

RESOLUTION NO. 2312

A RESOLUTION OF THE CITY OF WILSONVILLE AUTHORIZING ACQUISITION OF PROPERTY INTEREST RELATED TO THE CONSTRUCTION OF WEST SIDE WATER RESERVOIR(S)

WHEREAS, under and by virtue of the laws of the State of Oregon, the City of Wilsonville is duly authorized and empowered to acquire such real property as may be deemed necessary and proper for identified public improvements; and

WHEREAS, the City's Water System Master Plan, adopted by Ordinance No. 531 on January 24, 2002 identifies the need for B level reservoir storage on the west side of the City; and

WHEREAS, the City's engineering division is currently updating this Master Plan, has confirmed the above need still exists, and has determined the need can be met through the construction of two 3 mgd reservoirs, with the first to be constructed within the near term and the second to be constructed as demand increases; and

WHEREAS, a minimum of four to eight acres of property is needed to accommodate these two reservoirs, depending on topography and dimensions of the property; and

WHEREAS, these reservoirs need to be constructed to match existing hydraulic limitations of existing B level reservoirs, specifically an approximate base elevation of 350 feet and a maximum overflow elevation of 400.5 feet; and

WHEREAS, all land on the west side of the City within City limits is at an elevation lower than 350 feet; and

WHEREAS, a water tower of extreme height and diameter would be required to accommodate this reservoir within City limits; and

WHEREAS, City staff has expanded its property search to properties outside of the City limits that meet the elevation requirements and which are at least four acres in size; and

WHEREAS, this property search led to the initial consideration of twenty-three properties to the west of the City; and

WHEREAS, this initial list was narrowed down to nine viable properties with varying benefits and constraints; and

WHEREAS, one of these properties (the "Property") best meets criteria that include proximity to city limits, elevation, property size, willing seller, and preferred zoning designation; and

WHEREAS, Clackamas County land use approvals will be required to permit construction of these reservoir tanks and the Property currently under consideration is in the Rural Residential Farm Forest (RRFF) 5 zoning classification, under which such improvements would be more favorably perceived than on neighboring Exclusive Farm Use (EFU) zoned properties; and

WHEREAS, this Property is currently listed for sale and the price was recently reduced to \$650,000; and

WHEREAS, if constructed on this Property, the reservoirs would stand between twenty and thirty feet above ground, which is comparable to the height of existing barn improvements on the Property, and this height would not obstruct any neighbor's views; and

WHEREAS, the City's 2011-12 budget includes Project 1065: West Side Level B Reservoir Site & Offsite Improvements, with an allocation of \$855,000 funded from Water SDCs, to fund due diligence efforts and property acquisition; and

WHEREAS, City staff has been advised by the broker that other parties have expressed interest in purchasing the Property; and

WHEREAS, City staff would like to enter into an Option to Purchase Agreement and Contingent Purchase and Sale Agreement ("OPSA") that will allow the City to perform due diligence and also determine whether the County will approve this Property for location of the reservoirs before the City purchases the Property; and

WHEREAS, time is of the essence in presenting a proposal to secure an option to purchase this Property subject to necessary due diligence and County land use approval.

NOW, THEREFORE, THE CITY OF WILSONVILLE RESOLVES AS FOLLOWS:

1. There is needed and required, for the public purpose of providing water storage on the west side of the City, acquisition of property interest of the Property identified in Exhibit A attached hereto and incorporated herein by this reference.
2. The property interest is required as a result of the aforementioned public improvement, and the improvement has been planned and located in a manner most compatible with the greatest public good and the least private injury.
3. City staff and attorneys are authorized to present the owners and their realtor a draft Option to Purchase Agreement and Contingent Purchase and Sale Agreement (OPSA), a copy of which is attached hereto as Exhibit B.

4. The City Manager is authorized to negotiate the OPSA with the Sellers and to make reasonable modifications, as approved by the City Attorney and as necessary and customary in real estate transactions. If any major modifications are requested, the City Manager will present those proposed changes to the City Council prior to execution of the OPSA.

5. Should the required due diligence efforts result in an executed OPSA, City staff is authorized to seek land use approval through Clackamas County for construction of one or two reservoirs.

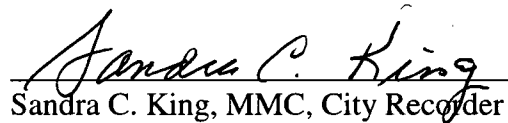
6. Upon receipt of required Clackamas County land use approvals, City staff and attorneys are authorized to complete acquisition of this Property in accordance with the terms of the OPSA.

7. This resolution is effective upon adoption.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof this 1st day of August, 2011 and filed with the Wilsonville City Recorder this date.


