

CITY OF BUCKEYE  
COUNCIL ACTION REPORT

MEETING DATE: September 2, 2014 AGENDA ITEM: \_\_\_\_\_  
 DATE PREPARED: August 14, 2014 DISTRICT NO.: N/A  
 STAFF LIAISON: Dave Nigh, Water Resources Director APPROVED BY: DN  
 DEPARTMENT: Water Resources Department (Director initials)  
 ACTION TITLE: Resolution No. 105-14 Approving the Settlement Agreement and Release by and among Hopeville Water Company, Hopeville Community for Progress, the City of Buckeye, and the individual residents of the community of Hopeville named therein, and authorizing the execution of documents and taking all necessary action with respect thereto.

WORKSHOP     SPECIAL     CONSENT     NON-CONSENT     TABLED     PUBLIC HEARING

**RECOMMENDATIONS:**

Council to adopt Resolution No. 105-14 Approving the Settlement Agreement and Release by and among Hopeville Water Company, Hopeville Community for Progress, the City of Buckeye, and the individual residents of the community of Hopeville named therein, and authorizing the execution of documents and taking all necessary action with respect thereto

**RELEVANT COUNCIL GOAL:**

Goal 7 Responsive and Accountable Government and Effective Public Service.

**SUMMARY**

**PROJECT DESCRIPTION:**

On or about November 6, 2012, the City entered into an Asset Purchase Agreement with the Hopeville Water Company, pursuant to which the City was to acquire the Water Company's assets and take over the operation of the Water Company's system. The City's obligation to purchase the assets was contingent upon the parties obtaining approval of the transfer of the assets from the Arizona Corporation Commission. In the course of the public hearings required by the ACC, several of the residents of the community of Hopeville expressed their opposition to the sale (which opposition was based primarily on issues that had arisen between the residents and the Company's Board of Directors). Ultimately, these residents filed suit against the Company, seeking, among other things, to enjoin the sale of the assets to the City. The pending litigation caused the ACC to put the proceedings for the approval of the sale on hold pending the resolution of the litigation. The City intervened in the litigation to protect its interests under the Asset Purchase Agreement.

The Company and the residents have reached an agreement to settle the pending litigation, pursuant to which the residents have agreed to withdraw their opposition to the sale of the assets to the City in exchange for the Company's agreement to transfer the net proceeds of the sale to a to-be-formed non-profit corporation to be operated for the benefit of the residents of Hopeville. **The City is a party to the Settlement Agreement both because of its status as an intervenor in the litigation and because a key element of the settlement was an agreement by the City to maintain the water rates for the Hopeville residents at their current levels for a period of five years.**

**BENEFITS:**

The proposed settlement will resolve the dispute between the Hopeville residents and the Company without further delay and will permit the ACC process for the approval of the sale of the Company's assets to again proceed, thereby removing a significant impediment to finalization of the City's acquisition of said assets.

**FUTURE ACTION:** None, other than execution of the Settlement Agreement and Release

**ATTACHMENTS:**

**Resolution No. 105-14  
Settlement Agreement and Release**

**FINANCIAL NARRATIVE:**

The Settlement Agreement should have no impact on the City financially. The water rates currently paid by the Hopeville residents are higher than the City's current rates, so the agreement to maintain rates should have no negative impact on City finances.

**CURRENT FISCAL YEAR TOTAL COST**

\$0

BUDGETED     UNBUDGETED FISCAL YEAR BUDGET (check one)    F/Y \_\_\_\_\_

**SETTLEMENT AGREEMENT AND RELEASE**

This Settlement Agreement and Release (hereinafter "Agreement") is entered into by and between the Parties (as defined below) and shall become effective on the date when the last Party (as defined below) to execute this Agreement has affixed and delivered his, her or its representative's signature (the "Effective Date").

