REQUEST FOR COUNCIL ACTION

MEETING DATE: 8/18/2003

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AGENDA SECTION: Consent	ORIGINATING DEPT: Park and Rec	ITEM NO. D-9
ITEM DESCRIPTION: Lease Agreement with Mathy Construction		PREPARED BY: D Stotz

The land use lease agreement is between the City and Mathy Construction whereby lands or interests in land will be transferred between the parties.

The agreement identifies rights and obligations of both parties relative to the mining and restoration of several parcels of City / Mathy controlled property located in what is referred to as the Cascade Lake area. The agreement will allow mining by Mathy and direct the reclamation of mined areas, as well as the shaping of the lake shorelines, lake bottoms and public lands as per the Cascade Lake Master Plan which is scheduled to completed by mid-2004.

ARENDS PARCEL

The agreement allows Mathy to begin sand and gravel mining on the City owned Arend's parcel immediately once required permits are obtained while obligating Mathy to pay the City either $.50 / cubic yard for mineral extracted, perform earth work at agreed upon hourly rates or provide the City with sand / gravel product at a future date. The mining of this parcel is to be completed by Dec 31 2004. The agreement allows Mathy to use portions of the Arend's property for gravel mining staging area and gives Mathy the right of first refusal to mine additional areas of the Arend's parcel once the master plan is adopted.

QUARVE PARCEL

The agreement requires that Mathy delay mining of this parcel pending the Council's adoption of the Cascade Lake Master Plan.

CITY / FIEGEL PARCEL

The agreement allows Mathy to use portions of the parcel for gravel mining staging area and gives Mathy the right to mine additional areas of the parcel. All mining and reclamation are to be consistent with the Cascade Lake Master Plan.

MATHY / FIEGEL PARCEL

The City is to attempt to obtain permits for the mining of wetlands, the current Cascade Creek waterway as well as the sewer / powerline corridor. Mathy is allowed to mine these areas consistent with the permits obtained and the Cascade Lake Master Plan as well as be responsible for performing the restoration work required of the permits.

CITY / WESTERN WALLS PARCEL

Mathy agrees to mine this area consistent with the Cascade Lake Master Plan and complete all mining and restoration work by Dec 31, 2008.

The agreement establishes a schedule for the completion of mining and restoration of each of the identified parcels and includes a schedule that would complete the mining of Cascade Lake in late 2008.

Council Action Requested: Authorize the Mayor and City Clerk to execute the land lease agreement with Mathy Construction

COUNCIL ACTION: Motion by:_____ Second by:_____ to:

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AGREEMENT

This agreement made this _____day of _____, 2003, by and between the **City of Rochester,** a Minnesota municipal corporation (hereinafter "City"), and **Mathy Construction, Inc.**, (hereinafter "Mathy").

WITNESSETH

WHEREAS, the City owns land or holds interests in lands in the area identified as the future site of Cascade Lake as identified in the attached Exhibit A; and,

WHEREAS, Mathy also owns land or holds interests in lands in the area identified as the future site of Cascade Lake; and,

WHEREAS, the lands identified in Exhibit A have certain mineral assets that are of value to both parties; and,

WHEREAS, the City desires to develop the lands identified in Exhibit A as a lake and public recreational area and the development of this area is dependent on the timing of the mining operations to take place there; and,

WHEREAS, Mathy desires the right to mine these areas and has the means and wherewithal to perform the mining operations as well as the reclamation and restoration work for the lake and appurtenant recreational facilities; and,

WHEREAS, the City and Mathy desire to formalize an agreement whereby certain lands or interests in lands will be transferred between the parties and Mathy will perform mining operations on the future Cascade Lake site under the timing and reclamation requirements

contained herein.

NOW, THEREFORE, in consideration of the mutual benefits to the parties set forth herein, the City and Mathy AGREE as follows:

1. Term. This Agreement shall become effective upon execution by both parties and shall remain in effect until terminated by mutual agreement of the parties, upon completion of all obligations by both parties within the time periods contained herein, or upon termination as otherwise provided for herein.

