

TO: City Council
FROM: James L. App, City Manager
SUBJECT: **13th Street Bridge Project – Right-of-Way Acquisition:
Litigation Settlement – Eminent Domain; W. & D. Heer**
DATE: April 6, 2004

NEEDS: For the City Council to ratify Settlement of an Eminent Domain Property Acquisition action between the City and W. & D. Heer.

- FACTS:**
1. The City is expanding the 13th Street Bridge as well as portions of the arterial roads at its eastern terminus.
 2. The expansion requires the acquisition of a portion of six private properties.
 3. Five of the six acquisitions have been accomplished through negotiated sales and purchase agreements. The sixth (a portion of the W. & D. Heer property) required filing of an eminent domain action.
 4. Subsequent to the filing, the parties entered into settlement discussions. The City Council authorized the City Attorney and City Manager to settle the matter.
 5. A settlement agreement has been executed consistent with the Council's authorization and the property is being acquired.

ANALYSIS &

CONCLUSION: The bridge expansion project is identified in the City's Circulation Plan as a critical transit corridor. Its improvement, along with expansion of the arterial roads that intersect its eastern terminus, is essential to effecting safe and efficient transit.

The project has three design objectives: (1) achieve traffic congestion relief, (2) improve public/traffic safety, and (3) realize cost/benefit from the improvements. These objectives resulted in a design that will significantly relieve congestion and improve public safety, while requiring the acquisition of a portion of six private properties. In some cases, entire parcels were acquired consistent with the property owner's interests, and, because doing so would eliminate the possibility of future uses that could compromise the congestion relief or public safety features of the project.

A portion of the private property located at the northeast corner of 13th Street/Creston Road and River Road (owned by W. & D. Heer) was needed for public right-of-way. The City was unable to negotiate acquisition of the needed right-of-way so it was necessary to seek acquisition via an eminent domain action. Subsequent to the eminent domain filing, settlement was reached resulting in acquisition of the entire parcel.

POLICY

REFERENCE: General Plan Circulation Element; 1998 Bond Measure; Capital Projects Budget.

FISCAL

IMPACT: \$720,000 from the Bridge Capital Project Budget.

OPTIONS:

A. Ratify the Settlement Agreement and Acquisition of the W. & D. Heer Property for the 13th Street Bridge Expansion Project.

B. Amend, Modify or Reject Option Above.

Attachment: Settlement Agreement

RESOLUTION NO. 04-

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES
ACCEPTING A DEED TO CERTAIN PROPERTY AND AUTHORIZING AND
DIRECTING THE CITY CLERK TO RECORD THE SAME WITH THE
RECORDER OF THE COUNTY OF SAN LUIS OBISPO

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO DE ROBLES
AS FOLLOWS:

SECTION 1. The City of El Paso de Robles does hereby accept the deed to certain property within the City executed by Donna Heer on March 8, 2004. A true and correct copy of the deed is attached hereto as Exhibit "A" and hereby incorporated by reference.

SECTION 2. The City Clerk is hereby authorized and directed to record the deed in the office of the County Recorder of the County of San Luis Obispo. The City Clerk may utilize the services of a land title company to effectuate the recording by delivering a certified copy of this resolution to the title company for presentation to the County Recorder together with the original deed.

PASSED AND ADOPTED by the City Council of the City of Paso Robles this 6th day of April 2004 by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

Frank R. Mecham, Mayor

ATTEST:

Sharilyn M. Ryan, Deputy City Clerk

SETTLEMENT AGREEMENT, WAIVER AND RELEASE

This Settlement Agreement, Waiver and Release ("Agreement") is made by and between WALTER N. HEER, an individual ("Mr. Heer") and the CITY OF EL PASO DE ROBLES, a municipal corporation ("City") and sets forth the terms upon which they have agreed to resolve their differences. The effective date of this Agreement is the latest date of signature on the last page of the Agreement.