**1. Parties**

The parties to this Agreement are:

- 1.1. Alvin Cobbins;
- 1.2. Ruby Cooper;
- 1.3. Anola Hubbert;
- 1.4. James Brown, Jr.;
- 1.5. Matilda White;
- 1.6. Georgia Land;
- 1.7. Sergio Munoz;
- 1.8. Aric Gonzalez;
- 1.9. Robert Williams;
- 1.10. Marshall Elizondo;
- 1.11. Cristina Orozco;
- 1.12. Elreece Guy;
- 1.13. Demetric Guy;
- 1.14. Lafurn Garland;
- 1.15. Albert Williams;
- 1.16. Carol Guy;
- 1.17. Ellen Berry;
- 1.18. Arthur Wilburn, Jr.;
- 1.19. Sharon Caldwell;

1.20. Ralph Wilburn;

1.21. Michael J. Ross;

1.22. Richmond Lee;

1.23. Darlene Lee;

1.24. Abraham Harris, III;

1.25. Louis Early;

1.26. Willie Wilson;

1.27. Bobby Smith;

1.28. Hopeville Water Company, Inc., a non-profit corporation organized under the laws of the State of Arizona in 1985 (“HWC”);

1.29. Hopeville Community for Progress, Inc. a non-profit corporation organized under the laws of the State of Arizona (“HCP”);

1.30. The City of Buckeye (the “City”);

1.31. The persons identified in paragraphs 1.1 through 1.23 are referred to in this Agreement as “Plaintiffs.”

1.32. The persons identified in paragraphs 1.24 through 1.27 are referred to in this Agreement as the “Individual Defendants.”

1.33. The persons and entities identified in paragraphs 1.24 through 1.29 are referred to in this Agreement as “Defendants.”

1.34. The persons and entities identified in paragraphs 1.1 through 1.30 are collectively referred to in this Agreement as the “Parties” or individually as a “Party.”

## **2. Recitals**

2.1. On or about June 27, 2013, plaintiffs Alvin Cobbins, Ruby Cooper, Anola Hubert, James Brown, Jr., Matilda White, Georgia Land, and Concerned Citizens Group of Hopeville Arizona, an unincorporated association, filed Plaintiffs’ Verified Member Derivative Complaint for 1. Breach of Fiduciary Duties; 2. Unjust Enrichment; 3. Accounting; 4. Rescission; 5. Conspiracy against defendants HWC, HCP, Abraham Harris III, Louis Early, Willie Wilson, and Bobby Smith (the “Complaint”) in the Superior Court of Arizona, Maricopa County, Case No. CV 2013-002997 (the “Action”).

2.2. The Complaint challenged and sought to enjoin HWC’s sale of its water system assets to the City as part of winding down HWC’s affairs after it was administratively dissolved by the Arizona Corporation Commission. The Complaint further alleged that the Individual

Defendants, who comprise the boards of directors of both HWC and HCP, mishandled funds and property of both companies.

2.3. On November 25, 2013, the same plaintiffs filed an Amended Complaint that dropped HCP as a defendant, but otherwise named the same defendants as in the Original Complaint (the “First Amended Complaint”).

2.4. On February 27, 2014, another Amended Complaint was filed that added the following additional plaintiffs—Sergio Munoz, Aric Gonzalez, Robert Williams, Marshall Elizondo, Cristina Orozco, Elreeca Guy, Demetric Guy, Lafurn Garland, Albert Williams, Carol Guy, Ellen Berry, Arthur Wilburn, Jr., Sharon Caldwell, Ralph Wilburn, Michael J. Ross, Richmond Lee, and Darlene Lee—but dropped Concerned Citizens Group of Hopeville Arizona, an unincorporated association, as a plaintiff, while keeping the same defendants (the “Second Amended Complaint”).

2.5. The Complaint, First Amended Complaint, and Second Amended Complaint were all derivative actions brought on behalf of HWC and/or HCP.

2.6. The City intervened in the Action based on in its interest as the prospective purchaser of HWC’s water system assets, which sale Plaintiffs sought to enjoin.

2.7. Defendants disputed Plaintiffs’ allegations of wrongdoing and further argued that Plaintiffs lack standing to bring this Action because HWC and HCP do not have “members” as that term is defined in A.R.S. § 10-3140(37); that, even assuming *arguendo* the companies did have “members” under the statute, Plaintiffs do not qualify as such; and, last, that Plaintiffs have not satisfied the requirements for bringing a derivative action under A.R.S. §§ 10-3631 and 10-3632.

2.8. On July 14, 2014, the Action was dismissed without prejudice to refile if the Plaintiffs so desired. The Plaintiffs continue to assert wrongdoing by Defendants and threatened to refile another suit against Defendants if a resolution is not reached between the Parties.

