

City Council Agenda Item #9A
Meeting of January 7, 2013

Brief Description: Agreement with Clarence Penaz to purchase the property at 17301 Excelsior Boulevard

Recommended Action: Approve purchase agreement

Background

In 2001, Minnetonka voters approved a \$15 million referendum to fund parks renewal and open space preservation. The Open Space Preservation Task Force established criteria to determine properties appropriate for preservation, and the city council and park board established prioritization and preservation alternatives for each of those properties.

One of the properties identified for open space acquisition is located at 17301 Excelsior Boulevard, a single family residence with a barn. This 1.23 acre highly visible property is adjacent to and would function as part of Purgatory Park, a 158 acre Community Preserve. Staff ordered a structural review of the barn and is currently considering renovation scenarios for a variety of recreational uses that will be presented during the Capital Improvement Program planning. In addition to the open space value early ideas for the site are programming space and facility rentals, such as weddings. The park board and city council toured the property on November 7, 2012. The home will be rented until there is an approved plan for the property.

Staff has negotiated a purchase agreement with Clarence Penaz, the owner of 17301 Excelsior Boulevard, as follows:

- A purchase price of \$396,000, paid for by Park and Open Space bonds.
- Closing to occur in January 2013
- The seller is allowed to have until June 30, 2013 to remove all personal property from the site.
- The city will place a plaque or equivalent acknowledgment on the property to recognize the Westburg family as early settlers of the 70 acre farm in the 1890's.
- The city will use good faith efforts to save and not demolish the barn on the property, but makes no guarantee regarding the matter.

Recommendation:

Approve the purchase agreement with Clarence Penaz.

Submitted Through:

Geralyn Barone, City Manager

Originated by:

Perry Vetter, Assistant City Manager

PURCHASE AGREEMENT

This Purchase Agreement is made _____, 20____ by Clarence J. Penaz, widowed and not remarried, Augustana Chapel View Apartments #212, 605 Minnetonka Mills Road, Hopkins, MN 55343, ("Seller"), and City of Minnetonka, a Minnesota municipal corporation ("Buyer").

1. **Offer/Acceptance.** In consideration of the mutual agreements contained in this Agreement and the sum of \$5,000.00 ("Earnest Money") paid by the Buyer to the Seller, the receipt of which is acknowledged, the Buyer offers to purchase and Seller agrees to sell fee simple title to the real property ("Subject Property") in the County of Hennepin, State of Minnesota, legally described as follows:

Tract A, Registered Land Survey No. 1172.
Together with a right-of-way easement over Tracts H, I, and U of Registered Land Survey No. 566 as shown in Doc No. 511701
PID 29-117-22-33-0034.

2. **Fixtures.** For the purposes of this Purchase Agreement, "Fixtures" are items that are embedded in the land or attached to the building(s) and cannot be removed without damage to the real property. The method by which the fixture is "attached" could be screws, nails, adhesives, or any other mechanical connection which shows Seller's intent to make the item a relatively permanent part of the real estate. Examples of fixtures are doors and cabinets. "Personal property" includes items that are not attached to the building(s) or embedded in the land and that are removable without damage to the real property. Examples of personal property are free-standing (not "built in") appliances and furniture. As further examples, a mirror attached to a wall by screws or nails is a fixture, while a mirror hung from a nail or picture hanger is personal property.

a. **FIXTURES INCLUDED IN THE SALE.** Title to fixtures passes to Buyer with the deed. All fixtures except those excluded at (b) below, are included in this sale such as: garden bulbs, plants, shrubs, trees, landscaping, storm windows and inserts, storm doors and inserts, screens, awnings, window shades, blinds, curtain-traverse-drapery rods, mirrors, door mirrors, cabinets, counter tops, doors, door hardware, mantels, woodwork, attached lighting fixtures with bulbs, electrical wiring, electric outlets, electric switches, electric outlet plates and switch plates, all

plumbing and piping, plumbing fixtures, sump pumps, water heaters, heating systems, heating stoves, fireplace inserts, fireplace doors and screens, built-in humidifiers, built-in air conditioning units, built-in electronic air filters, automatic garage door openers with controls, television antennas, satellite dishes, water softeners, built-in dishwashers, garbage disposals, built-in trash compactors, built-in ovens and cooking stoves, hood-fans, intercoms, installed carpeting, built-in work benches, security systems, fences, retaining walls, kennels, gates, survey monuments, culverts, sheds, gazebos, trellises, underground irrigation systems, weathervanes, lightning rods, flagpoles, light poles and lights, outdoor statuary, pumps, mail boxes, mail box posts, and newspaper boxes.

b. **FIXTURES EXCLUDED FROM THE SALE.** The following fixtures are excluded from this sale and will be removed by Seller at his own cost:

The following excluded and removed fixtures will be replaced by Seller with a functional equivalent:

None.

c. **FIXTURE LIENS.** At closing or prior to closing, Seller must provide for payment of, satisfaction of, or release of any existing liens, claims, or encumbrances on the fixtures, except for the following encumbrances which Buyer accepts or assumes:

None.

d. **PERSONAL PROPERTY.** Any personal property to be purchased by Buyer is listed in the special provisions in paragraph 14.