RECITALS

A. Mr. Heer had or has an ownership interest in that certain real property located in the City of El Paso de Robles, County of San Luis Obispo, and commonly described as 101 Creston Road and APN 009-401-018 (the "Property").

B. The City desires to widen and improve the 13th Street Bridge in the City of El Paso de Robles (the "Project"). The Project requires the City to acquire a portion of the Heer Property.

C. The City filed an action in eminent domain in the Superior Court of San Luis Obispo County, entitled *City of El Paso de Robles v. Heer et al.*, Case No. CV-03-0657, on June 27, 2003, (the "Action") to acquire a portion of the Property in fee along with a slope easement and a temporary construction easement. Upon the filing of the Action, the City deposited the amount of probable compensation with the State Treasurer's Office (the "Deposit").

D. Pursuant to a separate settlement agreement with Donna L. Heer ("Ms. Heer"), Mr. Heer has conveyed or intends to convey all of his ownership interest in the Property to Ms. Heer.

AGREEMENTS

1. Disclaimer of Interest in Action. Mr. Heer agrees that, concurrently with the execution of this Agreement, he shall execute a Disclaimer of Interest in the Action, in the form attached hereto as Exhibit A and incorporated herein by reference.

2. Waiver of Compensation. Mr. Heer hereby freely and voluntarily, and with full knowledge thereof, waives any right to compensation for any interest he has or had in the Property or the Deposit, and agrees that any and all proceeds resulting from the Action or the

sale of the Property shall be paid to Donna L. Heer. Mr. Heer understands and acknowledges, pursuant to a settlement agreement between Ms. Heer and the City, that the City will be acquiring the entire Property.

3. Release. In consideration of the respective rights and obligations of the parties pursuant to this Agreement, Mr. Heer hereby completely releases, waives, and forever discharges the City, its agents, employees, officers, and other representatives from any and all claims (including demands, obligations, actions, causes of action of any nature or legal theory whatsoever, damages, attorneys' fees, costs, suits, liabilities, and expenses), which Mr. Heer has now, or which hereafter may accrue or are otherwise acquired, on account of, or in any way resulting from the Action or City's acquisition of the Property and/or any claim by Mr. Heer against the City for damages resulting from the Action or the City's acquisition of the Property.

4. General Release. Mr. Heer is aware of, and waives the provisions and protections of, California Civil Code section 1542, which reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

5. Costs. Each party shall bear its own costs, attorneys' fees, litigation expenses and other fees and costs incurred in connection with the negotiation, preparation and execution of this Agreement or in the prosecution or defense of the Action.

6. Informed Consent. Each party declares that prior to the execution of this Agreement, it and/or its duly authorized representatives have apprised themselves of sufficient relevant data in order to intelligently exercise their judgment in deciding whether to execute, and in deciding the contents of, this Agreement. Each party states that this Agreement is entered into freely and voluntarily.

7. Integrated Agreement; Applicable Law; Venue; Attorney's Fees. This Agreement contains the full and complete understanding of the parties, and all changes or amendments hereto shall be in writing, signed by both parties. This Agreement is made pursuant to the laws of the State of California. Any action to enforce all or any provision hereof, or to collect any damages in connection with the breach hereof, shall be brought within a court of competent

jurisdiction in the County of San Luis Obispo, with all parties to bear their own costs, attorneys' fees and other litigation expenses.

8. Construction. The drafting and negotiations of the terms in this Agreement have been participated in by each of the parties or their counsel and for all purposes of this Agreement shall be deemed to have been drafted jointly by both parties.

9. Recitals in Captions. The recitals on the first page of this Agreement are hereby incorporated into and made a part of this Agreement.

10. Authority to Sign Agreement. Each party warrants that the person (or persons) whose signatures appear at the bottom of this Agreement on behalf of the party has (or have) the full and complete authority to sign this Agreement and to bind the party on whose behalf the Agreement is signed to its terms and conditions.