2. Descriptions of Properties and Conditions of Mining. The several parcels of land affected by this agreement are identified on Exhibit A attached hereto. This section is intended to identify the impacts on each particular parcel, and to include the responsibilities of each party as to the particular parcel.

Arends Parcel.

The Arends parcel consists of undeveloped lands and a pond created by prior mining operations. The City hereby grants to Mathy the authority to enter upon and remove minerals from that part of the Arends parcel that is that is currently covered by the pond. It is estimated that 300,000 cubic yards or material is present in the pond area. Excavation of the pond area is subject to the following conditions:

a. Mathy must apply for and receive any and all permits needed to perform this mining operation;
b. excavation may take place to a depth of 40' below the normal water level of the existing pond;
c. excavation must be completed by December 31, 2004;
d. within six months of excavation completion, Mathy must restore the property with slopes of 4:1 above the water level and 3:1 below the water line;
e. no over excavation or refilling of the lake will be allowed except for the placement of topsoil above the normal water level for the establishment of vegetation (the establishment of vegetation is required if mining operations cease or are expected to cease for a period of 30 days or more).
f. Mathy shall, in exchange for the right to mine the materials, compensate the City in one of the following ways:
   (i) pay a royalty of $.50 per cubic yard of materials removed from the site;

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(ii) provide work in lieu of payment that is mutually negotiated between the parties, the value of the work to be determined based on the rate schedule attached hereto as Exhibit B; or

(iii) provide the City with grading materials at any of the Mathy sites of a quantity and quality mutually negotiated between the parties.

g. Mathy shall pay the royalty identified above if no agreement can be made concerning work in lieu of payment or the exchange of materials.

h. Mathy may use areas of the Arends Parcel located outside of the pond area for purposes of staging and stockpiling materials removed from the pond area. Mathy shall obtain specific approval from the City for the location of this staging and stockpiling area. These activities shall be limited to locations that will accommodate the creek relocation and batch plant siting (expected to be located in the NW corner of the Arends Parcel) for the TH52 project. Mathy is responsible for preparing the areas for staging or stockpiling, which preparation may include overburden removal, and for soil stabilization. Mathy shall be responsible for control of tall grass / weeds on all portions of the Arends Parcel that are not assigned to the batch plant lessee.

i. The City shall, at its cost, obtain any and all permits necessary to provide wetland and creek mitigation and Mathy shall then perform the work necessary to comply with those permits and with the Cascade Lake Master Plan.

The City further grants to Mathy the right of first refusal to mine the undeveloped land portion of the Arends Parcel, which right applies if the City determines prior to June 31, 2004, that this portion of the Arends Parcel is to be mined. If the City offers mining rights over this land and Mathy accepts, the mining activity must be completed by December 31, 2005 and must otherwise comply with all other conditions identified above. Additionally, the mining and restoration work must also comply with any Cascade Lake Master Plan that may be adopted by the City.

Quarve Parcel.

The Quarve Parcel is currently owned by the City subject to a mining lease issued to Mathy by the prior owner. Mathy will not perform any mining work under the authority of its existing lease until the City adopts a Cascade Lake Master plan. The City shall extend the existing lease or enter into a new lease with Mathy for the mining to take place on this parcel. The lease term shall be for a period ending one year after the date the Cascade Lake Master Plan is adopted. Mathy shall compensate the City for minerals removed in the same manner as identified in subparts f. and g. under the Arends Parcel section of this agreement. All mining shall be consistent with the then approved Cascade Lake Master Plan.

City / Fiegel Parcel.

