

11702

May 6, 2010

To: Honorable Members of the  
Board of Acquisition and Contract

From: Robert F. Meehan  
County Attorney

Re: Request for Authorization to settle the lawsuit of The County of Westchester, Malpa Corporation, and Zacharia Malpass v. United Water of New Rochelle by payment from the County to United Water in the amount of \$45,698, inclusive of counsel fees.

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Attached for your consideration is a resolution, which, if approved by your Honorable Board, would authorize settlement of the lawsuit of The County of Westchester, Malpa Corporation, and Zacharia Malpass v. United Water of New Rochelle by payment from the County to United Water in the amount of \$45,698, inclusive of counsel fees.

This case deals with a collapsed portion of a roadway located on Midland Avenue in the Village of Tuckahoe. The roadway collapsed on September 10, 2004 when a fire hydrant blew open because of a water pipe break under the roadway. The water pipes are owned by United Water of New Rochelle. At or about the time of the water main break, the County and the Village of Tuckahoe were about to enter into an InterMunicipal Agreement (IMA) transferring responsibility for the maintenance of this roadway from the County of Westchester to the Village of Tuckahoe. Immediately after the collapse of the roadway, the County made a demand to United Water to indemnify the County for the cost of repairing the roadway and adjacent sidewalk. United Water rejected the County's demand and took the position that the pipes under the roadway broke because of work being performed by the County on the road surface immediately prior to the break.

The County commenced an action against United Water of New Rochelle. United Water of New Rochelle then commenced a third party action against the Village of Tuckahoe and the adjacent landowners. The cases were consolidated for purposes of discovery. Throughout the discovery process, the parties were working towards a reasonable resolution on the issues of on-going responsibility for the maintenance of the roadway and the reasonable apportionment of the

cost to repair and/or restore the roadway. After extensive settlement negotiations with United Water, and the Village of Tuckahoe, the parties were able to agree upon an equitable settlement. The terms of the proposed settlement are as follows:

- The collapsed portion of Midland Avenue will be repaired and the collapsed embankment will be replaced with a gabion wall;
- The Village of Tuckahoe will contribute \$70,000 towards the cost of the project. Half will be paid directly by the Village and the other half will be paid by the insurance company for the Village of Tuckahoe;
- The County will contribute \$45,698 towards the repair and/or restoration of the collapsed roadway;
- The County will waive all future application and permit fees in connection with United Water's restoration and/or repair in connection with this project;
- United Water has agreed to execute and deliver to the County a written confirmation of its compliance with the County permit laws and permit roadway laws.
- The Village of Tuckahoe agrees to ratify the IMA transferring responsibility of the collapsed portion of Midland Avenue to the Village of Tuckahoe.
- The Village of Tuckahoe agrees to maintain the gabion wall to be built by United Water in perpetuity; and
- Etre Associates, will contribute \$25,000 towards the work to be performed by United Water;
- United Water is responsible for the outstanding balance of the project costs and for implementation of the project by hiring contractors, subcontractors, or any other personnel needed to complete the project;
- United Water shall waive any claim for reimbursement of past costs and expenses associated with this litigation; and
- The Gentile property owners will provide access to the property to United Water to repair and construct the Gabion Wall, and execute an Easement Agreement with the Village of Tuckahoe for purposes of maintaining the gabion wall.
- As for the claims of Malpa Corp. and Zacharia Malpass as plaintiffs, United Water has agreed to pay \$35,000 and ELQ has agreed to pay \$6,500.
- As for the claims of the Gentiles as plaintiffs, United Water has agreed to pay \$10,250 and ELQ has agreed to contribute \$8,500.

Because at the time of the water main break, the County was responsible for the maintenance of the roadway, the County was legally obligated to repair the collapsed portions of the roadway and then seek indemnification or contribution from United Water. The basis of that litigation would be that it was United Water's pipes that broke under the surface of the County's roadway. The cost of the roadway repairs far exceed the \$45,698 to be paid by the County.

Moreover, once the road collapsed, the Village of Tuckahoe refused to execute the IMA until such time as the roadway was restored to its condition prior to the water main break. The County could have also commenced litigation against the Village of Tuckahoe seeking to compel the Village to specifically perform and execute that IMA. These litigations would have been expensive, requiring the retention of experts, and would have resulted in all parties refusing to restore the roadway until the completion of the litigation.

The Department of Public Works believes this to be a fair and equitable settlement and will result in the transfer of responsibility for the maintenance of this portion of the roadway to the Village of Tuckahoe.

Due to the costs of litigation, the delays necessarily incurred in repairing the roadway, and the uncertainty of the outcome, the prior County Attorney approved the settlement of this matter in the amount of \$45,698, subject to your Honorable Board's concurrence. I also recommend that this Honorable Board approve this settlement which requires the County to contribute \$45,698 towards the cost of repairing the roadway.

RFM/lvv

cc: Kevin Plunkett  
Deputy County Executive

APPROVED BOARD OF ACQUISITION & CONTRACT ADMINISTRATION  
JANUARY VILLAGE SECRETARY

RESOLUTION

Upon the communication of the County Attorney; it is hereby  
RESOLVED, that the County Attorney is hereby authorized to settle the lawsuit The  
County of Westchester, Malpa Corporation, and Zacharia Malpass v. United Water of  
New Rochelle by payment from the County to United Water in the amount of \$45,698,  
inclusive of counsel fees.

RESOLVED, that the County Attorney or his designee is authorized to execute  
any documents necessary to implement this resolution.

Account to be  
Charged/Credited

Fund	Dept	Major Program, Program & Phase & Or Unit	Object/ Sub-Object	Trust Account	Dollars
615	59	0684/2810	4280	04	\$45,698.00

Budget Funding Year(s) 2010 Start Date 1/1/2010 End Date 12/21/2010

(must match resolution)

Funding Source Tax Dollars \_\_\_\_\_

State Aid \_\_\_\_\_

**\$ 45,698.00** Federal Aid \_\_\_\_\_

(must match resolution)

Other 6N Fund \_\_\_\_\_