CITY OF WEST DES MOINES
CITY COUNCIL MEETING COMMUNICATION

DATE: November 28, 2016

ITEM: Resolution - Approval of Release and Settlement Agreement

FINANCIAL IMPACT: $1,900,000 total ($10,000.00 from City and $1,890,000 from Iowa Communities Assurance Pool)

SYNOPSIS: In May, 2015, Tanya Zaglauer Schmell filed a lawsuit against the City of West Des Moines and Police Chief Shaun LaDue seeking damages in connection with her employment with the City (Gass, et al. vs. the City of West Des Moines, Iowa, et al.).

BACKGROUND: At the direction of the City's insurance carrier, ICAP, Tanya Zaglauer Schmell has negotiated a Release and Settlement Agreement with Chief LaDue and the City of West Des Moines regarding the lawsuit filed in May, 2015. The Agreement releases and discharges LaDue, the City and ICAP (Iowa Community Assurance Pool) and all City related insurance entities from any and all claims alleged in the lawsuit or in relation to Ms. Zaglauer Schmell's employment with the City.

The Settlement Agreement anticipates payment of $150,000.00 to Ms. Zaglauer Schmell for emotional distress damages, $150,000.00 for lost wages and $816,902.42 to fund future Periodic Payments as set forth in detail in Exhibit A of the Release and Settlement Agreement. A payment of $783,097.58 to the Fiedler & Timmer Law Firm, the attorneys representing Ms. Zaglauer Schmell, will also be made. The Settlement Agreement further requires that Ms. Zaglauer Schmell leave City employment after a decision has been made on her application for disability retirement and dismiss her lawsuit. The Agreement also contemplates training of the West Des Moines Police Department on discrimination and retaliation issues.

The City maintains that it has no liability in regard to the claims alleged by Ms. Zaglauer Schmell, and no liability is admitted or implied by approval of the Release and Settlement Agreement. Instead, approval of the Agreement is recommended to protect the City from the financial risk of an adverse verdict and continuing a potentially long and costly lawsuit.

This Agreement is only in relation to Ms. Zaglauer Schmell.

OUTSTANDING ISSUES (if any): None.

RECOMMENDATION: Approve the Release and Settlement Agreement between the City of West Des Moines, Shaun LaDue and Alice Zaglauer Schmell.

Lead Staff Member: Richard J. Scieszinski, City Attorney

STAFF REVIEWS

Department Director	Richard J. Scieszinski, City Attorney
Appropriations/Finance	
Legal	
Agenda Acceptance	

#2790114

RESOLUTION APPROVING RELEASE AND SETTLEMENT AGREEMENT BETWEEN TANYA ZAGLAUER, SHAUN LADUE AND THE CITY OF WEST DES MOINES, IOWA

WHEREAS, in May, 2015 Tanya Zaglauer filed a lawsuit against the City of West Des Moines in the Iowa District Court for Polk County entitled *Carol Gass, Alice Wisner and Tanya Zaglauer Schmell, Plaintiffs, v. the City of West Des Moines, Iowa and Chief of Police Shaun LaDue, in his Individual Capacity and Official Capacity, Defendants*, No. LACL132694; and

WHEREAS, Tanya Zaglauer, Shaun LaDue, and the City of West Des Moines have reached a proposed settlement of the lawsuit and seek to memorialize the terms of the settlement in a Release and Settlement Agreement; and

WHEREAS, approval of the Release and Settlement Agreement between the parties will protect the City from the financial risk of an adverse judgment and a potentially long and costly lawsuit, and is in the best interest of the City.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF WEST DES MOINES, IOWA, THAT:

1. The attached negotiated Release and Settlement Agreement between Tanya Zaglauer and the City of West Des Moines regarding *Carol Gass, Alice Wisner and Tanya Zaglauer Schmell, Plaintiffs, v. the City of West Des Moines, Iowa and Chief of Police Shaun LaDue, in his Individual Capacity and Official Capacity, Defendants*, Case No. LACL132694, is approved.

2. The Mayor is authorized to sign the Release and Settlement Agreement on behalf of the City and the City Clerk is directed to attest to the Mayor's signature.