The City owns lands referred to on Exhibit A as the City/Fiegel Parcel. The City hereby

grants to Mathy the authority to enter upon and remove minerals from this land subject to the following conditions:

a. The City shall apply for and receive all permits necessary for the mining operation.
b. The mining rights granted hereby shall commence upon the City's adoption of the Cascade Lake Master Plan and shall continue for two years after adoption.
c. All mining operations shall be performed in a manner consistent with the conditional use permit and the Cascade Lake Master Plan
d. Mathy shall compensate the City in the same manner as provided for in subparts f. and g. under the Arends section of this agreement.
e. Mathy's obligation, under a prior agreement with the City, to construct an earthen berm from the West Zumbro Addition to the north property line of the Mathy/Fiegel Parcel shall continue in full force and effect with the additional requirement that the berm be constructed by December 31, 2006.
f. Mathy shall compete the mining restoration work required by the Cascade Lake Master Plan and any mining permit issued for this site by December 31, 2006.
g. Mathy shall remove all haul roads from the City/Fiegel Parcel concurrent with the completion of mining activities on the Mathy/Fiegel Parcel.
h. Mathy may use areas outside of the mining area on the City/Fiegel Parcel for staging and stockpiling material. Mathy shall obtain specific approval from the City for the location of this staging and stockpiling area which shall accommodate additional mining on this Parcel as well as park development as outlined in the Cascade Lake Master Plan. Mathy is responsible for preparing the areas for staging or stockpiling, which preparation may include overburden removal, and for soil stabilization and control of tall grass and weeds within the area controlled by Mathy. Mathy shall also provide fencing to separate that part of the parcel used for mining purposes from the area used for public recreation.

Mathy/ Fiegel Parcel

Mathy currently owns lands referenced on Exhibit A as the Mathy/Fiegel Parcel. Mathy presently holds a conditional permit for mining on this parcel. The existing conditional use permit limits the area that can be mined, excluding the sewer and powerline corridor, the creek bed and wetland areas. Pursuant to a prior purchase agreement between Mathy and the City, Mathy is to convey its interests in this land to the City without cost following completion of its mining activities on this Parcel. The City shall apply for and endeavor to receive an amendment to the conditional use permit that allows mining in portions of the excluded areas referenced above. Thereafter, if the amended permit is received, Mathy is authorized to enter upon and excavate minerals from the entire area subject to the following conditions:

a. All mining operations and restoration work shall be performed in a manner consistent with the conditional use permit and the Cascade Lake Master Plan.

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b. Mathy shall compensate the City in the same manner as provided for in subparts f. and g. under the Arends section of this agreement, except that the royalty rate shall be $.25 per cubic yard.

c. City shall obtain any and all permits necessary to provide wetland and creek mitigation and Mathy shall then perform the work necessary to comply with those permits and with the Cascade Master Plan. Mathy shall also pay to the City 20% of the costs associated with obtaining all wetland and creek mitigation permits for the Cascade Lake area.

d. Mathy shall perform the restoration work as required by the conditional use permit and the Cascade Lake Master Plan.

e. All mining work shall be completed by December 31, 2007, at which time Mathy shall convey the lands contained within this Parcel to the City. This time shall be extended if the City does not adopt the Cascade Lake Master Plan and obtain an amended conditional use permit by December 31, 2004, the extension to be to a date three years after the adoption of the Cascade Lake Master Plan and approval of the amended conditional use permit.

City/Western Wall Parcel

The City owns certain lands referenced on Exhibit A as the City/Western Walls Parcel. The City purchased these lands from Western Walls who retained the right to mine the minerals to the end of the term of its conditional use permit for mining. Mathy currently holds the right to mine these materials by assignment from Western Walls. The existing conditional use permit limits the area that can be mined, excluding the sewer and powerline corridor. The City shall apply for and endeavor to receive an amendment to the conditional use permit that allows mining in portions of the excluded areas referenced above. Thereafter, if the amended permit is obtained, Mathy agrees that it shall mine these lands subject to the following conditions:

a. All mining operations and restoration work shall be performed in a manner consistent with the Cascade Lake Master Plan.

b. Mathy shall not be required to provide royalty payments to the City for any portion of this Parcel, but rather shall perform all restoration work on this parcel as is required by the Cascade Lake Master Plan.

c. All mining operations on this Parcel, including restoration work, shall be completed by December 31, 2008.