TIM KNAPP, MAYOR

ATTEST:


Sandra C. King, MMC, City Recorder

SUMMARY OF VOTES:

Mayor Knapp	Yes
Council President Núñez	Yes
Councilor Hurst	Yes
Councilor Goddard	Excused
Councilor Starr	Yes

Attachments:

Exhibit A - Property Description

Exhibit B - Option to Purchase Agreement and Contingent Purchase and Sale Agreement (OPSA)

**OPTION TO PURCHASE AGREEMENT
AND CONTINGENT PURCHASE AND SALE AGREEMENT**

Sellers: Stephan M. McReynolds and
 Susan C. McReynolds

Buyer: City of Wilsonville, Oregon
 29799 SW Town Center Loop E
 Wilsonville OR 97070

1. **Purchase and Sale.** Sellers desire to sell to Buyer and Buyer desires to purchase from Sellers the improved real property, consisting of approximately seven (7) acres of land and legally described on **Exhibit A**, attached hereto and incorporated by reference herein (the "Property").

2. **Purchase Price.** Subject to verification by appraisal during the Due Diligence Period, set forth below, the Purchase Price for the Property will be Six Hundred Fifty Thousand Dollars (\$650,000). The Purchase Price includes all improvements on the Property and all fixtures contained therein, including kitchen stove and refrigerator.

3. **Title Report.** _____ (the "Escrow Agent") has prepared a preliminary title report (the "Preliminary Report") for the Property dated _____. Sellers agree to convey the Property to Buyer subject only to exceptions _____, as described in the Preliminary Report ("Permitted Exceptions"). All other title exceptions will be removed by Sellers prior to the Closing Date (defined below).

4. **Purchase Contingencies.** The purchase of the Property is contingent upon the City's ability to locate two (2) reservoirs on the Property. In order to do so, the City must perform Due Diligence on the Property to ensure the site will allow for the required construction and the City must also obtain non-appealable authority from Clackamas County to build the reservoirs on the Property. In order to determine if the reservoirs can be built and permitted on the Property the parties desire to enter into this Option to Purchase Agreement and Contingent Purchase and Sale Agreement.

5. **Option Period and Option Fee.** Buyer will have a six (6) month period in order to obtain the required approval of Clackamas County, Oregon to build the reservoirs on the Property ("Option Period"). Sellers agree to fully cooperate in and sign the application to the County for permission to build the reservoirs on the Property. In consideration for the Option Period, Buyer will pay Sellers the sum of Thirty Thousand Dollars (\$30,000) as an Option Fee, to be paid to Sellers upon expiration of the Due Diligence Period described below. If Buyer buys the Property, the Thirty Thousand Dollars (\$30,000) will be applied to the Purchase Price. If

Buyer does not purchase the Property for any reason and such failure to purchase is not caused by a default by Sellers, Sellers will be entitled to keep the Option Fee. If the application process exceeds six (6) months, or the County approval is appealed, Buyer will have the right to purchase a Second Option Period of an additional six (6) months. In consideration for the Second Option Period, Buyer will pay Sellers an additional sum of Thirty Thousand Dollars (\$30,000) as a Second Option Fee, to be paid to Sellers upon exercise of the Second Option Period, which exercise must occur before the expiration of the original Option Period. If Buyer buys the Property, the Sixty Thousand Dollar (\$60,000) total of both Option Fees will be applied to the Purchase Price. If Buyer does not purchase the Property for any reason and such failure to purchase is not caused by a default by Sellers, Sellers will be entitled to keep the full Sixty Thousand Dollars (\$60,000) paid as Option Fees.

6. Condition Precedent to Payment of Option Fee. Within forty-five (45) days of the date that both parties sign this Agreement ("Due Diligence Period"), Buyer shall have the right to enter the Property, upon reasonable notice to Sellers and as necessary, to conduct the following "Due Diligence":

(a) Buyer shall be entitled to conduct a Phase 1 environmental assessment of the Property and if recommended by the Phase 1, then a Phase 2 follow-up study. If a Phase 2 is recommended, the Due Diligence Period will be extended to ninety (90) days. Sellers will be entitled to a copy of the Phase 1 report and the Phase 2 report, if a Phase 2 report is generated.

(b) Buyer shall be entitled to conduct a geotechnical study of the Property to ensure the topography of the Property and the Property soils will be conducive to the installation of the reservoirs.

(c) Buyer shall be entitled to survey the Property. A copy of the survey will be provided to Sellers.

(d) Buyer shall be entitled to conduct a home and outbuilding inspection of the Property. A copy of the inspection report will be provided to Sellers.

(e) Buyer shall be entitled to conduct a well and septic inspection. A copy of the inspection report will be provided to Sellers.

If Buyer is satisfied with the results of the Due Diligence, Buyer will pay the first Option Fee to Sellers. If Buyer fails to pay the Option Fee before the expiration of the Due Diligence Period, this Agreement will terminate without liability to either party, except the Buyer will be required to restore the Property to its pre-inspection condition, if Buyer has not already done so.

