

## FOR BOARD ACTION

Agenda Item # 5

Meeting Date:

11/29/11

**SUBJECT:** Purchase of Lenwood Heights Water System

**PREPARED BY:** Doug Rovang, Senior Civil Engineer

### ITEM DESCRIPTION:

RPU staff and representatives of the Lenwood Heights Association, Inc., have agreed to terms under which the City would acquire the Lenwood Heights water system, a subdivision water system with 49 customers located within the City between Bamber Valley School and Highway 63 in southwest Rochester. (The water system customers are RPU electric customers.) The proposed Purchase Agreement and a separate Letter of Understanding are attached for Utility Board review. The Agreement specifies a total purchase price of one dollar (\$1) and other considerations. The anticipated closing date is mid-December, 2011. If approved by the Utility Board, the City Administrator will be asked to present the Board's resolution to the City Council at its first meeting in December, 2011. (The City Attorney's office has reviewed the purchase documents.)

Because the Lenwood Heights water system is scheduled to be connected directly to the municipal water system in 2012, staff proposes that the Lenwood Heights customers pay regular municipal water customer and commodity charges in accordance with RPU Rate Schedule WTR. Lenwood Heights customers will also pay the regular Fire Hydrant Facilities Charge in accordance with RPU Rate Schedule FHFC and the State-mandated Water Testing Fee.

Customers of the Lenwood Heights water system are all members of the Lenwood Heights Association, Inc., which owns the water system. Therefore, one of the conditions for City purchase of the water system is that each property owner signs an individual Agreement for Municipal Water Service. This Agreement, prepared by the City Public Works Department and City Attorney's office, contains terms and conditions required by the City Council prior to extension of City water and/or sewer service to the area, e.g., acceptance of future water and sewer related charges. At the time this Board agenda item was prepared, 47 of the 49 Lenwood Heights water system property owners had signed the Agreement.

### FOR CAPITAL PURCHASES/BIDS/MAJOR PROJECTS:

Not Applicable

### UTILITY BOARD ACTION REQUESTED:

Staff recommends the Utility Board approve the Purchase Agreement for the Lenwood Heights water system and the separate Letter of Understanding dated October 12, 2011, and request the Common Council to authorize the Mayor and the City Clerk to execute the Purchase Agreement with the Lenwood Heights Association, Inc., for the purchase of the Lenwood Heights water system, and the individual Agreements for Municipal Water Service with each of the 49 Lenwood Heights water System owners.

  
General Manager

  
Date



October 4, 2011

Lenwood Heights Association, Inc.  
C/O Mr. John Arnold, Attorney  
Dunlap & Seeger  
206 S. Broadway, Suite 505  
Rochester, MN 55904

RE: Letter of Understanding

Lenwood Heights Association, Inc. / Rochester Public Utilities (RPU)  
(Conditions for Purchase of Lenwood Heights Association Water System by Rochester Public Utilities)

TO WHOM IT MAY CONCERN:

As a followup to related discussions between representatives of the Lenwood Heights Association, Inc. (Association, hereafter), the City of Rochester (City, hereafter), and Rochester Public Utilities (RPU, hereafter), the following paragraphs express our joint understanding of the above-referenced conditions:

1. Water Rates The Lenwood Heights Subdivision is scheduled to be connected to the municipal water system during 2012. For that reason, after RPU purchase of the Lenwood Heights water system, Lenwood Heights water system users will be billed monthly in accordance with RPU Rate Schedule WTR (the same as other municipal water customers). In addition, Lenwood customers will be billed monthly for the standard Fire Hydrant Facilities Charge in accordance with RPU Rate Schedule FHFC, and for the State-mandated Water Testing Fee currently at \$0.53 per month. (A copy of the current Rate Schedules WTR and FHFC are attached.) These rate Schedules and State-mandated fees may be revised from time to time in accordance with established RPU ratemaking procedures and State legislation. (A sheet showing a typical water customer monthly billing breakdown is also attached.)
2. Water Meter Installation and Initiation of RPU Billing New remote radio read water meters will be furnished at no cost to Lenwood customers for installation at the time of water system purchase. RPU will provide each property owner a credit for the actual cost not to exceed \$200 for installation of the RPU furnished water meter. RPU monthly water billing will begin when RPU begins operating the water system.
3. Access to Well Site Parcel The Well Site property will remain the property of the Association. The Association will provide City a utility easement allowing access, operation and maintenance of the water system assets located on the Well Site. After City water is available to all Lenwood Heights property owners from the newly constructed City watermain, RPU will abandon and seal the well in accordance with Minnesota Department of Health regulations (removing the sealed well casing to 48" below grade), will demolish the well house to 24" below grade, and will release the easement.
4. City Failure to Extend Municipal Water to Lenwood Heights Subdivision by January 1, 2014 In the event City fails to extend City water to the Subdivision by January 1, 2014, City agrees to release the Well Site easement and return Lenwood Heights water system assets at no cost to the Association.