3. Accounting of Material Quantities. Mathy shall account for the materials removed in one of the following manners:

a. By weight using a Minnesota Department of Weights and Measures Approved Truck Scale.

b. By survey conducted by a Minnesota Certified Surveyor both before commencing mining and after mining completion. Royalty payments are based on the certified survey of mutually agreeable surveyor.

c. By volume based on loose volume measurement of the trucks hauling the materials and the truck tally sheets. From time to time the trucks shall be weighed on a certified scale to ensure the accuracy of the loose volume measurement.

4. Property Rights. a. Mathy hereby grants to the City, its employees and agents, the right to enter upon property identified on Exhibit A that is owned or controlled by Mathy for the purpose of testing materials and water for acceptability for use in the park development with the Cascade Lake Area. This right of entry shall expire December 31, 2004.

b. City hereby grants to Mathy, its employees and agents, the right to enter upon property identified on Exhibit A that is owned or controlled by City for the purpose of obtaining soils information. This right of entry shall expire December 31, 2004.

c. The conveyance of the City / Fiegel parcel from Mathy to the City as contemplated by this agreement shall be by warranty deed. City shall bear all costs of deed preparation, deed filing, and payment of state deed tax.

5. Restoration/Reclamation of Mining Areas. Conditional use permits authorizing mining in certain parcels identified on Exhibit A contain timelines and restoration requirements different than what may be identified herein or by what may be required by the Cascade Lake Master Plan. As part of its consideration for this Agreement, Mathy agrees to comply with the reasonable restoration and reclamation requirements of the Master Plan. At a minimum, Mathy shall provide the slopes and cross sections identified in the Master Plan, and shall stabilize all disturbed areas with vegetation. If the City desires vegetative cover beyond standard seeding, it shall bear the cost of purchasing such trees, shrubs, wetland plants or other vegetation it

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desires, and shall pay Mathy for planting the same at a cost mutually agreeable to the parties.

6. Performance Bond. Prior to commencement of any work under this contract, Mathy shall furnish to City a performance bond executed by itself and a surety company authorized to do business in the State of Minnesota. The bond shall be in the sum of $200,000.00 and shall be conditioned as required by Minnesota Statutes, Section 574.26, and shall guarantee the performance of the contract in accordance with the provisions of this agreement.

7. Breach by Mathy. If Mathy breaches this agreement by failing to prosecute the work in a manner consistent with this Agreement, and by failing to cure any breach within 60 days of notice provided by the City, the City may initiate an action for specific performance or may terminate this Agreement and any related leases, rights of entry, or other assignment of rights contained herein. If the City terminates this agreement based on Mathy's breach for failure to prosecute the work required herein, it shall be entitled to take action against the performance bond and to recover any damages it suffers, including any amounts it is required to expend above and beyond what is included in this agreement. Mathy shall further reimburse the City for all costs and expenses, including attorney's fees, if the City is required to initiate legal action to gain Mathy's compliance with this provision.

8. Breach by City. If City breaches this Agreement, Mathy shall be entitled to terminate the agreement if the breach is not cured within 60 days of notice by Mathy to the City. Upon termination, Mathy shall be reinstated to the position it was in prior to execution of this agreement relative to its right to mine the Mathy/Fiegle and Western Walls Parcels under the prior conditional use permits for those sites. Mathy shall also be entitled to an extension of it

lease rights on the Quarvey Parcel for the period of time at which it forego mining on that site in anticipation of this Agreement. Mathy shall also be entitled to any costs it has incurred in performing restoration or reclamation work above and beyond what was originally required in the conditional use permit for the particular parcel.

9. Acts of God. If either party fails to perform under this agreement because of any delays caused by flood, tornado, wind storm, heavy rain storm, unusually inclement weather, or other casualty, governmental laws or regulations, contractor delays, or other similar causes beyond either party's control, performance by such party will be extended for the period of time reasonably attributable to such causes.