11. Notice. For purposes of giving any notice required by this Agreement or communicating with the other party, the parties may be contacted as set forth below. Service of any notice or correspondence may be by certified mail, hand delivery, express mail (i.e. Federal Express or equivalent), facsimile transmission, or any other method of giving written notice generally accepted by the business community.

CITY:

City of El Paso de Robles
City Manager
1000 Spring Street
Paso Robles, CA 93446

MR. HEER:

Walter N. Heer
4740 Tower Road
Paso Robles, CA 93446

12. Successors and Representatives. This Agreement shall bind and inure to the benefit of each party and each party's agents, representatives, employees, beneficiaries, officers, directors, predecessors, successors and assigns.

13. Further Actions and Documents. Each party shall take such further actions and shall execute, acknowledge and deliver to the other party any documents as may be necessary in order to carry out this Agreement.

This Agreement is executed by the parties on the dates shown next to their respective signatures.

Dated: March 1, 2004

WALTER N. HEER, an individual

By: Walter N Heer
Walter N. Heer

APPROVED AS TO FORM:

By: [Signature]
Thomas D. Green, Esq..
Attorney for Walter N. Heer

Dated: March 8, 2004

CITY OF EL PASO DE ROBLES, a
municipal corporation

By: [Signature]
James L. App
City Manager

APPROVED AS TO FORM:

Iris P. Yang
Iris P. Yang, Esq.
City Attorney

ATTEST:

[Signature]
Sharilyn M. Ryan
Deputy City Clerk

SETTLEMENT AND RELEASE AGREEMENT

This Settlement Agreement and Release ("Agreement") is entered into this 9th day of March, 2004, by and between the City of El Paso de Robles ("City"), a California municipal corporation, and Donna L. Heer ("Ms. Heer"), an individual, as to all claims they have or may have against each other as set forth below. The effective date of this Agreement is the latest date of signature on the last page of the Agreement.

RECITALS

A. Ms. Heer has an ownership interest in that certain real property located in the City of El Paso de Robles, County of San Luis Obispo, commonly described as 101 Creston Road and APN 009-401-018, and legally described in Exhibit A, attached hereto (the "Property").

B. The City desires to widen and improve the 13th Street Bridge in the City of El Paso de Robles ("the Project"). The Project requires the City to acquire a portion of the Property.

C. The City filed an action in eminent domain in the Superior Court of San Luis Obispo County, entitled *City of El Paso de Robles v. Heer et al.*, Case No. CV-03-0657 on June 27, 2003, (the "Action") to acquire a portion of the Property in fee along with a slope easement and a temporary construction easement. Upon the filing of the Action, the City deposited the probable amount of compensation with the State Treasurer's Office.

D. City and Ms. Heer desire to settle the pending Action between themselves with respect to issues that have been, or could at any subsequent time be, raised by making and executing this Agreement.

AGREEMENTS

1. Condition to Agreement. This Agreement is expressly conditioned upon the execution of both a (i) Settlement, Waiver and Release; and (ii) Disclaimer of Interest in the Action by Walter N. Heer, who is a defendant in the Action, in a form satisfactory to City.

2. Settlement Amount. The parties agree that the City shall acquire the entire Property. In full and complete settlement of all claims in the Action and all other matters arising out of such Action, as described further below, the City agrees to pay Ms. Heer SEVEN HUNDRED TWENTY THOUSAND DOLLARS (\$720,000) (the "Settlement Amount"). This Settlement Amount represents full and complete compensation for (i) the entire Property and any improvements thereon; (ii) any and all expenses for relocating and moving of Ms. Heer and any other persons residing on the Property and their personal property; (iii) any and all expenses

and costs incurred by Ms. Heer arising out of the Action or this Agreement, including attorneys' fees and costs; (iv) any costs necessary to convey title to the Property to the City in the condition required by Section 3 below; and (v) any and all other claims or demands that could have arisen out of the Action. The City shall pay for the costs of transfer stamps, title insurance, escrow fees, costs of recordation and any other miscellaneous closing costs. Ms. Heer warrants and represents that she is unaware of any other party or parties who claim an interest in the Property or any goodwill that is the subject of the Action, other than Walter N. Heer ("Mr. Heer").