2.9. The Parties desire to settle the dispute between them on the terms and conditions set forth herein.

### **3. Overview of Settlement**

3.1. HWC was administratively dissolved by the Arizona Corporation Commission on or about October 1, 2010. Pursuant to A.R.S. § 10-11421(C), HWC’s corporate existence continues notwithstanding its administrative dissolution, but HWC may only engage in those activities necessary to wind down its affairs under A.R.S. § 10-11405. A.R.S. § 10-11405 authorizes a dissolved non-profit corporation to liquidate its assets as part of the wind-down process in order to pay its creditors and to distribute the remainder to another non-profit corporation.

3.2. By this Agreement, Plaintiffs consent to HWC proceeding with the sale of its water system assets (including, without limitation, the parcel of real property on which HWC’s well is located) to the City. This will allow HWC to convert its water system assets into cash to

pay its creditors. HWC's remaining funds after its creditors are paid will be distributed to an Arizona non-profit corporation, "Hopeville Charitable Alliance, Inc." ("HCA"), to be formed as part of this settlement. This new non-profit corporation will serve the charitable and other needs of the Hopeville community. It will be managed by a board of directors elected by its members comprised of the real property owners in Hopeville.

3.3. The assets of HCP will also be transferred to HCA to held and used for the benefit of Hopeville residents.

3.4. In consideration of the foregoing, Plaintiffs agree to release their claims against Defendants and not to sue them for the alleged wrongdoing again.

3.5. In addition to creating and funding HCA for the benefit of Hopeville, this settlement serves the community's best interests by transferring management and control of the water company to the City. The City has better resources to operate and manage the water system assets and meet the required water quality standards. The Parties believe that sale of the water system assets to the City will promote the health and safety of Hopeville residents.

#### **4. Formation of Hopeville Charitable Alliance, Inc.**

4.1. Defendants shall form HCA under the laws of the State of Arizona with Articles of Incorporation in the form attached as Exhibit 1 hereto.

#### **5. Sale of HWC's Water System Assets to the City of Buckeye**

5.1. Plaintiffs hereby consent to and approve the sale of HWC's water system assets to the City substantially on the terms and conditions set forth in the Asset Purchase Agreement (the "Sale") attached as Exhibit 2 hereto.

5.2. **As part of the Sale, as more particularly set forth in the Asset Purchase Agreement, the City agrees to maintain water rates for Hopeville residents at current (i.e., August, 2014) levels for a period of five (5) years.**

5.3. Plaintiffs agree not to directly or indirectly oppose, undermine, or otherwise interfere with (a) HWC's application to the Arizona Corporation Commission for an order authorizing the sale of HWC's water system assets to the City or (b) the consummation by HWC and the City of the sale of such assets to the City.

5.4. The proceeds from the Sale shall be placed into escrow with instructions to the escrow agent to:

- a. Pay HWC's debts listed in Exhibit 3 hereto; and
- b. Distribute the remaining proceeds to HCA.

#### **6. Option to Purchase 15 Acres of Land**

6.1. Abraham Harris, III shall execute and deliver the quitclaim deed attached as

Exhibit 4 hereto transferring the real property described therein (the "Property") that was previously held by HCP back to HCP.

6.2. As part of the Sale, HCP has entered into the Real Estate Purchase Option Agreement (the "Option") with the City attached as Exhibit 4 hereto. The Option grants the City the right to purchase the Property at the price and subject to the terms and conditions stated therein.

6.3. Plaintiffs hereby consent to and approve the Option and agree not to directly or indirectly oppose, undermine or otherwise interfere with the City's acquisition of the Property pursuant to the Option, including without limitation in any proceedings before the State Land Department relating thereto.

6.4. After Abraham Harris, III transfers the Property back to HCP, HCP shall execute and deliver the quitclaim deed attached as Exhibit 5 hereto transferring the Property to Hopeville Charitable Alliance, Inc.

6.5. HCA shall take the Property subject to the Option and HCA and HCP shall execute an assignment and assumption agreement, whereby HCA shall succeed to the rights and obligations of HCP under the Option, in a form reasonably acceptable to the City.