10. Insurance. Mathy agrees to, at its own expense, procure and maintain for a period ending two years after the work is accepted by the City, a general liability insurance policy naming the City of Rochester as an additional insured, with bodily injury limits of at least $1,000,000/$2,000,000 and property damage limits of at least $500,000, and file such policy of insurance, or a certificate of such insurance, with the City Clerk. Contractor further agrees to maintain insurance on its vehicles and to maintain insurance on all vehicles in the performance of this Agreement with bodily injury limits of at least $1,000,000/$2,000,000 and property damage limits of at least $500,000, naming the City of Rochester as an additional insured, and to file a certificate or certificates of such automobile insurance with the City Clerk. Contractor shall also file with the City Clerk a certificate indicating insurance is in effect for workers' compensation. All policies of insurance shall be endorsed indicating that in the event of cancellation or termination of any insurance above described, City of Rochester is to receive thirty days' written notice of the insurance company's intention to cancel or terminate.

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11. Dispute Resolution. In the event that a dispute shall arise between the parties, the parties agree to submit such dispute to non-binding mediation by a neutral qualified mediator agreed to by the parties. Either party may invoke this provision by giving the other party written notice of its intent to engage in mediation. Upon the giving of such a notice, the parties shall endeavor to choose a mediator that is acceptable to both of them. In the event that the parties are unable to agree to a mediator, the matter shall be submitted to the Olmsted County District Court for appointment of a mediator from the roster of qualified neutrals providing mediation services in Olmsted County. The mediation process shall take place in the manner determined by the mediator in consultation with the parties. If the dispute is not fully resolved through mediation, either party may initiate legal action in Olmsted County District Court.

12. Indemnity. Each party shall save and hold harmless the other, its officers, agents, employees, and members, from all claims, suits, or actions of whatsoever nature resulting from or arising out of The Contractor agrees to defend, indemnify, and hold harmless the City and its officials, officers, agents, and employees from all claims brought by the employees or agents of the Contractor, or its subcontractors, arising out of or as a result of any act, or failure to act, whether or not negligent, in connection with the performance of the work to be performed pursuant to this contract by the Contractor, its employees, agents, and subcontractors. The Contractor agrees to defend and pay all costs in defending these claims, including attorney's fees.

13. Signing. Except as otherwise provided herein, the City shall sign or otherwise identify those areas on the site that are open for public recreational purposes while mining activities are ongoing, and shall take reasonable measure to minimize contacts between public

recreational users and the mining operations. Mathy shall sign or otherwise identify those areas on the site that are not open to the public.

14. Amendments. The terms of this agreement shall not be waived, altered, modified, supplemented, or amended, in any manner whatsoever, except by written instrument signed by the parties, except that Mathy may request in writing that any deadline for completion of mining and reclamation for any particular parcel be extended for up to six months and the same shall automatically extended so long as the written notice is provided more than three months prior to the scheduled completion date. Any other extension request must be made by a formal amendment to this agreement.

15. Assignment. Mathy shall not assign or transfer any of its duties and responsibilities under this Agreement to any other person or organization without the City's prior written approval.

16. Successor's Responsibility. The obligations set forth in this agreement apply to the parties hereto and their heirs, successors and assigns.

17. Merger. This agreement constitutes the entire agreement between the parties. No waiver consent, modification of change of terms of this agreement shall bind either party unless in writing and signed by both parties. There are no understandings, agreements or representations, oral or written, not specified herein regarding this agreement.

18. Minnesota Law. This agreement shall be governed by and construed in accordance with the laws of the State of Minnesota.

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Dated this ____ day of _____, 2003.

MATHY CONSTRUCTION, INC.

By_____
Its_____

By_____
Its_____

Dated this ____ day of _____, 2000.