3. The City's Finance Department is authorized to make appropriate payment as provided by the terms of the Release and Settlement Agreement.

PASSED AND ADOPTED this 28th day of November, 2016.

_____
Steven K. Gaer, Mayor

ATTEST:

_____
Ryan T. Jacobson,
City Clerk

#2790116

RELEASE AND SETTLEMENT AGREEMENT

WHEREAS, Tanya Zaglauer Schmell ("Zaglauer") has filed a lawsuit against the City of West Des Moines, Iowa ("the City") and Shaun LaDue ("LaDue") (Zaglauer, the City and LaDue are collectively sometimes referred to as "the Parties") seeking damages in connection with her employment and the termination of her employment, and the City and LaDue have denied the claims in response thereto, which Lawsuit is pending in the Iowa District Court for Polk County, Zaglauer et al. vs. the City of West Des Moines, Iowa, and Shaun LaDue, LACL132694 (the "Lawsuit"); and

WHEREAS, the City and LaDue have denied any liability for the claims made and the damages sought by Zaglauer in the Lawsuit; and

WHEREAS, Zaglauer and Defendants have now agreed to settle this dispute and all matters between them relating to or arising out of Zaglauer's claims of sex discrimination and retaliation and any other matters raised or which could have been raised relating to her employment at the City and her claims of constructive discharge, including but not limited to the claims in the Lawsuit; and

WHEREAS, Zaglauer and Defendants now wish to confirm and memorialize their settlement of the Lawsuit and disputes between them relating to this matter,

NOW, THEREFORE, Zaglauer, the City, and LaDue agree as follows:

1. RELEASE. In consideration of the covenants, promises, and conditions herein contained and the amounts to be paid hereunder, receipt of which is hereby acknowledged, Zaglauer, for herself and her heirs, legal representatives, successors and assigns, hereby releases and discharges the City, LaDue, Iowa Communities Assurance Pool (ICAP), American Risk Pooling Consultants, Inc., York Risk Pooling Services, Inc., and Public Entity Risk Services of Iowa (PERSI), and their successors, predecessors, affiliates, representatives, employees, agents,

officers, directors, attorneys, the City Council, insurers and assigns from any and all claims, causes of action, damages, liabilities, expenses, fees, and costs, which Zaglauer ever had, now has, or may have in the future for any losses, injuries, or damages, which occurred prior to the execution of this Agreement, whether anticipated or unanticipated, arising from, arising out of, or directly or indirectly connected with Zaglauer's employment, her constructive discharge claim, and her claims against the City and LaDue. Zaglauer releases the City and LaDue from any claims that have been made or could be made involving her employment to and through the date of the execution of this Agreement, including claims for wrongful termination, breach of implied contract, breach of implied covenant of good faith and fair dealing, or any other contract, implied contract, or quasi contract. It is further agreed that this Release includes, but is not limited to, any claims to and through the date of the execution of this Agreement for discrimination based on the Age Discrimination in Employment Act, Title VII of the Equal Employment Opportunities Act, the Iowa Civil Rights Act, the Fair Labor Standards Act, Iowa Code Chapter 91A, the Americans with Disabilities Act, the FMLA and any and all other claims, whether statutory or common law.

2. PAYMENT AND OTHER TERMS. In consideration of the promises contained in this Agreement, and in full and final settlement of the claims the Parties may have or could have against each other in the Lawsuit, the Parties agree:

(a) The City will pay $150,000.00 to Zaglauer reported on Form 1099 for emotional distress damages; and

(b) The City will pay $150,001.22 to Zaglauer reported on Form W-2 for claims of lost wages. This payment will be subject to required withholdings and deductions for applicable taxes; and

(c) The City will make a payment of $817,692.00 to fund Defendants' future Periodic Payment obligation as set forth in detail in Exhibit A; and

(d) The City will pay $782,306.78 to Fiedler & Timmer, PLLC which will be reported on Form 1099.

3. NON-ADMISSION AND STATEMENT. The Parties to this Agreement recognize that any payments or agreements made pursuant hereto are not an admission of any liability by the City or LaDue. This settlement is made for the purposes of avoiding the costs and risks of litigation.

