

RESOLUTION NO. 2019-008
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AUTHORIZING THE CITY MANAGER TO EXECUTE AN AGREEMENT REGARDING
USE OF WATER AVAILABLE UNDER 2.25 OF THE CITY'S SHARES
OF THE WATER SUPPLY AND STORAGE COMPANY FOR A
THREE-YEAR TERM AND TEN POTENTIAL ONE-YEAR RENEWALS

WHEREAS, the City recently purchased 2.5 shares of the Water Supply and Storage Company, a mutual ditch and reservoir company ("New WSSC Shares"); and

WHEREAS, pursuant to internal arrangements between City departments and service areas, the New WSSC Shares pertain to and are generally the responsibility of the Park Planning & Development Department and do not pertain to the Utilities and are not part of the part of the water utility system; and

WHEREAS, the New WSSC Shares were purchased, among other reasons, for water supply purposes on existing and planned parks in northeast Fort Collins; and

WHEREAS, the New WSSC Shares have not been through a judicial change of water right proceeding such that, without additional State administrative or judicial proceedings, they are primarily only available for irrigation use under the Water Supply and Storage Company system; and

WHEREAS, several of such planned parks are in the developmental stage and do not currently require water deliveries under the New WSSC Shares, such that for the next few years, the amount of water available under the New WSSC Shares will likely be greater than the immediate needs of the City and its inhabitants, and is thus potentially available for use by persons outside of the City as a rental; and

WHEREAS, pursuant to Article XII, Section 4 of the City Charter, if at any time the water supply is greater than the immediate needs of the City and its inhabitants, the City Council may authorize the City Manager to permit the use of such surplus water by consumers outside the City at such rates as the City Council may prescribe, provided that no vested right shall accrue under such permits; and

WHEREAS, City Council has historically authorized Fort Collins Utilities ("Utilities") to lease the use of surplus water under water interests that pertain to Utilities and is part of the water utility system, most recently through *Ordinance No. 038, 2018 of the Council of the City of Fort Collins Establishing Rates and Delivery Charges for Use of Water Available Under the City's Water Interests for 2018 Through March 2021*, which is due, among other reasons, to the fact that Utilities has acquired water interests for the future needs of Utilities and the fact that the yield from and demand for Utilities water rights vary by year; and

WHEREAS, City staff has negotiated an agreement with Cliff E. Simpson, attached hereto as Exhibit "A" ("Agreement"), regarding his temporary use of 2.25 of the New WSSC

Shares ("2.25 Shares"), which will provide revenue for the City and help preserve their value by ensuring their use while the planned parks in northeast Fort Collins and being developed and completed; and

WHEREAS, in the event that Mr. Simpson were to not execute the Agreement for whatever reason, it would be beneficial to the City to offer the same Agreement to other, similarly-situated agricultural water users.

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. City Council finds, pursuant to Section 23-113(b)(1) of the City Code, that an agreement for use of the 2.25 Shares pursuant to an agreement that is substantially similar to the attached Agreement is in the best interest of the City.

Section 3. City Council finds, pursuant to Section 23-114 of the City Code, that an agreement for use of the 2.25 Shares pursuant to an agreement that is substantially similar to the attached Agreement will result in the City receiving a value in an amount equal to or greater than the fair market value of the 2.25 Shares under terms as those set forth in an agreement that is substantially similar to the attached Agreement.

Section 4. That the City Manager is hereby authorized to execute an agreement substantially in the form of Exhibit "A", with such modifications and additional terms and conditions as the City Manager, in consultation with the City Attorney, determines to be necessary and appropriate to protect the interests of the City or effectuate the purposes of this resolution, including substituting Mr. Simpson for other, similarly-situated agricultural water users in the event that Mr. Simpson does not execute the Agreement.

Passed and adopted at a regular meeting of the Council of the City of Fort Collins this 15th day of January, A.D. 2019.



Mayor

ATTEST:



City Clerk



**AGREEMENT BETWEEN THE CITY OF FORT COLLINS AND
CLIFF E. SIMPSON REGARDING USE OF WATER AVAILABLE UNDER 2.25 OF
THE CITY'S SHARES OF THE WATER SUPPLY AND STORAGE COMPANY**

This Agreement, dated and effective this _____, is entered into by and between the following Parties: City of Fort Collins, Colorado, a home rule municipality ("City"); and Cliff E. Simpson, an individual ("Mr. Simpson").

