

**AN ORDINANCE AUTHORIZING THE EXECUTION OF A
SETTLEMENT AND RELEASE AGREEMENT**

WHEREAS, a dispute was previously filed against the City challenging the procedural adoption of the City's Sales Tax Ordinance No. 148, approved on March 15, 1976, and the City's Fire Protection Tax Ordinance No. 83, approved on January 24, 2005 ("Disputed Ordinances"); and

WHEREAS, the City's records reflect that Ordinance No. 148 and No. 83 were passed in written bill and in conformance with all requirements of §79.130 R.S.Mo. and all other applicable authority; and

WHEREAS, to clarify any claimed ambiguity and to preclude any unnecessary continued litigation regarding the Disputed Ordinances, the City and the Plaintiffs, Andrea Penberthy and Tom Burcham, III as proposed class counsel, seek to enter into a Settlement and Release Agreement; and

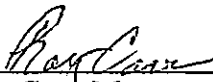
WHEREAS, as a condition of such Settlement and Release Agreement, the parties will seek Court approval of a Consent Judgment and Order, including a nunc pro tunc order correcting, clarifying or ratifying the public records to eliminate any alleged deficiency to affirm the lawful passage and valid enactment of the Disputed Ordinances in compliance with §79.130 R.S.Mo.; and

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF ARCADIA, MISSOURI as follows:

Section One. The Mayor is hereby authorized to execute the Settlement and Release Agreement in substantially the form attached hereto as Exhibit A, and the Mayor, City Attorney, and special legal counsel are authorized to take such other actions as may be necessary or appropriate to effect the Settlement and Release Agreement.

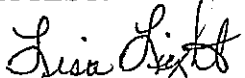
Section Two. This Ordinance shall be in full force and effect from and after its passage and approval as provided by law.

This Bill was passed and approved as provided by law this 14th day of March, 2011 by the Board of Aldermen of the City of Arcadia, Missouri after having been read by the title or in full two times prior to the passage.



Roy Carr, Mayor

ATTEST:



Lisa Light, City Clerk

EXHIBIT A

SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement ("Agreement") is made this 16th day of March, 2011, by and between the City of Arcadia, Missouri ("City") and Andrea Penberthy and proposed class action counsel, Tom R. Burcham, III ("Plaintiffs").

RECITALS

WHEREAS, a lawsuit was previously filed against the City by Andrea Penberthy as plaintiff and Tom R. Burcham, III as proposed class action counsel in the Circuit Court of Wayne County, *Penberthy v. City of Arcadia*, Cause No. 07IR-CC00053-01 (Dec. 6, 2007), ("Action"), challenging the procedural adoption and validity of the City's Sales Tax Ordinance No. 148, approved on March 15, 1976, and the City's Fire Protection Tax Ordinance No. 83, approved on January 24, 2005, ("Disputed Ordinances");

WHEREAS, Tom R. Burcham, III sought in the Action class certification and an order appointing himself as class counsel in the above referenced lawsuit;

WHEREAS, the City and Plaintiffs agree that the Disputed Ordinances were voted upon and approved by the citizens of Arcadia at duly advertised public elections, but Plaintiffs dispute the adequacy of the minutes or documentation as to the form or adoption of the Disputed Ordinances;

WHEREAS, neither the City nor Plaintiffs agree with the allegations of the other nor admit any liability but agree that the proposed consent judgment and order, in the form attached hereto as Attachment 1 ("Consent Judgment & Order"), provided for herein would wholly resolve and moot the Action and allegations alleged therein;

WHEREAS, to clarify any claimed ambiguity and to preclude any unnecessary continued litigation regarding the Disputed Ordinances, the City and Plaintiffs seek to have the Court approve a Consent Judgment & Order, including a nunc pro tunc order correcting, clarifying or ratifying the public records to eliminate any alleged deficiency to affirm the lawful passage and valid enactment of the Disputed Ordinances in compliance with §79.130 RSMo.;

