

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

HEMPHILL, LLC,

Plaintiff,

v.

CITY OF MCKINNEY, TEXAS,

Defendant.

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Civil Action File No. 4:21-cv-00655

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release (“Agreement”) is entered into by and between Hemphill, LLC, an Oklahoma Limited Liability Company (“Hemphill”), and the City of McKinney, Texas, a Texas home-rule municipal corporation (“City”), on May 3, 2022 (“Effective Date”). Hemphill and the City are referred to collectively as the “Parties,” or individually as a “Party.”

RECITALS

WHEREAS, on March 2, 2021, and March 26, 2021, respectively, Hemphill submitted an original application and revised application submittals to the City, requesting that the City rezone a tract of land located at 551 Bluestem Drive, McKinney, Texas 75070, Collin County CAD Property ID #2780828 (“Subject Property”), from “PD – Planned Development District for Elementary School Uses” to “PD – Planned Development District, Generally to allow for government uses and a Telecommunications Tower” (collectively, the “application”); and

WHEREAS, Hemphill’s application proposed, among other things, the installation of a unipole telecommunications tower 80 feet tall with a five-foot lightning rod, for a total height of

85 feet (“facility”), which was designed to provide personal wireless service in the vicinity of the proposed facility; and

WHEREAS, on April 27, 2021, the McKinney Planning and Zoning Commission voted to recommend approval of the application by a 7-0-0 vote, but on July 6, 2021, the McKinney City Council voted to deny Hemphill’s application by a 4-3-0 vote; and

WHEREAS, on August 17, 2021, the McKinney City Council adopted a resolution setting forth its written denial and the reasons therefor (“Denial”), and the City forwarded a copy of the Denial to Hemphill on August 19, 2021; and

WHEREAS, on August 19, 2021, Hemphill initiated this lawsuit (“Litigation”) by filing its Complaint for Declaratory and Injunctive Relief Under the U.S. Telecommunications Act of 1996 against the City of McKinney, Texas, in the United States District Court for the Eastern District of Texas, Sherman Division (“Complaint”); and

WHEREAS, Hemphill alleges in its Complaint that the City unlawfully denied Hemphill’s application to construct the wireless telecommunications facility on the Subject Property, which is currently occupied by a school and is zoned “PD” – Planned Development District (Elementary School Uses); and

WHEREAS, Hemphill further alleges that the City’s denial effectively prohibits the provision of personal wireless service in the vicinity of the proposed facility, thereby violating the federal Communications Act, as amended (“Communications Act”), 47 U.S.C. § 332(c)(7), and entitling Hemphill to an order granting Hemphill’s application for the proposed facility; and

WHEREAS, on September 23, 2021, the City filed its Original Answer to Plaintiff’s Complaint, in which it denied any and all allegations of wrongdoing and opposed all relief requested by Hemphill; and

WHEREAS, on September 29, 2021, the Court issued its Order Governing Proceedings, in which it set forth certain pretrial deadlines, including discovery deadlines; and

WHEREAS, soon thereafter the Parties entered into good-faith discussions to resolve their differences in an attempt to settle the case, which discussions included the possibility of relocating the site of the proposed facility to a parcel which will be conveyed to the City under an existing development agreement for its future use as a public park ("City Property"); the issuance of a special use permit and a rezoning of the City Property, as necessary, to accommodate the facility, all subject to the approval of the McKinney City Council; and entering into a lease agreement, also subject to City Council approval, between Hemphill and the City regarding the facility and the City Property; and

WHEREAS, on November 1, 2021, the Parties filed their Joint Agreed Motion to Abate Litigation for 90 Days and to Vacate Existing Deadlines and Settings ("Motion to Abate"), the purpose of which was to allow the Parties additional time to continue settlement discussions without incurring attorneys' fees and related litigation costs that might later prove to be totally unnecessary; and

WHEREAS, by Order dated November 3, 2021, the Court granted the Motion to Abate, thereby abating the case to January 31, 2022 (or until further notice of the Court), canceling the Rule 16 management conference, staying all existing deadlines in the case, and instructing the Parties to file a joint report with the Court no later than February 7, 2022, regarding the status of the Parties' settlement discussions; and

WHEREAS, by Order dated February 1, 2022, the Court granted the parties' Joint Agreed Motion to Extend the Abatement of Litigation Until May 2, 2022, Including a Stay of All Existing Deadlines ("Agreed Joint Motion to Extend Abatement"), thereby abating the case until May 2,

2022 (or until further notice of the Court), staying all existing deadlines in the case, and instructing the Parties to file a joint report with the Court no later than May 9, 2022, regarding the status of the Parties' settlement discussions; and