RECITALS

A. The City recently purchased from Mr. Simpson 2.5 shares of the Water Supply and Storage Company, a mutual ditch and reservoir company ("New WSSC Shares"). The water rights represented by the New WSSC Shares have not been through a judicial change of water right proceeding and were not included in the City's change of water rights decree entered by the Water Court in Case No. 2011CW265. The New WSSC Shares were represented by Stock Certificate No. 6738 when they were in Mr. Simpson's name, and are now represented by Stock Certificate No. 6796 in the City's name. Pursuant to internal arrangements between City departments and service areas, the New WSSC Shares pertain to and are generally the responsibility of the Park Planning & Development Department.

B. The City purchased the New WSSC Shares, among other reasons, for water supply purposes on existing and planned parks in northeast Fort Collins. Several of such planned parks are in the developmental stage and do not currently require water deliveries under the shares. Mr. Simpson owns certain lands under the system of the Water Supply and Storage Company ("Company") and has a current use for water available under such shares.

C. During the developmental stage of such northeast parks, the City desires to allow Mr. Simpson to use water available under 2.25 of the New WSSC Shares ("2.25 Shares") pursuant to the terms and conditions of this Agreement. Mr. Simpson's use of water available under the 2.25 Shares will provide the City with additional revenue and will further the use of the 2.25 Shares.

D. The City is proceeding with this Agreement pursuant to Article XII, Section 4 of the City Charter, and other applicable laws and policies.

AGREEMENT

1. **Incorporation of Recitals.** The foregoing recitals are hereby incorporated as if fully restated in their entirety.

2. **Mr. Simpson's Right to Use Water Available Under the 2.25 Shares.** During the term of this Agreement, Mr. Simpson shall be entitled to use water available under the 2.25 Shares pursuant to the following terms and conditions. Any rights not expressly granted to Mr. Simpson hereunder shall be reserved to the City.

2.1. Mr. Simpson shall use water available under the 2.25 Shares for the irrigation of lands under the Company's system or such other uses as may be approved by the Company. Nothing in this Agreement authorizes Mr. Simpson to seek approval to change the use of the water rights represented by the 2.25 Shares in any proceeding before the District Court for Water Division 1, the Colorado Division of Water Resources, or any other entity with jurisdiction.

2.2. This Agreement only authorizes Mr. Simpson to use water available under the 2.25 Shares pursuant to its terms and conditions, and therefore, Mr. Simpson shall be solely responsible for coordinating and effectuating the delivery water available under the 2.25 Shares.

2.3. Mr. Simpson shall be responsible for ensuring that his use of water available under the 2.25 Shares at all times complies with any and all applicable obligations and requirements of the Company and local, state, and federal law. Mr. Simpson assumes any and all risk associated with the use of water available under the 2.25 Shares under this Agreement.

3. **Term.**

3.1. **Initial Term.** This Agreement shall be for an Initial Term from the date of this Agreement through December 31, 2021, which includes three irrigation seasons, during which Mr. Simpson shall acquire the right to use water under all of the 2.25 Shares.

3.2. **Additional One-Year Periods.** The Parties shall be entitled to extend this Agreement for additional one-year periods, not to exceed 10 such additional-one-year periods, for all or some of the 2.25 Shares provided that: both Parties agree to such a one-year extension for a specific number of shares in increments of a quarter share, confirmed in writing; and Mr. Simpson has paid in full the amount due for the additional one-year before December 31 of the then-current year.

4. **Payment.** All payments under this Agreement shall be made to the City and directed to the Park Planning & Development Department.

4.1. **Initial Term Payment.** The amount due for the Initial Term shall be \$4,100 per year per share, which is calculated as 2.25 shares x \$4,100 per share = \$27,675.00. The entire \$27,675.00 amount shall be paid in full to the City upon signing this Agreement.

4.2. **Additional One-Year Periods Payments.** The amount due for any additional one-year periods shall be calculated as: (Company's annual assessment per share + \$1,000 per share) multiplied by the number of shares to be used. The entire amount shall be paid in full to the City on or before December 31 of the then-current year.

5. **No Relinquishment of the 2.25 Shares.** The City agrees that Mr. Simpson shall have the right to use water available under the 2.25 Shares pursuant to the terms and conditions of this Agreement, but Mr. Simpson acknowledges and agrees that the City relinquishes no other rights

in and to the 2.25 Shares, relinquishes no water or water rights associated with the 2.25 Shares, and reserves the full right to determine all matters in connection with the control and use of the City's water and water rights, and that all use hereunder is contingent upon payment by Mr. Simpson of all amounts due to the City as provided herein and continued compliance with the terms and conditions of this Agreement.