WHEREAS, upon execution of this Agreement, the Plaintiffs and City shall file an executed Consent Judgment & Order, in the form of Attachment 1, with the Court of Wayne County ordering the minutes amended or ratified and vacating the earlier interim judgment in this case; and

NOW, THEREFORE, in consideration of the foregoing, and in consideration of the mutual promises and obligations hereinafter set forth, the parties to this Agreement hereby agree as follows:

AGREEMENT

1. PAYMENT

Subject to the terms hereof, the City agrees to pay the Plaintiffs the sum of Five Thousand Dollars (\$5,000.00) as reimbursement of costs incurred in obtaining this resolution within five (5) business days after the Effective Date of this Agreement. The "Effective Date" shall be the date of a judge's final approval and issuance of the Consent Judgment & Order, in the form of Attachment 1. Except to the extent provided in this paragraph, all parties shall bear their own attorneys' fees, costs, and expenses.

2. BINDING CONSENT JUDGMENT

The Plaintiffs and City agree to seek a Consent Order & Judgment, in the form of Attachment 1, vacating the existing judgment sustaining a partial summary judgment motion, authorizing a nunc pro tunc correction, clarification or ratification of records, and thereby affirming the validity the Disputed Ordinances. Plaintiffs agree, on their own behalf and as legal counsel, that the commitments herein shall be binding and enforceable and that the Consent Judgment & Order shall fully resolve and dismiss the Action and moot all allegations therein as to the invalidity of the Disputed Ordinances. In the event that such Consent Order & Judgment is not approved by the Court within forty-five (45) days of the date of the last signature hereto, this Agreement shall be null and void.

3. RELEASE OF CLAIMS

Plaintiffs do hereby release and forever discharge the City, and its departments, divisions, and offices and their respective officials, officers, employees, agents, contractors, representatives, predecessors, successors, assigns, trustees, insurers, and attorneys, and each of them, from any and all claims, demands, actions, causes of action, liabilities, obligations, losses, accounts, debts, damages, judgments, costs, interest, expenses, attorney's fees, and demands of any kind or nature, known or unknown, arising out of or in any way related to this Action, including any actions that may have been or could have been asserted by one or more of the proposed class members in this Action concerning the validity of either of the Disputed Ordinances or any taxes collected thereunder. Furthermore, the Plaintiffs expressly agree that this Settlement, and/or the events leading up to it, including the Action, may not be deemed or used as an admission in any manner, including in any subsequent judicial or administrative proceeding against the City, other than to enforce the terms of this Agreement. Plaintiffs agree that City may file the Consent Judgment & Order, in the form of Attachment 1, and Plaintiffs agree to cooperate in obtaining the entry thereof. Plaintiffs further agree that upon approval of such Consent Judgment & Order by a judge in the Court of Wayne County, Plaintiffs will not appeal or challenge in any way the entry of such Order.

4. VOLUNTARY AGREEMENT

This Agreement is freely and voluntarily executed by each party, without any duress or coercion, and after each party has consulted with its counsel. Each party has carefully and completely read all of the terms and provisions of this Agreement. It is understood and

agreed by all parties that nothing herein shall be deemed to be an admission of liability by the City.

5. AUTHORITY AND BINDING EFFECT

The parties represent and warrant to the other that each has the legal right, power, and authority to enter into this Agreement and to perform its obligations hereunder. This Agreement will inure to the benefit of and be binding upon the parties and their respective successors and assigns. The parties agree to join in or execute any instruments and to do any other act or thing necessary or proper to carry into effect this or any part of this Agreement.

6. ENTIRE AGREEMENT

This Agreement sets forth the entire agreement between the City and Plaintiffs relating to this Agreement. Each of the parties agree that no representation or promise not expressly set forth herein has been made to such party in connection with the matters set forth herein, and each further affirmatively represents that this Agreement is not being entered into in reliance upon any such promise or representation, whether express or implied.