WHEREAS, since the granting of both the Motion to Abate and the Agreed Joint Motion to Extend Abatement, the Parties have continued to engage in meaningful, productive, good-faith discussions; and

WHEREAS, the Parties now desire to fully and finally compromise, settle, and resolve any and all disputes and claims that currently exist, may exist, or may have existed, or that have been or could have been asserted in the Litigation or in connection with the submission of, or the City's consideration of or action taken regarding, Hemphill's application, including but not limited to claims for damages, equitable relief, declaratory relief, specific performance, attorneys' fees, court costs, and interest; and

WHEREAS, pursuant to the Parties' desire to avoid the time, cost, delay, and uncertainty of continued litigation, the Parties, in full consideration of the mutual promises and covenants contained in this Agreement, including these Recitals, and without any admission by either Party concerning the merit or lack of merit of any claim or defense made in the Litigation or related to Hemphill's application, have agreed and do hereby agree as follows:

1. Terms of Agreement. The Parties understand, acknowledge, and agree to each of the following:

- a. Subject to the obligations and terms set forth herein, the Parties have fully and finally compromised, settled, and resolved any and all disputes and claims between them that currently exist, may exist, or may have existed, or that have been or could have been asserted in the Litigation or in connection with the submission of, or the City's

consideration of or action taken regarding, Hemphill's application, including but not limited to claims for damages, equitable relief, declaratory relief, specific performance, attorneys' fees, court costs, and interest.

b. Hemphill has executed and delivered to the City a Land Option and Lease Agreement ("Lease Agreement") covering a portion of the City Property, as more fully described in Exhibit B to the Lease Agreement as the "Leased Premises", and the executed Lease Agreement and a special warranty deed for the City Property are being held in escrow pending formal action by the McKinney City Council. The City's staff has recommended to the City Council that it approve the Lease Agreement on the terms and conditions contained in that document and that it authorize the City Manager to execute the Lease Agreement.

c. The Lease Agreement shall be executed by the City Manager and will become effective upon the contemporaneous approval by the McKinney City Council of (1) the approval of a special use permit for the City Property and any necessary zoning or rezoning allowing the facility and the Leased Premises; and (2) this Settlement Agreement and Mutual Release between the City of McKinney, Texas and Hemphill, LLC.

d. Hemphill has prepared, and the City has approved, the necessary documents that provide for Hemphill's dismissal of the Litigation against the City with prejudice to the refiling of same ("Dismissal Documents"). Hemphill shall file the Dismissal Documents with the Court immediately following the McKinney City Council's approvals as provided in subparagraph 1.c, above.

2. Release of the City. The Parties understand, acknowledge, and agree that except for the obligations created by or arising out of this Agreement, Hemphill, for itself and on behalf of its

successors and assigns and its respective representatives, agents, officers, attorneys, and employees, hereby fully, finally, and absolutely releases, acquits, and forever discharges the City, and any and all affiliated representatives, agents, officers, attorneys, and employees from any and all claims, demands, liabilities, debts, obligations, accounts, causes of actions, compensatory damages, punitive or exemplary damages, prejudgment or post-judgment interest, costs of court, and attorneys' fees, whether past, present, or future, known or unknown, at law or in equity, arising out of or related to any act or omission occurring before the execution of this Agreement, including but not limited to all matters concerning or relating to this Litigation and claims arising out of or relating to any acts or omissions that were or could have been asserted in this Litigation.

3. Release of Hemphill. To the extent allowable by law and except for the obligations created by or arising out of this Agreement, the City, for itself and on behalf of its respective representatives, agents, officers, attorneys, and employees, hereby fully, finally, and absolutely releases, acquits, and forever discharges Hemphill, and any and all affiliated representatives, agents, officers, attorneys, and employees from any and all claims, demands, liabilities, debts, obligations, accounts, causes of action, compensatory damages, punitive or exemplary damages, prejudgment or post-judgment interest, costs of court and attorneys' fees, whether past, present, or future, known or unknown, at law or in equity, arising out of or related to any act or omission occurring before the execution of this Agreement, including but not limited to all matters concerning or relating to this Litigation and claims arising out of or relating to any acts or omissions that were or could have been asserted in this Litigation.

4. Warranties and Representations. The Parties warrant and represent together that they are the sole and lawful owners of their respective right, title, and interest in and to all matters being released under this Agreement, and they have not heretofore assigned or transferred or purported

to assign or transfer to any person or entity not a party to this Agreement any such released matters or any part or portion thereof. Further, the Parties warrant and represent that this Agreement constitutes a valid, binding, and enforceable agreement of the Parties, and that each of the Parties, and their respective signatories to this Agreement, has the full legal right, power, capacity, and authority to enter into and bind the Party to perform the obligations contained in this Agreement. The Parties also warrant and represent that the agreements and instruments required by this Agreement, and the execution and performance of this Agreement, will not contravene or violate any other agreement or law in effect at the time of execution.