3. **Purchase Price.** The total purchase price for the Subject Property will be \$396,000.00, payable by check on the Closing Date. The Earnest Money will be applied as a partial pre-payment of the purchase price.

4. **Title Issues:**

a. **MARKETABILITY OF TITLE.** The Buyer will at its own expense undertake a review of the condition of title for the Subject Property. The Buyer will have 30 days after the date of this Purchase Agreement to deliver any written objections to title, if any, to the Seller. Seller must not permit additional encumbrances to be made upon the Subject Property between the date of this Purchase Agreement and the Closing Date.

If Buyer finds that title to the Subject Property is unmarketable, Seller will have ten days after service of the written objections, to give written notice to Buyer of Seller's intent to make title marketable and must make the title marketable within 30 days after this notice. Within five business days after expiration of the 30-day correction period, Seller must provide Buyer documentation establishing that title has been made marketable. Buyer will have five business

days after receipt of the documentation to object to the title in writing. This Agreement will terminate at Buyer's option if any of the following occurs:

- (1) Buyer continues to reasonably object to title,
- (2) Seller does not give notice of intention, within the ten days specified above, to make title marketable, or
- (3) Seller fails to provide the required documentation of correction within the required time period.

If Buyer terminates this Agreement, the Earnest Money must be refunded to the Buyer, and the parties must execute a cancellation of this Agreement. Alternatively, the Buyer may clear title to the extent required and charge the cost of clearing to the Seller, not to exceed an amount agreed upon by the parties. During the period of times required to clear title as specified above, all required payments and the closing will be postponed.

- b. **DEED DELIVERED AT CLOSING.** Seller agrees to give good and marketable title to the Subject Property in fee-simple, together with all improvements and all of Seller's rights to any adjoining streets or alleys, and to convey title by warranty deed joined in by all individuals known collectively as Seller, and in a form reasonably acceptable to counsel for Buyer.
- c. **EXCEPTIONS TO MARKETABLE TITLE.** Seller will convey marketable title to the Property to the Buyer subject only to the following exceptions:

- 1) Building and zoning laws, ordinances, state and federal regulations.
- 2) Reservation of minerals or mineral rights to the State of Minnesota.
- 3) Utility and drainage easements.

5. **Closing.** The closing of the sale of Subject Property will take place on January 8, 2013 ("Closing Date"), or at such later date as may be mutually agreed upon by the Seller and Buyer.

- a. **SELLER'S CLOSING COSTS.** The Seller must pay the following at closing:
 1. Document preparation costs, recording fees, and deed taxes for documents necessary to establish good and marketable title in Seller.
- b. **BUYER'S CLOSING COSTS.** The Buyer must pay the following at closing:
 1. Filing fee for the well disclosure certificate, if necessary.
 2. Recording fee for the deed.
 3. Fees payable to Buyer's lawyer or to a closer for conducting the closing.

4. Document preparation costs for Seller's deed, certificate of real estate value, seller's affidavit, well disclosure certificate, and any other documents necessary to transfer good and marketable title by Seller's deed.
5. Deed tax on Seller's deed.

c. **SELLER'S AFFIDAVIT.** At closing, the Seller must supplement the warranties and representations in this Purchase Agreement by executing and delivering a seller's affidavit in a form substantially the same as the Minnesota Uniform Conveyancing Blank Affidavit of Seller. The affidavit must include Seller's representation that no encumbrances have been placed on the Subject Property since the date of this Purchase Agreement.

6. **Responsibilities and Adjustments.** The Seller agrees to free the Subject Property from all liens, leases, encumbrances and charges of any kind to the date of closing, except for those items noted in paragraph 3(c) above. Property taxes payable in the current year will be pro-rated through the date of closing. Buyer will pay real estate taxes due and payable in the years following closing. All pending and levied special assessments will be the responsibility of the Buyer. Buyer will be responsible for the appropriate abandonment of any wells on the site. All charges for sewer, water, gas, electricity and other service to the Subject Property will be pro-rated to the date of closing.

7. **No Broker Involved.** The Seller and Buyer warrant to each other that there is no broker involved in this transaction with whom it has negotiated or to whom it has agreed to pay a broker commission. Each party agrees to indemnify the other for all claims for brokers' commissions or finder's fees in connection with negotiations for the purchase of the Subject Property arising out of any alleged agreement, commitment or negotiation by that party.

8. **Possession and Insurance.** Unless otherwise provided in paragraph 14, Seller will continue in possession of the Subject Property until the closing. Seller must maintain the Subject Property substantially in its present condition, and must not undertake or allow any substantial change to the Subject Property without the Buyer's express written consent. Risk of loss from casualty or any liability incurred as a result of the use of the Subject Property will be the Seller's until delivery of possession to the Buyer on the Closing Date. Seller must maintain sufficient property and casualty insurance to cover this risk until the Closing Date. If the Subject Property is damaged before the Closing Date, Seller must give notice to Buyer within three business days after the damage has occurred. Risk of loss from casualty or any liability incurred as a result of the use of the Subject Property will be Buyer's after delivery of possession to Buyer at the closing.