## **7. Mutual Global Releases**

7.1. Plaintiffs, on behalf of themselves and their predecessors, successors, parents, subsidiaries, affiliates, assigns, transferees, representatives, directors, officers, employees, shareholders, members, partners, principals, agents, attorneys, trustees, heirs and beneficiaries (collectively "Plaintiffs and Related Parties"), hereby release all direct and indirect claims, actions, causes of action, suits, debts, sums of money, accounts, covenants, contracts, agreements, representations, warranties, damages, injuries, liabilities and demands whatsoever, whether known or unknown, contingent or fixed, legal or equitable, liquidated or unliquidated, which Plaintiffs and Related Parties ever had, now have, hereafter can, shall or may have against Defendants (excluding HCP) and their predecessors, successors, parents, subsidiaries, affiliates, assigns, transferees, representatives, directors, officers, employees, shareholders, members, partners, principals, agents, attorneys, trustees, heirs and beneficiaries (collectively "Non-HCP Defendants and Related Parties") from the beginning of time through the Effective Date. Plaintiffs further covenant not to sue the Individual Defendants in the future based on any fact, event, or circumstance in any way related to the Individual Defendants' involvement in, management of, or actions with respect to HWC.

7.2. Defendants and Related Parties hereby release all direct and indirect claims, actions, causes of action, suits, debts, sums of money, accounts, covenants, contracts, agreements, representations, warranties, damages, injuries, liabilities and demands whatsoever, whether known or unknown, contingent or fixed, legal or equitable, liquidated or unliquidated, which Defendants and Related Parties ever had, now have, hereafter can, shall or may have against Plaintiffs and Related Parties from the beginning of time through the Effective Date.

7.3. Plaintiffs and Related Parties hereby absolutely, forever and fully, generally and specifically, release and discharge the City and its present and former agents, independent

contractors, employees, elected or appointed officials, officers, attorneys, insurers, predecessors, successors and assigns and each of them, from any and all claims, contentions, rights, debts, liabilities, demands, obligations, costs, expenses (including, without limitation, attorneys' fees), liens, subrogation rights, indemnification rights, damages, losses, actions and causes of action whether known or unknown, suspected or unsuspected, fixed or contingent, matured or unmatured, which arise from or relate to the Action, including any issues or claims that were or could have been asserted in the Action.

## 8. Other Terms and Conditions

8.1. No Admission of Fault or Liability. The Parties expressly acknowledge and agree that neither this Agreement, nor any action taken pursuant thereto, constitutes nor shall be construed to constitute, any admission of fault (including, specifically, unethical conduct or professional negligence or misconduct) or liability of any kind whatsoever on the part of any of the Parties or Related Parties hereby released. The Parties agree that each Party and their Related Parties do not admit any unethical conduct or professional negligence or any liability to any of the other Parties, and that each Party specifically denies that its conduct or that of any of its Related Parties was improper or caused any other Party any damage.

8.2. Modification in Writing. This Agreement, including this paragraph, may be modified only by written agreement signed by the Parties hereto.

8.3. Arizona Law. This Agreement shall be governed, construed and enforced in accordance with the laws of the State of Arizona (without regard to principles of conflict of laws).

8.4. Severability. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

8.5. Additional Acts. At any time, upon request by any of the Parties hereto, each of the other Parties shall perform any additional acts and execute any additional documents that may be reasonably necessary to carry out the intent of this Agreement.

8.6. Entire Agreement. This Agreement constitutes the entire agreement among the Parties and supersedes and replaces all prior negotiations and any proposed agreements. The Parties, and each of them, acknowledge that they have not executed this Agreement in reliance on any promise, representation or warranty not contained herein.

8.7. Authority to Sign. Each Party expressly and severally represents and warrants that it is authorized to enter into this Agreement and that the person signing on behalf of that Party is authorized to do so, and that this Agreement, when executed, is a binding obligation of, and enforceable against, such Party in accordance with its terms.

8.8. Attorneys' Fees. In the event there are disputes or litigation arising out of or related to this Agreement, the parties agree that the court shall award the successful party in the dispute attorneys' and expert witness fees, costs and other litigation expenses.

8.9. Cancellation. This Agreement is subject to A.R.S. § 38-511.

8.10. Counterpart Signatures. This Agreement and any other document related to this Agreement may be executed in any number of counterparts and by different Parties on separate counterparts, each of which, when executed and delivered, shall be deemed to be an original, and all of which, when taken together, shall constitute but one and the same Agreement or document. Delivery of an executed counterpart of this Agreement or any such document by facsimile or email shall be equally as effective as delivery of a manually executed counterpart of this Agreement or any such document. Any Party delivering an executed counterpart of this Agreement or any such document by facsimile or email shall also deliver a manually executed counterpart of this Agreement or any such document but the failure to deliver a manually executed counterpart shall not affect the validity, enforceability, and binding effect of this Agreement or any such document.

**[Signatures begin on next page]**