Lenwood Heights Association, Inc.  
October 4, 2011  
Page 2

5. Costs of Property Transfer The City will process water system property transfer related documents at no cost to the Association. The Association will process the Transfer of Well and Termination of Well Agreement at no cost to the City.

This letter of understanding is subject to and contingent upon the successful execution, implementation and completion of the purchase agreement between Lenwood Heights Association, Inc., and the City of Rochester. This letter of understanding incorporates herein all terms and conditions of the purchase agreement not otherwise completed upon closing. If you concur, please return a copy of this letter signed by the appropriate Lenwood Heights Association, Inc., officer, and we will take this matter to the Public Utility Board and City Council for their consideration.

Very truly yours,

  
\_\_\_\_\_  
Larry J. Koschire  
RPU General Manager

 10/26/2011  
\_\_\_\_\_  
Lenwood Heights Association, Inc. (Date)  
Barry K. Gilbert, Its President

**ROCHESTER PUBLIC UTILITIES  
(RPU)  
WATER SERVICE**

**RATE SCHEDULE WTR-C  
SHEET 1 OF 1**

**AVAILABILITY:** At all locations within the Rochester City limits and at locations external to the City limits, that have been authorized by the Rochester Common Council.

**MONTHLY RATE:**

<u>Customer Charge:</u>	<u>Size of Meter</u>	<u>Rate</u>
	5/8"	\$ 5.26
	3/4"	\$ 7.48
	1"	\$ 12.02
	1-1/2"	\$ 23.21
	2"	\$ 36.63
	3"	\$ 68.15
	4"	\$ 113.06
	6"	\$ 225.36
	8"	\$ 405.03

<u>Commodity Charge:</u>	<u>Rate/CCF</u>
Residential	
0 - 7 CCF	69.2¢
7.01 - 12 CCF	76.1¢
12.01 and over CCF	87.5¢
Commercial:	69.2¢
Industrial:	69.2¢
Interdepartmental:	69.2¢
Irrigation Meter (All Classes):	87.5¢

NOTE: Customers whose service is taken outside the Rochester city limits with individual water systems not connected to the City water system shall have a rate of 2.0 times the customer and commodity charges.

**MINIMUM BILL:** Applicable monthly customer charge according to size of meter provided.

**PAYMENT:** Payments are due on or before the due date.

**CONDITIONS OF DELIVERY:**

1. Service furnished under this rate schedule is subject to connection policies of the Rochester City Council.
2. Service furnished under this rate schedule is subject to provisions of RPU's Water Service Rules and Regulations.
3. RPU shall not be liable for damage or loss sustained by customer in conjunction with taking service under this rate.
4. Water furnished under this rate shall not be resold.

Approved by Rochester Public Utility Board:  
Effective Date:

February 23, 2010  
April 1, 2010

**ROCHESTER PUBLIC UTILITIES  
(RPU)**

**RATE SCHEDULE FHFC  
SHEET 1 OF 1**

**FIRE HYDRANT FACILITIES CHARGE**

**APPLICABILITY:**

To all residential and commercial and industrial water utility customers.

**MONTHLY RATE:**

<u>Customer Class</u>	<u>Rate</u>
Residential	\$1.16
Commercial/Industrial	\$2.32

**BILLINGS:**

Billings will be on a monthly basis.

**PAYMENT:** Payments are due on or before the due date.

**CONDITIONS OF DELIVERY:**

1. RPU shall not be liable for any damage or loss sustained by customer resulting from interruptions, deficiencies, or imperfections of service provided under this rate.
2. The rate will not be applied to water service meters that are used exclusively for irrigation purposes.
3. The rate will not be applied to water service meters that are not connected to the City's central water system.
4. The rate will be applied regardless of the property's water service status (active or non-active).

Approved by Rochester Public Utility Board:  
Effective Date:

December 14, 2006  
January 1, 2007



TYPICAL RPU MONTHLY RESIDENTIAL WATER BILLING AMOUNT

Customer Charge (5/8" Meter) -	\$ 5.26
Commodity Charge - 6 billing Units (600 cu ft*) x \$0.692/100 cu ft *600 cu ft equals 4,500 gallons	\$ 4.15
Fire Hydrant Facilities Charge -	\$ 1.15
State-mandated Water Testing Fee -	<u>\$ 0.53</u>
Total -	\$11.09

Effective Date: April 1, 2010

## PURCHASE AGREEMENT

This AGREEMENT, entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by and among **Lenwood Heights Association, Inc.**, a Minnesota non-profit corporation (hereinafter "Seller") and the **City of Rochester**, a Minnesota municipal corporation, acting by and through its Public Utilities Board, (hereinafter "Rochester").