4. DISMISSAL OF ZAGLAUER'S CLAIMS IN THE LAWSUIT. Once the payment is made in accordance with paragraph 2 above, Zaglauer agrees to dismiss with prejudice all of her claims pending in the Lawsuit and further agrees that her claims for relief asserted in the Lawsuit are dropped for all purposes and all times. The only payment to be made by the City or LaDue for costs of suit and attorney fees for Zaglauer is the payment set forth in paragraph 2.

5. OPEN RECORDS. Zaglauer recognizes that the City will comply with the Iowa Open Records Act. Zaglauer also acknowledges that this settlement will be presented to the City Council, which may take action to approve or reject the settlement.

6. SEVERABILITY. If any portion or portions of this Agreement are held by a court of competent jurisdiction to conflict with any federal, state, or local law, and as a result such portion or portions are declared to be invalid and of no force or effect in such jurisdiction, all remaining portions of this Agreement shall otherwise remain in full force and effect and be construed as if such invalid portion or portions had not been included herein.

7. CONSIDERATION OF AGREEMENT. Zaglauer represents that she has discussed the terms of the settlement with her counsel, Fiedler & Timmer, and her counsel has answered all of her questions relating to this Agreement. Zaglauer understands that she has twenty-one (21) days from receipt of this Agreement to review and consider its terms. Zaglauer further understands and agrees that upon signing this Agreement, she has seven (7) days to revoke her acceptance of this Agreement.

8. TAX MATTERS. Zaglauer acknowledges that the City does not warrant or represent any tax consequences of this Agreement, and she is relying on her own counsel and/or tax advisors and not on the City in that regard. If the Internal Revenue Service or the Iowa Department of Revenue disagree with the tax treatment of this settlement payment, Zaglauer agrees to release and indemnify the City for any charges, payments, fines, fees or other costs incurred in connection therewith except as prohibited by law. City will pay its share of payroll taxes as required by law.

9. EMPLOYMENT. Consistent with her sworn testimony at trial, Zaglauer will leave City employment after a decision has been made on her application for disability retirement.

10. GOVERNING LAW. This Agreement shall be governed and construed in accordance with the laws of the state of Iowa.

11. ENTIRE AGREEMENT. Each Party acknowledges and agrees that no representations or promises have been made to or relied upon by any of them or by any person acting for or on their behalf in connection with the subject matter of this Agreement which are not specifically set forth herein. All prior representations and promises made by any Party to

another, whether in writing or orally, are understood by the Parties to be merged in this Agreement.

12. ATTORNEYS' FEES. Zaglauer agrees and acknowledges that any claim for attorneys' fees by her attorney is her sole responsibility and the payments set forth in paragraph 2 above constitute the total payments owed Zaglauer hereunder.

13. MEDICARE REPRESENTATIONS. Zaglauer represents that she is not currently receiving Medicare benefits and Medicare has not made any conditional payments on her behalf. Zaglauer has not and will not apply for Social Security Disability benefits related to this incident. Zaglauer does not anticipate any future Medicare-eligible expenses relative to any injuries suffered while an employee of the City. Because none of the parties anticipate any future Medicare-eligible expense, no part of the settlement is being set aside for Medicare. Zaglauer agrees to defend, indemnify, and hold the City harmless from any interest asserted by Medicare. Such indemnification shall include, without limitation, any and all attorney fees, court costs, and any and all other costs and expenses.

14. TRAINING. The City will provide debriefing and in-person training on discrimination, harassment, and retaliation for all employees of the City of West Des Moines Police Department.

Tanya Zaglauer Schmell	Date
City of West Des Moines, Iowa	Date
Shaun LaDue	Date

EXHIBIT A

I. Periodic Payments

A draft payable to BARCO Assignments, LTD to fund future Periodic Payments according to the following schedule. For settlement purposes, the present value of these future payments is $817,692.00:

Payee: Tanya Zaglauer Schmell

1. $50,000 payable on January 1, 2021;
2. $50,000 payable on January 1, 2026;
3. $5,029.00 payable monthly for life, beginning August 1, 2027, guaranteed for 20 years and zero months. Final guaranteed payment on 07/01/2047.

The parties agree these future periodic payments are allocated to general compensatory damages, including emotional distress.