9. **Seller's Warranties and Representations.** Seller makes the following warranties and representations:

a. **BOUNDARY, ACCESS, RESTRICTIONS, AND LIENS.** Seller warrants that buildings, if any, are entirely within the boundary lines of the Subject Property. Seller warrants that there is a right of access to the Subject Property from a public right-of-way. Seller warrants that there has been no labor or material furnished to the Subject Property for which payment has not been made. Seller warrants that there are no present violations of any restrictions relating to the use or

improvement of the Subject Property. Seller warrants that the Subject Property is not subject to a lien for Medical Assistance or other public assistance.

b. **HAZARDOUS SUBSTANCES.** Seller makes no warranties regarding whether hazardous substances or petroleum products having been placed, stored, or released from or on the Subject Property by any person in violation of any law. Seller has notified Buyer of an underground storage tank for fuel oil on the Subject Property, and the parties agree that Seller is not obligated to remove the tank.

c. **MECHANICAL SYSTEMS.** Seller makes no warranties regarding the fixtures, heating and air conditioning equipment, fireplaces, wiring, and plumbing used and located on the Subject Property, and Buyer accepts them “as is.” Seller agrees that if these items are not in working order, Seller is not obligated to repair them.

d. **CLEAN CONDITIONS.** Seller must remove all trash, garbage, and miscellaneous discarded materials from the buildings, and must leave the buildings in “broom clean” condition before the date specified in paragraph 14. Seller must remove all personal property not included in this sale from the Subject Property before the date specified in paragraph 14. Seller has notified Buyer that there is mold in the home on the Subject Property, and the parties agree that Seller is not obligated to remove the mold.

e. **WARRANTIES SURVIVE CLOSING.** Seller’s warranties and representations contained in subparagraphs (a) and (d) of this Paragraph 9 survive the delivery of the deed to Buyer. Seller makes no other warranties regarding the condition of the Subject Property, and Seller accepts the Subject Property “as is” with respect to any other matters involving the condition of the Subject Property.

10. **Entire Agreement; Amendments.** This Purchase Agreement constitutes the entire agreement between the parties and no other agreement prior to, or contemporaneously with, this Purchase Agreement is effective except as expressly stated in this document. Any amendment will not be effective unless it is in writing and executed by both parties or their respective successors or assigns.

11. **Binding Effect; Assignment.** This Purchase Agreement is binding upon and inures to the benefit of the parties and their respective heirs, executors, administrators, successors and assigns. Neither Seller nor Buyer may assign its rights and interest under this Purchase Agreement without notice to, and approval by, the other party. All representations and warranties made in this agreement are intended to survive closing and will not be merged in the deed.

12. **Notice.** Any communication that may or must be given by one party to the other will be deemed to have been given on the date it is deposited in the United States mail, registered or certified, postage pre-paid, and addressed as follows:

- a. If to Seller: Clarence J. Penaz
Augustana Chapel View Apartments #212
605 Minnetonka Mills Road
Hopkins, MN 55343
- b. If to Buyer: City Manager
City of Minnetonka
14600 Minnetonka Boulevard
Minnetonka, MN 55345

Either party may change this location by giving written notice to the other party specifying the new location.

13. **Specific Performance.** This Purchase Agreement may be specifically enforced by either party, who may recover reasonable costs and attorneys fees.

14. **Special Provisions.**

- a. Seller is allowed to have until June 30, 2013, to remove all personal property and trash from the Subject Property.
- b. Buyer agrees to use good faith efforts to save and not demolish the barn on the Subject Property, but Buyer makes no guarantee regarding this matter.
- c. Buyer agrees to place a plaque or another equivalent acknowledgement on the Subject Property to recognize the Westburg family as early settlers on the Subject Property.
- d. Buyer agrees to execute IRS Form 8283 acknowledging receipt of any donated value of the Subject Property, upon request.
- e. This purchase agreement is exempt under Minn. Stat. Sec. 513.54 from the seller disclosure requirements of Minn. Stat. Sec. 513.51 – 513.60.
- f. The provisions of this Paragraph 14 survive the delivery of the deed to Buyer.

15. **Effective Date of Purchase Agreement.**

This Purchase Agreement requires the approval of the Minnetonka City Council and will be effective on the date of that approval. The Seller may terminate this Purchase Agreement if the City Council does not act on it within 30 days after the date of this Agreement.

[Signature Page Follows]

I agree to the terms of this Purchase Agreement.

SELLER:

Clarence J. Penaz

Date: _____

I agree to the terms of this Purchase Agreement, subject to approval by the Minnetonka City Council.

BUYER:

CITY OF MINNETONKA

By: _____
Its City Manager

Date: _____

Approved by the Minnetonka City Council on _____.

David E. Maeda, City Clerk