Both parties agree that City's consultant, Karen Eddleman, has been providing relocation assistance to Ms. Heer. The parties further agree that the City, based on information provided by Ms. Eddleman, has previously advanced certain moving and related expenses to or on behalf of Ms. Heer and/or Ray Alexander, who has been residing on the Property. Both parties further agree that any and all monies paid by City prior to the conveyance of the Property to the City for relocation and moving expenses of Ms. Heer and/or Ray Alexander shall reduce the total amount to be deposited into escrow by City, as set forth herein. City shall have no obligation to advance any funds to Ms. Heer other than as requested and verified by Ms. Eddleman. Both parties further agree that City shall deposit the Settlement Amount, less all amounts advanced, into an escrow account for the conveyance of the Property.

3. Conveyance of Property. Promptly after execution of this Agreement, the parties shall open escrow with Fidelity National Title Company, 704 Spring Street, Paso Robles, California, for the conveyance of the Property to City. Fee simple title to the Property shall be conveyed to the City free and clear of all recorded liens, encumbrances, assessments, leases and taxes, except as specifically approved by City in writing. Other than the costs to be separately paid by the City, as specified in Section 2 above, the parties agree that the escrow agent shall be authorized to deduct out of the monies deposited by City any and all fees and costs specified in Section 2., above, that are necessary to convey title to the Property to City. The parties further agree that they will take any actions and execute any documents necessary in order for escrow to close no later than March 1, 2004, unless otherwise agreed by the parties in writing. Upon the close of escrow for the conveyance of the Property to City, City shall file a dismissal of the Action.

4. Return of Probable Compensation; Dismissal of Action. Both parties agree that on or about June 27, 2003, the City deposited the amount of TWO HUNDRED SEVENTY-

EIGHT THOUSAND DOLLARS (\$278,000) (the "Deposit") with the State Treasurer, which amount was the probable amount of compensation for the acquisition of the portion of the Property the City sought to acquire in the Action. Ms. Heer understands and agrees that upon execution of this Agreement by both parties, City intends to withdraw the Deposit from the State Treasurer, and any interest earned thereon, and Ms. Heer agrees that the City may obtain an order from the Court allowing such withdrawal without further notice. Ms. Heer disclaims any interest in or entitlement to any portion of the Deposit or any interest earned thereon.

5. Release. In consideration of the respective rights and obligations of the parties pursuant to this Agreement, and excepting only the rights and obligations set forth in this Agreement, Ms. Heer hereby completely releases, waives, and forever discharges the City, its agents, employees, officers, and other representatives from any and all claims (including demands, obligations, actions, causes of action of any nature or legal theory whatsoever, damages, attorneys' fees, costs, suits, liabilities, and expenses), which Ms. Heer has now, or which hereafter may accrue or are otherwise acquired, on account of, or in any way resulting from the Action or City's acquisition of the Property and/or any claim by Ms. Heer against the City for damages resulting from the Action or City's acquisition of the Property, beyond that for which City has herein agreed to pay Ms. Heer, as identified in section 1, above.

6. General Release. Ms. Heer is aware of, and waives the provisions and protections of, California Civil Code section 1542, which reads as follows:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

7. Duty to Perform Acts. Both parties shall in good faith and in an expeditious manner execute such documents and perform such acts as are necessary to accomplish the things required by this Agreement.

8. No Admission of Liability. Nothing herein shall be construed as an admission on the part of any of the parties of any claims asserted by the other party.

9. Informed Consent. Each party declares that prior to the execution of this Agreement, it and/or its duly authorized representatives have apprised themselves of sufficient relevant data in order to intelligently exercise their judgment in deciding whether to execute, and

in deciding the contents of, this Agreement. Each party states that this Agreement is entered into freely and voluntarily.

10. Construction. The drafting and negotiations of the terms in this Agreement have been participated in by each of the parties or their counsel and for all purposes of this Agreement shall be deemed to have been drafted jointly by both parties.