With respect to the funding of any annuity (structured settlement) to be purchased as part of this settlement, it is further agreed and understood that if the structured settlement is funded after 01/05/2017 (purchase date) for any reason, including but not limited to delay in obtaining final court approval, delay in satisfying Medicare requirements, and/or any other reasonable cause, the above payment beginning dates may be delayed by the same number of days to maintain the agreed to benefit amount.

It is expressly understood by and between the parties that the Defendants make no representation with regard to the tax consequences of this transaction. It is further understood that no portion of the settlement proceeds represent prejudgment or post judgment interest.

II. Consent to a Non-Qualified Assignment

The Parties hereto acknowledge and agree that the Defendants may make a "non-qualified assignment" to BARCO Assignments, LTD [hereinafter referred to as BARCO] of the Defendants' liability to make the periodic payments described above.

Any such assignment, if made, shall be accepted by the Claimant without right of rejection and shall completely release and discharge the Defendants from such obligations hereunder as are assigned to BARCO.

The obligation assumed by BARCO with respect to any required payment shall be discharged upon the mailing of a check or electronic funds transfer on or before the due date of a valid payment in the amount specified to the address of record. In the event Payee notifies BARCO that a check has not been received, or that an electronic transfer has not been deposited, BARCO will initiate a stop payment action, and,

upon confirmation that such check has not been negotiated or electronic funds transfer deposited, BARCO shall issue a replacement check or electronic funds transfer.

Payee agrees:

A. That periodic payments under this Settlement Agreement cannot be accelerated, deferred, increased or decreased by the Claimant.

B. In the event of an assignment, BARCO's obligation for payment of the periodic payments shall not be greater than the obligation of the person originally liable (whether by suit or agreement) for payment and from whom the obligation was assigned.

III. Right to Purchase an Annuity

The Defendants and/or BARCO shall not segregate or set aside any of its assets to fund the payments to Claimant required herein. Said payments cannot be accelerated, deferred, increased or decreased. The Claimant shall have no power to sell, mortgage, encumber, or anticipate the payments in whole, or part, by assignment or otherwise, except as pursuant to a qualified order under IRC Section 5891.

Claimant agrees that the Defendants and/or BARCO shall have the right to fund its liability to make periodic payments by purchasing a "qualified funding asset" in the form of annuity policy from Liberty Life Assurance Company of Boston [hereinafter referred to as Liberty Life] brokered through Summit Settlement Services, Inc. The Defendant and/or BARCO shall be the owner of the annuity policy and shall have all rights of ownership. The Defendant and/or BARCO may have Liberty Life mail payments directly to the Claimant. The Claimant shall be responsible for maintaining the currency of the proper mailing address and mortality information to Liberty Life. Liberty Mutual Insurance Company will provide a Certificate of Guarantee that allows for Liberty Mutual Insurance Company to assume the responsibility to make any and all payments under the annuity contract in the event that Liberty Life Assurance Company of Boston were unable. It is understood Stan K. Harlan of Summit Structured Settlements will handle the funding of the annuity policy with Liberty Life.

IV. Discharge of Obligation

The obligation of the Defendants, the Insurer and/or the Assignee to make each Periodic Payment shall be discharged upon the mailing of a valid check in the amount of such payment to the designated address of the Payee(s) named in Section I of this Exhibit.

Upon Defendant/Insurer's funding of the full premium to the Assignee, and full execution of the Assignment document, Assignee will accept and assume, all of Assignor's liability to make the periodic payment(s). Each Claimant hereby accepts and consents to such assignment by Assignor and assumption by Assignee. Effective on the Effective Date of the NON-Qualified Assignment and Release Agreement, each Claimant hereby releases and discharges Assignor from all liability to make the Periodic Payments, including the failure of Assignee to make any of the Periodic Payments and/or to fund any of the Periodic Payments for any reason whatsoever. Claimant agrees never to look to the Assignor for payment of any benefits should the life company fail to make the payments, go insolvent, etc.