7. Other Conditions Precedent to Purchase. Buyer's obligation to close the purchase of the Property shall be subject to and conditioned upon the required approval of Clackamas County, Oregon to build the reservoirs on the Property. Buyer's obligation to close the purchase of the Property shall also be subject to and conditioned upon Sellers' ability to convey the Property to Buyer subject only to the Permitted Exceptions and the accuracy of Sellers' representations and warranties made in this Agreement as of the Closing Date. Sellers shall have

until the Closing Date to cause the extinguishment of all title exceptions, other than the Permitted Exceptions.

8. Representations and Warranties. Sellers represent and warrant to Buyer that:

(a) The Property is not in violation of any agreements, covenants, conditions or restrictions affecting the Property.

(b) Sellers have received no notice from any governmental agency having jurisdiction in the matter of any violation of any statute, law, ordinance, deed restriction, or rules or regulations with respect to the existence, construction, maintenance, or operation of the Property.

(c) Neither Seller is a foreign person within the meaning of Section 1445 of the Internal Revenue Code of 1986 and, at closing, Sellers shall deliver a certification to this effect to Buyer.

(d) There are no material hidden or latent defects that exist in or on the Property.

(e) There are no underground storage tanks located on the Property. Sellers have no knowledge of any underground storage tank that was located on the Property but has been removed, unless otherwise set forth in Sellers' Property Disclosure Form, attached hereto as **Exhibit B** and incorporated by reference herein.

(f) During Sellers' ownership of the Property there have been no releases, disposals, or burials of any Hazardous Substance on the Property and Sellers know of no prior release, disposal, or burial of any Hazardous Substance on the Property. As used herein "Hazardous Substance" shall mean any and all substances defined or designated as hazardous, toxic, radioactive, dangerous, or regulated wastes or materials, or any other similar term in or under any applicable Environmental Laws. Hazardous Substance shall also include fuels, petroleum, and petroleum-derived products. "Environmental Laws" shall mean any and all federal, State of Oregon, and local laws, regulations, rules, permit terms, codes, and ordinances now or hereafter in effect, as the same may be amended from time to time, and applicable decision law, which govern materials, substances, regulated wastes, emissions, pollutants, animals or plants, noise, or products and/or relate to the protection of health, natural resources, safety, or the environment.

(g) There are no actions, claims, or proceedings pending or, to Sellers' knowledge, threatened by any party against Sellers in connection with the Property or against the Property, nor to Sellers' knowledge is there any basis for any such action or proceeding.

(h) At the Closing Date, there will be no unpaid or deferred property taxes.

(i) Sellers have the legal power, right, and authority to enter into this Agreement and to consummate the transactions contemplated herein. The individuals executing this instrument on behalf of Sellers have the legal power, right, and actual authority to bind Sellers to the terms and conditions of this Agreement.

(j) The foregoing representations and warranties are true and correct as of the date of this Agreement and shall be true and correct at closing. These representations and warranties shall survive the closing and be fully enforceable thereafter.

9. Closing, Escrow, Prorates. If the Purchase Contingencies set forth in Paragraph 4 above have been timely satisfied or waived, the purchase and sale of the Property shall close on a date no later than ten (10) days after the expiration of any appeal period of the County's approval of the Property as the location for the reservoirs, assuming such approval is granted ("Closing Date"). The purchase of the Property shall be closed in escrow by the Escrow Agent. Prior to the Closing Date, each party will deposit with the Escrow Agent the funds, documents, and instructions necessary for closing. The cost of the escrow shall be shared by Buyer and Sellers. Current real property taxes on the Property will be prorated between the parties as of the Closing Date. Buyer shall be entitled to possession of the Property on the Closing Date. Sellers will pay any farm deferred taxes. Sellers will provide Buyer with a Statutory Warranty Deed and will purchase a Standard Owner's Policy of Title Insurance with Buyer as the insured.

10. Broker. The parties represent and warrant to one another that David Giambone is the listing agent representing Sellers in this transaction and that Buyer is acting without representation from a real estate broker or salespersons.

11. Full Payment. Sellers acknowledge that the Purchase Price is just and full compensation for this transaction.

12. Default.

(a) Should Buyer default in the performance of this Agreement and fail to close, Sellers shall be entitled to retain the Option Fee or Option Fees already paid to Sellers.

(b) Should Sellers default in the performance of this Agreement, Buyer shall be entitled to sue for specific performance of this Agreement or to recover the Option Fee(s) paid and Buyer's actual damages that have occurred as a result of Sellers' failure to perform, including all Due Diligence costs, all application fees and staff time spent on the County approval process, legal fees, and consultant fees associated with the Due Diligence, the County application and Sellers' default.