6. **Untreated Water.** Mr. Simpson acknowledges and agrees that the water available under the 2.25 Shares under this Agreement is neither treated nor potable water and, therefore, the City disclaims any warranties, expressed or implied, regarding the quality or the potability of the water to available under the 2.25 Shares.

7. **Indemnification.** Mr. Simpson shall indemnify and hold the City harmless from any and all claims, injuries or losses, including any associated costs or attorney fees, resulting from its use of the 2.25 Shares, or resulting from contact with water attributable to the 2.25 Shares.

8. **Fiscal and Legal Contingency.** Notwithstanding any other provision of this Agreement to the contrary, the obligations of the City in fiscal years after the fiscal year of this Agreement shall be subject to appropriation of funds sufficient and intended therefor, with the City having the sole discretion to determine whether the subject funds are sufficient and intended for use under this Agreement, and the failure of the City to appropriate such funds shall be grounds for the City to terminate this Agreement with written notice pursuant to Paragraph **Error! Reference source not found.**

9. **Remedies.** If either Party fails to comply with the provisions of this Agreement, the other Party, after providing written notification to the noncomplying Party, and upon the failure of the noncomplying Party to achieve compliance within 35 days, may seek all such remedies available under Colorado law.

10. **No Third-Party Beneficiaries.** This Agreement is entered into between the Parties for the purposes set forth herein. It is the intent of the Parties that they are the only beneficiaries of this Agreement and the Parties are only benefitted to the extent provided under the express terms and conditions of this Agreement.

11. **Governing Law and Enforceability.** This Agreement shall be construed in accordance with the laws of the State of Colorado. The Parties recognize that the constitutions, statutes, and rules and regulations of the State of Colorado and of the United States, as well as the City's charters and codes, and rules and regulations, impose certain legal constraints on the City and that the Parties intend to carry out the terms and conditions of this Agreement subject to those constraints. Whenever possible, each provision of this Agreement shall be interpreted in such a manner so as to be effective and valid under applicable law.

12. **Waiver.** A waiver of a breach of any of the provisions of this Agreement shall not constitute a waiver of any subsequent breach of the same or another provision of this Agreement. Nothing in this Agreement shall be construed as any waiver of governmental immunity of the Parties who are governments or any other governmental provisions of State law. Specifically, by entering into this Agreement, neither Party waives the monetary limitations on liability or any

other rights, immunities, or protections provided by the Colorado Government Immunity Act, C.R.S. § 24-10-101, *et seq.*, or any successor or similar statutes of the State of Colorado.

13. **Notices.** All notices or other communications hereunder shall be sufficiently given and shall be deemed given when personally delivered, or after the lapse of five business days following mailing by certified mail-return receipt requested, postage prepaid, addressed as follows:

To the City: City of Fort Collins
Park Planning & Development Department
Attn: Director
215 Laporte Ave.
Fort Collins, Colorado 80521
sbassingier@fcgov.com

With copy to: Fort Collins City Attorney
300 LaPorte Avenue; P.O. Box 580
Fort Collins, Colorado 80522-0580
epotyondy@fcgov.com

To Mr. Simpson: Cliff E. Simpson
115 2nd Avenue
Ault, CO 80610

14. **Construction.** This Agreement shall be construed according to its fair meaning as it was prepared by the Parties. Headings in this Agreement are for convenience and reference only and shall in no way define, limit, or prescribe the scope or intent of any provision of this Agreement.

15. **Entire Agreement.** This Agreement constitutes the entire agreement of the Parties regarding the matters addressed herein. This Agreement binds and benefits the Parties and their respective successors. Covenants or representations not contained in this Agreement regarding the matters addressed herein shall not bind the Parties.

16. **Representations.** Each Party represents to the other parties that it has the power and authority to enter into this Agreement and the individual signing below on behalf of that Party has the authority to execute this Agreement on its behalf and legally bind that Party.

17. **Assignment.** No Party may assign any rights or delegate any duties under this Agreement without the written consent of the other Party.

[Remainder of Page Left Blank Intentionally]

CITY OF FORT COLLINS, COLORADO, a Colorado home rule city

By: _____
Darin Atteberry, City Manager

Date: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO LEGAL FORM:

By: _____
City Attorney's Office
Eric Potyondy, Assistant City Attorney

CLIFF E. SIMPSON, an individual

By: _____

Date: _____

ATTEST:

By: _____