V. Beneficiary

Any payments to be made after the death of Payee pursuant to the terms of this Settlement Agreement shall be made to such person or entity as shall be designated in writing by Payee to BARCO. If no person or entity is so designated by Payee, or if the person designated is not living at the time of the Payee's death such payments shall be made to the estate of Payee. No such designation, nor any revocation thereof, shall be effective unless it is in writing and delivered to BARCO. The designation must be in a form acceptable to BARCO before such payments are made.

Non-Qualified Assignment and Release of Periodic Payment Obligation

"Claimant"	Tanya Zaglauer Schmell
"Assignor"	Iowa Communities Assurance Pool
"Assignee"	**BARCO ASSIGNMENTS LTD.**
"Annuity Issuer"	**LIBERTY LIFE ASSURANCE COMPANY OF BOSTON**
"Effective Date"	

This Agreement is made and entered into by and between the parties hereto as of the Effective Date with reference to the following facts:

A. Claimant has executed a settlement agreement or release dated _____ (the "Settlement Agreement") that provides for the Assignor to make certain periodic payments to or for the benefit of the Claimant as stated in Addendum No. 1 (the "Periodic Payments"); and

B. The parties desire to effect an assignment of Assignor's periodic payment liabilities to Assignee.

NOW, THEREFORE, in consideration of the foregoing and other good and valuable consideration, the parties agree as follows:

1. The Assignor hereby assigns and Assignee hereby assumes all of Assignor's liability to make the Periodic Payments. The Assignee assumes no liability to make any payment not specified in Addendum No. 1.

2. The Assignee's liability to make the Periodic Payments is no greater than that of the Assignor immediately preceding this Agreement. Assignee is not required to set aside specific assets to secure the Periodic Payments. The Claimant has no rights against the Assignee greater than a general creditor. None of the Periodic Payments may be accelerated, deferred, increased or decreased and may not be anticipated, sold, assigned, or encumbered.

3. The obligation assumed by Assignee with respect to any required payment shall be discharged upon the sending on or before the due date of a valid check (or other form of payment) in the amount specified to the address of record.

4. This Agreement shall be governed by and interpreted in accordance with the laws of _____.

5. The Assignee may fund the Periodic Payments by purchasing an annuity contract or funding agreement issued by the Annuity Issuer. All rights of ownership and control of such annuity contract shall be and remain vested in the Assignee exclusively.

6. The Assignee may have the Annuity Issuer send payments under any annuity contract or funding agreement purchased hereunder directly to the payee(s) specified in Addendum No. 1. Such direction of payments shall be solely for the Assignee's convenience and shall not provide the Claimant or any payee with any rights of ownership or control over the annuity contract, funding agreement or against Annuity Issuer.

7. Assignee's liability to make the Periodic Payments shall continue without diminution regardless of any bankruptcy or insolvency of the Assignor.

8. In the event the Settlement Agreement is declared terminated by a court of law this Agreement shall terminate. The Assignee shall then assign ownership of any annuity contract or funding agreement purchased hereunder to Assignor, and Assignee's liability for the Periodic Payments shall terminate.

9. This Agreement shall be binding upon the respective representatives, heirs, successors and assigns of the Claimant, the Assignor and the Assignee and upon any person or entity that may assert any right hereunder or to any of the Periodic Payments.

10. The Payee hereby accepts Assignee's assumption of all liability for the Periodic Payments and hereby releases the Assignor from all liability for the Periodic Payments.

Assignor: Iowa Communities Assurance Pool

By: _____
Authorized Representative

Title: _____

Assignee: **BARCO ASSIGNMENTS LTD.**

By: _____
Authorized Representative

Title: _____

Payee/Insured: _____

Attorney for Payee/Insured: _____

Addendum No. 1
Description of Periodic Payments

Payee (1): **Tanya Zaglauer Schmell**

Benefit(s):

1. **Life Certain Annuity** - $5,029.00 for life, payable monthly, guaranteed for 20 year(s), beginning on 08/01/2027, with the last guaranteed payment on 07/01/2047.
2. **Guaranteed Lump Sum** - $50,000.00 paid as a lump sum on 01/01/2021 guaranteed.
3. **Guaranteed Lump Sum** - $50,000.00 paid as a lump sum on 01/01/2026 guaranteed.

Initials

Assignor: _____

Payee/Insured: _____

Assignee: _____