13. General and Miscellaneous Provisions.

(a) **Prior Agreements.** This instrument is the entire, final, and complete agreement of the parties pertaining to the sale and purchase of the Property, and supersedes and replaces all written and oral agreements heretofore made or existing by and between the parties or their representatives insofar as the Property is concerned. Neither party shall be bound by any promises, representations, nor agreements except as are herein expressly set forth.

(b) **Time is of the Essence.** Time is expressly made of the essence of each provision of this Agreement.

(c) **Notices.** Any notice required or permitted under this Agreement shall be in writing and shall be given when actually delivered in person or forty-eight (48) hours after

having been deposited in the United States mail as certified or registered mail, addressed to the addresses set forth below the names of the parties on the first page hereof, or to such other address as one party may indicate by written notice to the other party.

(d) **Attorney Fees and Costs.** In the event legal action is commenced in connection with this Agreement, the prevailing party in such action shall be entitled to recover its reasonable attorney fees and costs incurred therein.

(e) **Nonwaiver.** Failure by either party at any time to require performance by the other party of any of the provisions hereof shall in no way affect the party's rights hereunder to enforce the same, nor shall any waiver by the party of the breach hereof be held to be a waiver of any succeeding breach or a waiver of this nonwaiver clause.

(f) **No Merger.** The obligations set forth in this Agreement shall not merge with the transfer or conveyance of title to any party of the Property but shall remain in effect until fulfilled.

(g) **Amendments.** This Agreement may be amended, modified, or extended without new consideration, but only by written instrument executed by both parties.

(h) **Governing Law.** This Agreement shall be construed in accordance with and governed by the laws of the State of Oregon.

(i) **Attorneys Fees.** In the event of a suit, action, arbitration, or other proceeding of any nature whatsoever, including, without limitation, any proceeding under U.S. Bankruptcy Code, is instituted to interpret or enforce any provision of this Agreement, or with respect to any dispute relating to this Agreement, including, without limitation, any action in which a declaration of rights is sought or an action for rescission, the prevailing party shall be entitled to recover from the losing party its reasonable attorneys, paralegals, accountants, and other experts fees and all other fees, costs, and expenses actually incurred and reasonably necessary in connection therewith, as determined by the judge or arbitrator at trial or arbitration, as the case may be, or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorneys fees related to or with respect to proceedings in Federal Bankruptcy Courts, including those related to issues unique to bankruptcy law.

(j) **Severability.** If any portion of this Agreement shall be invalid or unenforceable to any extent, the validity of the remaining provisions shall not be affected thereby.

(k) **Counting of Days.** Whenever a time period is set forth in days in this Agreement, the first day from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or legal holiday, including Sunday, in which event the period runs until the end of the next day which is not a Saturday or legal holiday.

(l) **Number, Gender and Captions.** In construing this Agreement, it is understood that, if the context so requires, the singular pronoun shall be taken to mean and include the plural,

the masculine, the feminine and the neuter, and that, generally, all grammatical changes shall be made, assumed, and implied to individuals and/or corporations and partnerships. All captions and paragraph headings used herein are intended solely for convenience of reference and shall in no way limit any of the provisions of this Agreement.

(m) **Recording.** Upon request of either party, the parties shall execute in a form sufficient for recording a memorandum of this Agreement, which may be recorded at the expense of the party requesting the same.

(n) **Binding Effect.** The covenants, conditions, and terms of the Agreement shall extend to and be binding upon and inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties hereto.

(o) **Execution in Counterparts.** This Agreement may be executed in any number of counterparts and by different parties hereto on separate counterparts, each of which counterparts, when so executed and delivered, shall be deemed to be an original and all of which counterparts, taken together, shall constitute but one and the same Agreement.

14. Zoning and Land Use. THE PROPERTY DESCRIBED IN THIS INSTRUMENT MAY NOT BE WITHIN A FIRE PROTECTION DISTRICT PROTECTING STRUCTURES. THE PROPERTY IS SUBJECT TO LAND USE LAWS AND REGULATIONS THAT, IN FARM OR FOREST ZONES, MAY NOT AUTHORIZE CONSTRUCTION OR SITING OF A RESIDENCE AND THAT LIMIT LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, IN ALL ZONES. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO VERIFY THE EXISTENCE OF FIRE PROTECTION FOR STRUCTURES, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336, SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, AND SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009.

15. **Authority.** This Option to Purchase and Contingent Purchase and Sale Agreement is subject to final authorization and approval by the City Council of the City of Wilsonville.

SELLERS:

BUYER:

CITY OF WILSONVILLE, a municipal Corporation of the State of Oregon

By: _____
Bryan Cosgrove
As Its: City Manager

APPROVED AS TO FORM
this ____ day of _____, 20__.

Barbara A. Jacobson, Assistant City Attorney
City of Wilsonville, Oregon

ATTESTED TO:

Sandra C. King, MMC, City Recorder
Date: _____