5. No Waiver. The failure of any Party to enforce at any time any provision of this Agreement will not be construed as a waiver of such provision, nor will it affect in any way the validity of this Agreement or any part thereof or the right of any person thereafter to enforce any provision. A waiver of any breach of this Agreement will not be held to constitute a waiver of any other breach.

6. Applicable Law and Exclusive Jurisdiction and Venue. This Agreement shall be governed, interpreted, construed, and enforced pursuant to the laws of the State of Texas. Exclusive jurisdiction and venue for any action arising out of this Agreement shall be in a district court in Collin County, Texas. As part of the dismissal of the Litigation, the parties shall request the Court retain jurisdiction to enforce this Agreement.

7. Binding Agreement. This Agreement shall be binding upon the Parties and their respective successors and assigns, representatives, agents, officers, attorneys, and employees.

8. Entire Agreement. This Agreement constitutes and contains the entire Agreement and understanding between the Parties concerning the subject matter hereof and supersedes and replaces all prior negotiations, proposed agreements, and agreements (other than the agreements referenced herein as part of this Agreement), whether written, oral, or implied. Any oral

representation or modification concerning this Agreement shall be of no force or effect whatsoever. The Parties acknowledge, one to the other, that no Party, nor agent or attorney of any other Party, has made any promise, representation, or warranty to the other Party (express, implied, or statutory) not contained herein concerning the subject matter hereof, to induce such other Party to execute this Agreement and that they have not executed this Agreement in reliance upon any promise, representation, or warranty not contained herein.

9. Consultation with Legal Counsel. The Parties acknowledge that they have been represented by independent legal counsel of their own choice throughout all the negotiations that preceded the execution of this Agreement, that they have read and fully understand the terms and legal consequences of this Agreement, and that they have executed this Agreement with the consent and on the advice of such independent legal counsel. The Parties further acknowledge that they and their counsel have had adequate opportunity to make whatever investigation they deem necessary or desirable in connection with the subject matter of this Agreement prior to the execution hereof and the delivery and acceptance of the considerations specified herein.

10. No Inference of Draftsmanship. No Party, nor any Party representative or attorney, shall be deemed the drafter of this Agreement for purposes of interpreting any provision hereof in this or any other proceeding that may arise between the Parties.

11. Amendments to the Agreement. Neither the entirety of this Agreement, nor any portion or provision hereof, may be altered, amended, modified, or otherwise changed, except by writing duly executed by each Party.

12. Agreement Counterparts. This Agreement may be executed in multiple counterparts. Such counterparts, taken together, shall constitute the Agreement between the Parties. Any

counterpart upon being signed, and photocopied, or signed and transmitted electronically, shall be as effective as if the signature on the photocopy or transmitted copy appeared on the original.

13. Severability. If, after the date of execution of this Agreement, any provision herein is held to be illegal, invalid, or unenforceable under present or future law, such provision shall be fully severable.

14. Cooperation of Parties. The Parties agree to reasonably cooperate, including the execution of supplemental documents, as may be required, and to take all additional action that may be necessary or appropriate to give full force and effect to the terms and the intent of this Agreement.

City of McKinney, Texas,
a Texas home-rule municipal corporation

By: _____
Paul G. Grimes
City Manager

STATE OF TEXAS §
 §
COUNTY OF COLLIN §

Before me the undersigned notary public in and for the State of Texas, on this day personally appeared Paul G. Grimes, City Manager of the City of McKinney, Texas, a Texas home-rule municipal corporation, known to me to be the person whose name is subscribed to the foregoing Agreement, and acknowledged to me that he is duly authorized to execute and has executed the foregoing Agreement on the City’s behalf.

Given under my hand and seal of office on the ___ day of _____, 2022.

Notary Public in and for the

State of Texas
My commission expires_____

Hemphill, LLC

By: _____

STATE OF OKLAHOMA §
 §
COUNTY OF _____ §

Before me the undersigned notary public in and for the State of Texas, on this day personally appeared _____, who acknowledged to me that he is the person whose name is subscribed to the foregoing Agreement and that he is duly authorized to execute and has executed the foregoing Agreement in the name of and on behalf of Hemphill, LLC.

Given under my hand and seal of office on the ___ day of _____, 2022.

Notary Public in and for the
State of Oklahoma
My commission expires_____