WITNESSETH:

WHEREAS, Seller operates a water supply and distribution system and is engaged in the non-profit distribution of water from a well located within Lenwood Heights Subdivision, Olmsted County, Minnesota (the "Water System") to users within the Lenwood Heights water system; and,

WHEREAS, Seller desires to sell said water system; and,

WHEREAS, Rochester desires to purchase the water system of Seller and provide those services previously provided by Seller.

NOW, THEREFORE, the parties hereby agree as follows:

1. Description of Property to be Sold and Easements to be Granted. On the terms and subject to the conditions set forth in this Agreement, Seller agrees to sell and convey to Rochester and Rochester agrees to purchase, on the closing date, the following easement and personal property:
  - a. Utility easement providing temporary access to the Well Site (Easement Form shown in Attachment 1);
  - b. All wells, pumps, tanks, mains, pipes, lines, valves, and other property owned by Seller, and presently used in the distribution of water located within the Water System and attached to it - with the exception of individual water service lines extending from the

water mains to individual properties, said service lines to remain the property of individual property owners (Bill of Sale Form shown in Attachment 2);

- c. Any interest in real property in the nature of an easement, permit, or license presently held by Seller for the purpose of maintaining and operating said Water System;
  - d. Any contracts held by Seller to serve users of the Water System in the Water System's service area;
2. Purchase Price. The purchase price for the property shall be One Dollar (\$1) and other valuable consideration, including those obligations set forth separately by contract or agreement between the parties.
3. Terms of Payment. The total purchase price shall be paid by Rochester in cash on the purchase closing date, as defined herein paragraph 8, (the "Closing Date").
4. Warranties of Seller. Rochester has been afforded an opportunity to inspect the property to be purchased by it hereunder, and Seller makes no representation or warranties whatsoever with respect thereto except that:
- a. Seller will have at the date of closing and will convey to Rochester good and marketable title to all property agreed to be sold to Rochester hereunder, free and clear of any lien, encumbrance, or claim whatsoever.
  - b. Seller has identified and will not be in default on the closing date with respect to the performance of its obligations under any contract or agreement assigned to Rochester hereunder.
  - c. Seller is a corporation duly organized, validly existing, and in good standing under the laws of the State of Minnesota and has full power and authority to carry on its business as it is presently conducted and all corporate action necessary by Seller to execute, deliver, and perform this Agreement has been taken.
  - d. Seller is not a party to or bound by any written or oral contract to convey to any other person any of the assets to be purchased by Rochester hereunder.
  - e. The execution, delivery, and performance of this Agreement by Seller will not violate the Articles of Incorporation or By-Laws of Seller, or any indenture, agreement, commitment, or order of any tribunal or administrative agency to which Seller is a party or by which it is bound.
  - f. Seller is not a party to any pending, and has no knowledge of any threatened litigation or government action, with regard to the property being sold hereunder.
5. "As-Is, Where-Is". Seller is selling the Assets in its present condition and state of repair, "As-



Is”, Where-Is” with all faults and conditions thereon, with all defects and liabilities, latent or apparent.

6. Indemnification. Seller agrees to indemnify Rochester with respect to loss or damages (including reasonable attorneys' fees and court costs) incurred by Rochester as the direct result of the breach by Seller of the representations, warranties, or covenants contained above in paragraph 4 a – f.
7. Representation and Warranties by Rochester. Rochester represents and warrants that it will have the requisite power and authority to enter into this Agreement and Rochester's closing documents signed by it; such documents will be duly authorized by all necessary corporate action on part of Rochester and have been duly executed and delivered; That the execution, the delivery and performance by Rochester of such documents do not conflict with or result in violation of Rochester's charter of any judgment, order, or decree of obligations of Rochester, and are enforceable in accordance with their terms. Rochester will indemnify Seller, its successors and assigns, against, and will hold Seller, its successors and assigns, harmless from any expense or damage, including attorney's fees, the Seller incurs because of the breach of the above representations and warranties, whether such breach is discovered before or after closing.
8. Closing. The closing date shall be on or about November 15, 2011 at 9:00 a.m. and shall be held at the office of Rochester Public Utilities, 4000 East River Road NE, or at such other place as may be mutually agreed upon by the parties.
9. Binding on Successors. This Agreement shall inure to the benefit of and be binding on the successors and assigns of each of the parties.
10. Interpretation. This Agreement shall be interpreted under the laws of the State of Minnesota.
11. Steps to be taken at the Closing.
  - a. General Procedure. At the closing, each party shall deliver or execute such documents, instruments, and materials as may be reasonably required in order to effectuate the intent and provisions of this Agreement, and all such documents, instruments, and materials shall be satisfactory in form and substance in all material respects to counsel for the other party. The listing of specific deliveries or executions to be made in the following Subsections of this Section shall not be deemed to limit the provisions of this subsection.
  - b. Items to be Delivered by Seller at the Purchase Closing. [Seller shall have no obligations to deliver these items until Rochester supplies the items required under the terms of Subsection (c)]:
    - i. evidence that the appropriate corporate officers of Seller have authorized the sale of the Water System to Rochester;
    - ii. bill of sale for all personal property being purchased hereunder;