IN WITNESS WHEREOF, the City and Plaintiffs have executed this Agreement as their free and voluntary acts and deeds, and such shall be effective after each party has signed hereto and final approval of the Consent Judgment & Order, in the form of Attachment 1, within forty-five (45) days of filing such by a judge at the Court of Wayne County.

City of Arcadia, Missouri

By: [Signature]
Date: _____

Attest: _____

Andrea Penberthy

By: [Signature]
Date: 2/18/11

Tom R. Burcham, III

By: [Signature]
Date: 2-18-11

Attachment 1:

Consent Order & Judgment

IN THE CIRCUIT COURT OF WAYNE COUNTY, MISSOURI

ANDREA PENBERTHY,)	
)	
Plaintiff)	
)	
vs.)	Case No. 07IR-CC00053
)	
CITY OF ARCADIA,)	
)	
Defendant.)	

CONSENT ORDER AND JUDGMENT

WHEREAS, Plaintiff filed this action challenging the validity of the City's Sales Tax Ordinance No. 148, approved on March 15, 1976, and the City's Fire Protection Tax Ordinance No. 83, approved on January 24, 2005, (the "Disputed Ordinances") due to alleged procedural deficiencies in the adoption or minutes documenting such enactments:

WHEREAS, Plaintiff and Defendant agree that the Disputed Ordinances were in fact approved by the City Board of Aldermen and executed by the Mayor and City Clerk, submitted to and approved by the voters, that the City and State of Missouri have enforced the taxes since the enactment and voter approval of the Disputed Ordinances, but Plaintiff disputes the adequacy of the public record and minutes reflecting such historical facts under applicable law:

WHEREAS, this Court previously issued an interim order in which the Disputed Ordinances were invalidated due to the City's failure to produce records reflecting the historical compliance with the required procedures showing the Disputed Ordinances were enacted as bills, but the City seeks to rebut such ruling with further proceedings:

WHEREAS, in lieu of further litigation as to such legal issues in dispute, the parties agree that the issuance of a nunc pro tunc order correcting, clarifying or ratifying the public records to eliminate any alleged deficiency in the documentation is authorized and would resolve the dispute and moot allegations of any alleged deficiency in the enactment of the Disputed Ordinances; and

Now, therefore, **IT IS ADJUDGED, ORDERED, AND DECREED** that:

1. The minutes of the City of Arcadia are hereby ordered amended or ratified to reflect that the City's Sales Tax Ordinance No. 148, approved on March 15, 1976, and the City's Fire Protection Tax Ordinance No. 83, approved on January 24, 2005, were passed as a bill and duly enacted into law by the legislative body in conformance with §79.130 RSMo., and shall hereinafter be deemed validly enacted.
2. The Judgment of this Court dated January 4, 2010 sustaining Plaintiff's partial motion for summary judgment is hereby vacated and of no force and effect.

3. All remaining claims in this cause of action are hereby dismissed with prejudice as moot, with each party bearing their own attorneys' fees, costs, and expenses.

SO ORDERED:

Judge

Dated: _____

By: _____
Daniel G. Vogel, No. 39563
Erin P. Seele, No. 63235
CUNNINGHAM, VOGEL & ROST, P.C.
75 West Lockwood, Suite One
St. Louis, Missouri 63119
Telephone: 314.446.0800
Facsimile: 314.446.0801

&

R. Scott Killen, #45735
OLIVER, OLIVER & WALTZ, P.C.
1838 Broadway, P.O. Box 559
Cape Girardeau, MO 63702-0559
Telephone: (573) 335-8278
Facsimile: (573) 334-6375

*Co-Counsel for Defendant,
City of Arcadia, MO*

By: _____
Tom R. Burcham, III #43932
222 West Columbia Street
Farmington, MO 63640
Telephone: (573) 756-5014
Fax: (573) 756-6878

*Counsel for Plaintiff,
Andrea Penberthy*