer.

- iii. Once installation of the new back-flow preventer is completed, Owners shall immediately notify the City. City will then inspect the newly installed back-flow preventer for compliance with the Minnesota State Building Code.
- c. Release of Claims. In exchange for the consideration provided by the City under Section 2.01 of this Agreement, Owners, both personally and on behalf of their principals, beneficiaries, partners, officers, employees, agents, successors in interest, officials, attorneys and legal representatives do waive, release, and forever discharge the City, its present and former council members, officials, employees, agents, attorneys and legal representatives of and from any claims, causes of action, demands, or damages whatsoever, whether in law or in equity, which they have had or now have against the City that in any way relate to, arise from, or are connected with the Property under this Agreement. This Release of Claims shall also include, but is not limited to, all claims, rights and causes of action for costs, attorney's fees, or percentage of awards or settlements which Owners may assert against or which may be asserted against City by anyone on behalf of Owners, or against any of the released parties from any third parties.

ARTICLE III **INDEMNIFICATION AND WARRANTY**

Section 3.01 Indemnification. To the full extent permitted by law, Owners agree to indemnify, defend and hold harmless City, its present and former council members, officials, employees, agents, attorneys and legal representatives against, and will hold and save each of them harmless from, any and all actions, either judicial, administrative, arbitration or regulatory claims, damages to persons or property, losses, costs, penalties, obligations, errors, omissions or liabilities whether actual or threatened that may be asserted or claimed by any person, firm or entity arising out of or in connection with the willful misconduct or negligent performance of the work, operations or activities provided by any individual or business entity, its officers, employees, agents, subcontractors, or invitees hired by Owners to perform any of the Owners' obligations under this Agreement. Owners will defend any action or actions filed in connection with any of said claims or liabilities and will pay all costs and expenses, including legal costs and attorneys' fees incurred in connection therewith.

Section 3.02 Warranty. Owners sole and exclusive warranty, if any, for any parts or products supplied by the City under this Agreement, is that provided by the parts or products manufacturer. City makes no express or implied warranties for any products supplied to Owners under this Agreement. City hereby disclaims all express or implied warranties, whether implied by operation of law or otherwise, including, without limitation, all implied warranties of merchantability and fitness for a particular purpose. Under no circumstances, and in no event, will City be liable for personal injury, property damage, or any other loss, damage, cost of repairs or incidental, punitive, special, consequential or liquidated damages of any kind, whether based upon warranty, contract, strict liability, negligence or any other cause of action arising in connection with the design, manufacture, sale, transportation, installation, use or repair of the parts or products provided by City to Owners under this Agreement.

ARTICLE IV
GENERAL PROVISIONS

Section 4.01 Binding Effect. This Agreement and the terms, conditions and covenants contained herein and the transaction contemplated hereunder shall be binding upon and inure to the benefit of the Parties hereto and their respective successors, heirs, executors, personal representatives, tenants, and permitted assigns.

Section 4.02 Severability. In the event any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

Section 4.03 Amendments, Changes and Modifications. This Agreement may be amended or any of its terms modified or changed only by a written amendment authorized and executed by the Parties hereto.

Section 4.04 Counterparts. This Agreement may be simultaneously executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same instrument.

Section 4.05 Entire Agreement. This Agreement shall constitute the entire agreement between the Parties and shall supersede all prior oral or written negotiations.

Section 4.06 Applicable Law. This Agreement shall be interpreted, construed and governed both as to validity and to performance of the Parties in accordance with the laws of the State of Minnesota. Legal actions concerning any dispute, claim or matter arising out of or in relation to this Agreement shall be instituted in the District Court of Dakota County, State of Minnesota, or any other appropriate court in such county.

Section 4.07 Captions. The captions and the headings in this Agreement are for convenience only and in no way define, limit or describe the scope or intent of any provision or section of this Agreement.

Section 4.08 Waiver. Waiver by any party to this Agreement of any term, condition, or covenant of this Agreement shall not constitute a waiver of any other term, condition, or covenant. Waiver by any party of any breach of the provisions of this Agreement shall not constitute a waiver of any other provision or a waiver of any subsequent breach or violation of any provision of this Agreement. No delay or omission in the exercise of any right or remedy by a nondefaulting party on any default shall impair such right or remedy or be construed as a waiver. Any waiver by either party of any default must be in writing and shall not be a waiver of any other default concerning the same or any other provision of this Agreement.

Section 4.09 Notices. Any notice, demand, request, consent, approval, or communication the Parties desire or is required to give to the other party or any other person shall be communicated to the following addresses:

If to City: City of Hastings
101 4th Street East
Hastings, MN 55033
Attention: Travis Dunn

Or e-mailed: TDunn@hastingsmn.gov

If to Owners: Jim or Corie Biermaier
110 4th Street East
Hastings, MN 55033

Or e-mailed: jbiermaier@biermaier-financial.com

IN WITNESS WHEREOF, the City and Owners have caused this Agreement to be executed by its duly authorized representatives.

[Remainder of Page Intentionally Left Blank]

CITY OF HASTINGS

By: _____
Mary Fasbender, Mayor

ATTEST:

By: _____
Erica Henderson, City Clerk

STATE OF MINNESOTA)
)
COUNTY OF _____)

On this ___ day of _____, 2021, before me a Notary Public within and for said County, personally appeared Mary Fasbender and Erica Henderson to me personally known, who being each by me duly sworn, each did say that they are respectively the Mayor and the City Clerk of the City of Hastings, the Minnesota municipal corporation named in the foregoing instrument, and that the seal affixed to said instrument was signed and sealed in behalf of said municipal corporation by authority of its City Council and said Mayor and City Clerk acknowledged said instrument to be the free act and deed of said municipal corporation.

Notary Public