- iii. utility easement providing access to the Well Site;
  - iv. Assignments or other documents necessary to convey any easements, permits, or licenses held by Seller for the operation of the water system.
- c. Items to be Delivered to Seller at Purchase Closing. [Rochester shall not be required to deliver the following items until such time as Seller has available for delivery the documents set out in Subsection (b)]:
- i. A cash payment of One Dollar (\$1) made payable to Seller for the purchase price.
12. Cooperation. At the closing and at anytime or from time to time thereafter, each of the parties agrees to cooperate in carrying out the terms of this Agreement and the agreements and documents executed in connection herewith, including the execution and delivery of such further instruments and documents as may reasonably be requested in order to more effectively carry out the terms and conditions hereof. Those items not completed by date of closing shall be deemed to survive closing and shall be a continuing obligation of the respective party.
13. Expenses. Each party hereto shall pay its own expenses in connection with this Agreement and the transactions contemplated hereby whether or not the transactions contemplated hereby are consummated. In the event of any controversy, claim, or dispute among the parties to this Agreement, arising out of or relating to this Agreement or breach thereof, the prevailing party shall be entitled to recover from the losing party reasonable expenses and attorney's fees.
14. Entire Agreement. This Agreement, and the exhibits, including the schedules and letter of understanding attached hereto, contain the entire agreement among the parties superseding in all respects any and all prior oral or written agreements or understandings pertaining to the subject matter hereof and transactions contemplated hereby, and shall be amended or modified only by written instruments signed by all of the parties hereto.
15. Notices. Any notice or other communication required or permitted to be given or served upon any of the parties under this Agreement shall be sufficiently delivered, given, or served if delivered personally to such party or sent to such party by registered or certified mail, postage prepaid, addressed to such party as set forth below or such other address as such party shall designate by giving written notice to the other parties as follows:
- |                                   |                                     |
|-----------------------------------|-------------------------------------|
| In case of notice to Sellers:     | In case of notice to Rochester:     |
| Barry K. Gilbert, President       | General Manager                     |
| Lenwood Heights Association, Inc. | Rochester Public Utility Department |
| 2227 Lenwood Court SW             | 4000 East River Road, NE            |
| Rochester, MN 55902               | Rochester, MN 55906-2813            |
16. General. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. The paragraph headings contained herein are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement. The invalidity or unenforceability of any

provisions hereof and this Agreement shall be construed in all respects as if such invalid or unenforceable provision were omitted.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the day and year first above written.

**City of Rochester, a Minnesota municipal corporation**

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: Mayor

[MUNICIPAL SEAL]

Attest: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: City Clerk

Approved as to Form: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: City Attorney

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Its: General Manager, Rochester Public Utilities

Address: City of Rochester  
c/o Rochester Public Utilities  
4000 East River Road NE  
Rochester, MN 55905  
Phone: (507) 280-1510

Federal Tax ID No.: \_\_\_\_\_

**Lenwood Heights Association, Inc., a Minnesota Non-Profit Corporation**

By: Barry K. Gilbert  
Barry K. Gilbert, President

STATE OF \_\_\_\_\_ )  
 ) SS  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_, 2011,  
by \_\_\_\_\_,  
and \_\_\_\_\_, the Mayor, City Clerk, and City Attorney and Rochester Public Utilities  
General Manager, respectively, of the City of Rochester, a Minnesota municipal corporation, on behalf of the  
corporation.