11. Integrated Agreement; Applicable Law; Venue; Attorney's Fees. This Agreement contains the full and complete understanding of the parties, and all changes or amendments hereto shall be in writing, signed by both parties. This Agreement is made pursuant to the laws of the State of California. Any action to enforce all or any provision hereof, or to collect any damages in connection with the breach hereof, shall be brought within a court of competent jurisdiction in the County of San Luis Obispo, with all parties to bear their own costs, attorneys' fees and other litigation expenses.

12. Recitals in Captions. The recitals on the first page of this Agreement are hereby incorporated into and made a part of this Agreement.

13. Authority to Sign Agreement. Each party warrants that the person (or persons) whose signatures appear at the bottom of this Agreement on behalf of the party has (or have) the full and complete authority to sign this Agreement and to bind the party on whose behalf the Agreement is signed to its terms and conditions.

14. No Prior Assignment. The parties represent and warrant that they have not previously assigned or transferred, or purported to assign or transfer, to any person or entity any claim or other matter released in this Agreement.

15. Notice. For purposes of giving any notice required by this Agreement or communicating with the other party, the parties may be contacted as set forth below. Service of any notice or correspondence may be by certified mail, hand delivery, express mail (i.e. Federal Express or equivalent), facsimile transmission, or any other method of giving written notice generally accepted by the business community.

CITY:

City of El Paso de Robles
City Manager
1000 Spring Street
Paso Robles, CA 93446

MS. HEER:

Donna L. Heer
101 Creston Road,
Paso Robles, CA 93446

16. Successors and Representatives. This Agreement shall bind and inure to the benefit of each party and each party's agents, representatives, employees, beneficiaries, officers, directors, predecessors, successors and assigns.

This Agreement is executed by the parties on the dates shown next to their respective signatures.

Dated: April, 2004

DONNA L. HEER, an individual

By: Donna L. Heer
Donna L. Heer

APPROVED AS TO FORM:

By: Thomas D. Green, Esq.
Thomas D. Green, Esq.
Attorney for Donna L. Heer

Dated: April 8, 2004

CITY OF EL PASO DE ROBLES, a
municipal corporation

By: James L. App
James L. App
City Manager

APPROVED AS TO FORM:

Iris P. Yang
Iris P. Yang
City Attorney

ATTEST:

Sharilyn M. Ryan
Sharilyn M. Ryan
Deputy City Clerk

1 McDONOUGH HOLLAND & ALLEN PC
Attorneys at Law
2 STACEY N. SHESTON, ESQ. (CA #186016)
G. RICHARD BROWN, ESQ. (CA #050203)
3 555 Capitol Mall, 9th Floor
Sacramento, California 95814
4 Phone: 916.444.3900
Fax: 916.444.8334

5
6 Attorneys for Plaintiff
City of El Paso De Robles
7

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN LUIS OBISPO**

10 CITY OF EL PASO DE ROBLES,
a public body, corporate and politic,
11
12 Plaintiff,

13 vs.

14 WALTER N. HEER et al.,
15 Defendants

) Case No. CV 03-0657

) **DISCLAIMER OF INTEREST AS TO**
) **WALTER N. HEER**

16 Pursuant to Section 1250.325 of the Code of Civil Procedure, Defendant Walter N. Heer, an
17 individual, hereby disclaims any interest in the property described in Plaintiff's complaint. Walter N.
18 Heer hereby waives any right, title or possession in the property for which this action has been filed.
19 Walter N. Heer further disclaims any interest in the compensation that may be awarded in the above-
20 entitled proceeding.

21 Walter N. Heer further understands that he has no right to participate in further proceedings
22 or to share in any compensation awarded after filing this disclaimer. No fees and/or costs shall be
23 awarded to or against Walter N. Heer in this proceeding.

24 DATED: January 6, 2004

25 WALTER N. HEER, an individual

26
27 *Walter N Heer*
28 _____