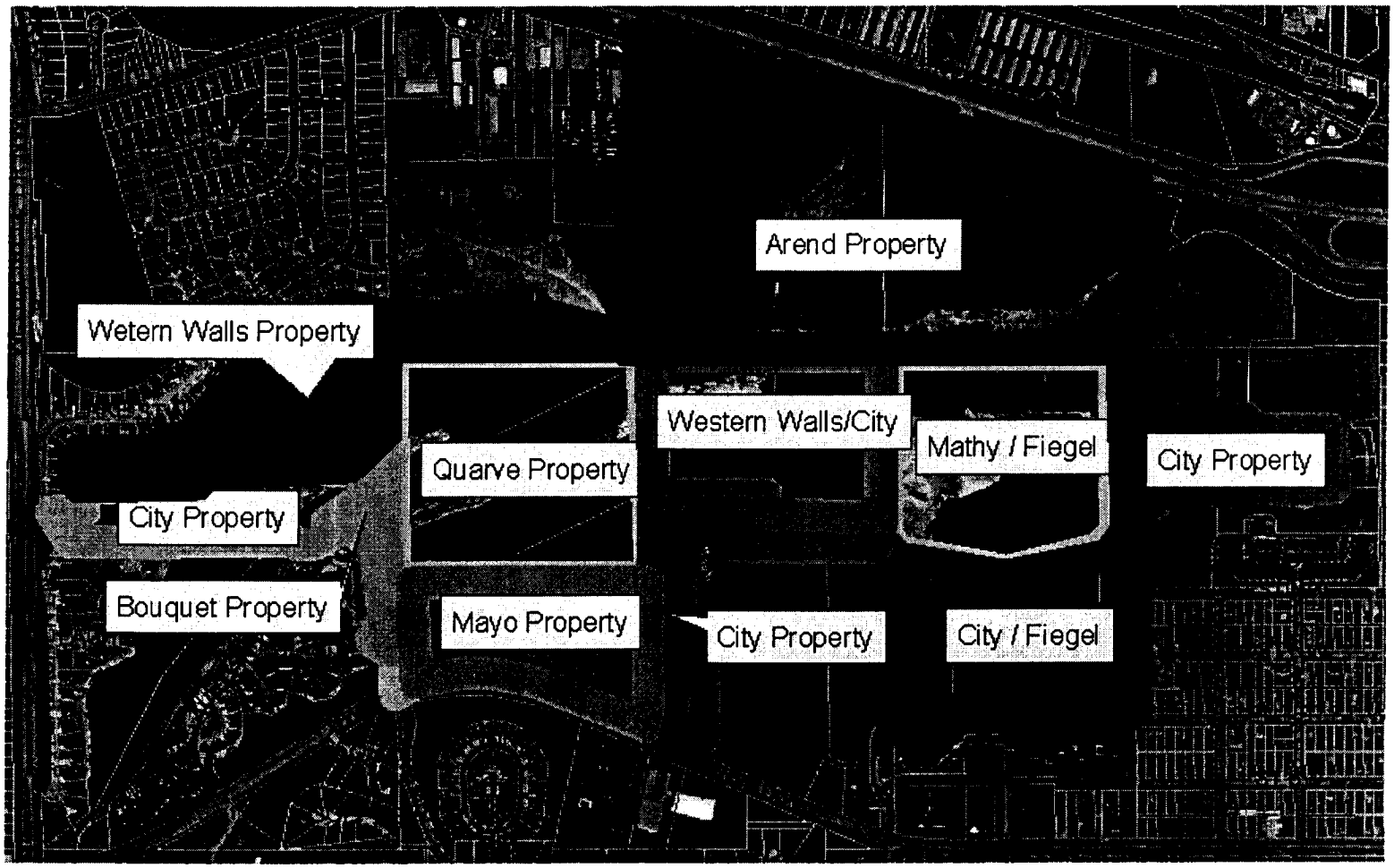
CITY OF ROCHESTER

By_____
Ardele Brede, Its Mayor

By_____
Judy K. Scherr, Its City Clerk

K\Mathy.cascade.3rd.doc

EXHIBIT A


Arend Property
Wetern Walls Property
Western Walls/City
Mathy / Fiegel
City Property
Quarve Property
City Property
Bouquet Property
Mayo Property
City Property
City / Fiegel

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