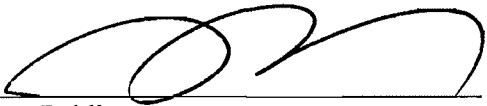
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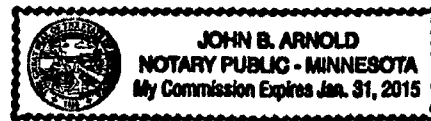
\_\_\_\_\_  
Notary Public  
My commission expires \_\_\_\_\_

STATE OF MINNESOTA)  
 ) SS  
COUNTY OF OLMSTED)

The foregoing instrument was acknowledged before me on the 26th day of October, 2011, by  
Barry K. Gilbert, the President of Lenwood Heights Association, a Minnesota non-profit corporation,  
on behalf of the corporation.

[seal]

  
\_\_\_\_\_  
Notary Public  
My commission expires \_\_\_\_\_



This document drafted by  
Rochester Public Utilities  
4000 East River Road NE  
Rochester, MN 55906-2813

**ATTACHMENT 1**

**PUBLIC UTILITY EASEMENT FORM – LENWOOD HEIGHTS WELL SITE**

**(See Attached Document)**

PUBLIC UTILITY EASEMENT

THIS INDENTURE, made this \_\_\_\_ day of \_\_\_\_\_, 2011, by and between **Lenwood Heights Association, Inc.**, a Minnesota Non-Profit Corporation (hereinafter "Grantor"), and the **City of Rochester**, a Minnesota municipal corporation (hereinafter "Grantee");

WITNESSETH:

In consideration of the payment of ONE DOLLAR and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Grantor hereby grants, bargains, sells and conveys to Grantee an easement to operate and maintain Lenwood Heights water system infrastructure over, above and below the following described land in the County of Olmsted, State of Minnesota, to-wit:

Well Site, Lenwood Heights Subdivision, Olmsted County, Minnesota

Grantee, by acceptance of the rights herein granted, covenants and agrees that it will at all times be responsible for the maintenance and repair of any water system infrastructure located in the easement area at its cost and expense and that it will at all times maintain said infrastructure in a good useable condition. Grantee also agrees to release said Utility Easement when each property currently served by the Lenwood Heights Association water system is connected to the new City watermain and



ATTACHMENT "2"

BILL OF SALE FORM - LENWOOD HEIGHTS ASSOCIATION WATER SYSTEM

(See Attached Document)



## LENWOOD HEIGHTS ASSOCIATION WATER SYSTEM

The **Lenwood Heights Association**, hereinafter referred to as "Seller", in consideration of One Dollar (\$1) and other valuable consideration it paid by the **City of Rochester**, a Minnesota municipal corporation, hereinafter referred to as "Buyer", the receipt of which is hereby acknowledged, sells to Buyer the following personal property:

All wells, pumps, tanks, mains, pipes, lines, valves, fire hydrants and other personal property owned by Seller and presently used in the distribution of water located within the Lenwood Heights Subdivision. (This does not include the Well Site parcel in the Lenwood Heights Subdivision, or individual water service lines extending from the watermains to individual properties.)

The Seller covenants with Buyer that it is the lawful owner of the personal property; that it has good right to sell the personal property; that the property is free from all encumbrances; and that it will defend the Buyer against all lawful claims and demands existing at the time of this sale.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

**LENWOOD HEIGHTS ASSOCIATION, INC.**  
A Minnesota Non-Profit Corporation

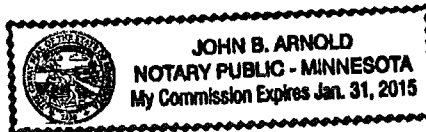
By Barry K. Gilbert  
Barry K. Gilbert, President

STATE OF MINNESOTA )  
 ) SS  
COUNTY OF OLMSTED )

The foregoing instrument was acknowledged before me this 26th day of October, 2011, by Barry K. Gilbert, President, Lenwood Heights Association, Inc., for and on behalf of the Corporation.

**NOTARY PUBLIC**

**THIS INSTRUMENT DRAFTED BY**  
**Rochester Public Utilities**  
**4000 East River RD NE**  
**Rochester, MN 55906**





## RESOLUTION

BE IT RESOLVED by the Public Utility Board of the City of Rochester, Minnesota, to approve a Purchase Agreement and supplemental Letter of Understanding with the Lenwood Heights Association, Inc., subject to amending Paragraph 8 of the Purchase Agreement to reflect a closing date on or about December 15, 2011, and request that the Mayor and City Clerk execute the Purchase Agreement for

### Purchase of Lenwood Heights Water System

The amount of the Purchase Agreement to be ONE DOLLAR (\$1) and other valuable consideration, including those obligations set forth separately by contract or agreement.

Passed by the Public Utility Board of the City of Rochester, Minnesota, this 29th day of November, 2011.

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President

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Secretary