

SUBJECT: RESOLUTION NO. 3, SERIES 2024 – A RESOLUTION
APPROVING AN ADDENDUM TO THE WATER TAP
EXPANSION AGREEMENT AT 1775 CHERRY STREET WITH
FRESCA FOODS HOLDING COMPANY, LLC

DATE: JANUARY 21, 2025

PRESENTED BY: KURT KOWAR, P.E., PUBLIC WORKS DIRECTOR

SUMMARY:

Staff recommends approval of the Addendum #1 to the Water Tap Expansion Agreement (WTEA) with Fresca Holding Company, LLC for 1775 Cherry Street.

In September 2024, a WTEA was executed for a tenant of 1775 Cherry Street, Fresca Holding Company, LLC. (Fresca). The WTEA provide for the applicant to provide water through a water lease agreement in lieu of expansion fee.

During the preparation of the water lease agreement, which was approved by City Council on December 17, it was determined that an addendum to the WTEA agreement was necessary to provide further details, update schedules, and minor legal clarifications.

FISCAL IMPACT:

No additional fiscal impacts have been identified.

PROGRAM/SUB-PROGRAM IMPACT:

One of the main objectives for the Water Utility Sub-Program is to allow for reasonable and equitable rates while maintaining optimal quality. These efforts also allowed a collaborative alignment with the Economic Prosperity goal of promoting a business climate that facilitates investment.

RECOMMENDATION:

Staff recommends City Council approval of the Resolution to approve the addendum to the water tap agreement. The Resolution would further authorize the Mayor and City Clerk to sign and execute the Agreement and certain other documents on behalf of the City.

ATTACHMENTS:

1. Resolution No. 3, Series 2025
2. Addendum #1 to Water Tap Expansion Agreement

STRATEGIC PLAN IMPACT:

☒		Financial Stewardship & Asset Management	☒		Reliable Core Services
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☒	 Vibrant Economic Climate	☐	 Quality Programs & Amenities
☐	 Engaged Community	☐	 Healthy Workforce
☐	 Supportive Technology	☐	 Collaborative Regional Partner

CITY COUNCIL COMMUNICATION

**RESOLUTION NO. 3
SERIES 2025**

**A RESOLUTION APPROVING AN ADDENDUM TO THE WATER TAP EXPANSION
AGREEMENT AT 1775 CHERRY STREET WITH FRESCA FOODS HOLDING
COMPANY, LLC**

WHEREAS, the City and Fresca Holding Company, LLC (“Fresca”) are parties to a Water Tap Expansion Agreement (“WTEA”) concerning Fresca’s use of municipal water at a unit of property located at 1775 Cherry Street, Louisville, Colorado (the “Property”); and

WHEREAS, at the time of the WTEA’s effective date, Louisville and Fresca were in the process of negotiating terms and conditions for how Fresca would remedy the deficiency described in the WTEA; and

WHEREAS, the WTEA, thus, granted Fresca ninety (90) days from the effective date of the WTEA to confirm an ancillary arrangement for the future commitment of water to Louisville’s municipal water system (the “Final Agreement”); and

WHEREAS, for compliance with Section 13.12.040(E) of the City Code, there has been prepared an addendum to the WTEA (“Addendum”) to require that lease payments under the Lease for the Leased Water be made by Fresca, and that all costs and fees, including transfer fees, associated with transferring the water to Louisville for use in its municipal water system be paid by Fresca, a copy of which Addendum accompanies this resolution; and

WHEREAS, by this resolution the City Council desires to approve, and authorize the Mayor to execute, the Addendum.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LOUISVILLE, COLORADO:

Section 1. The City Council hereby approves the Addendum to Water Tap Expansion Agreement (the “Addendum”), by and between the City of Louisville and Fresca Products, Inc., in essentially the same form as the copy of such Addendum that accompanies this resolution.

Section 3. The Mayor is hereby authorized to execute the Addendum on behalf of the City, and the Mayor is hereby further authorized to negotiate and approve such revisions to such instruments as the Mayor determines are necessary or desirable for the protection of the City, so long as the essential terms and conditions of such instruments are not altered.

Section 4. All actions heretofore taken by the City staff pursuant to the that certain Water Tap Expansion Agreement, dated September 3, 2024, concerning Fresca' s use of municipal water at a unit of property leased by Fresca located at 1775 Cherry Street, Louisville, Colorado, are hereby ratified and affirmed.

PASSED AND ADOPTED this 21ST day of January 2025.

Christopher M. Leh, Mayor

ATTEST:

Genny Kline, Interim City Clerk

ADDENDUM
to
WATER TAP EXPANSION AGREEMENT

This ADDENDUM TO WATER TAP EXPANSION AGREEMENT (“**Addendum**”) is made by and between the City of Louisville, a Colorado home rule municipal corporation acting by and through its Water Enterprise, whose address is 749 Main Street, Louisville, Colorado 80027 (“**Louisville**”), and Fresca Holding Company, LLC, a Colorado limited liability company whose address is 195 CTC Blvd, Louisville, CO 80027 (“**Fresca**”). The above may occasionally be referred to herein singularly as “**Party**” or collectively as the “**Parties**.”

RECITALS

WHEREAS, this Addendum supplements and forms a part of the Water Tap Expansion Agreement made and entered into as of September 3, 2024, by and between Louisville and Fresca. Capitalized terms used in this Addendum, but which are not otherwise defined in this Addendum, have the meanings given to them in the Water Tap Expansion Agreement.

WHEREAS, pursuant to the Water Tap Expansion Agreement and Chapter 13.12 of the City Code, because Fresca’s water usage is projected to exceed the annual water demand contemplated for the water tap size installed at the Property, Fresca is required to pay Louisville additional water tap fees or introduce additional water to Louisville’s municipal water system in order to remedy the Deficiency described in the Water Tap Expansion Agreement.

WHEREAS, at the time of the Water Tap Expansion Agreement’s Effective Date, Louisville and Fresca were in the process of negotiating terms and conditions for how Fresca would remedy the Deficiency and, therefore, the Water Tap Expansion Agreement granted Fresca ninety (90) days to confirm an ancillary arrangement for the future commitment of water to Louisville’s municipal water system (the “**Final Agreement**”).

WHEREAS, the Parties entered into an Extension to the Water Tap Expansion Agreement (the “**Extension**”) on December 13, 2024, whereby the deadline to formalize the Final Agreement was extended to on or about January 13, 2025.

WHEREAS, the Water Tap Expansion Agreement provides Fresca with the option to introduce additional water to Louisville’s municipal water system by securing a multi-year lease entitling Louisville to a share of the water supply from the Colorado Big Thompson (“**C-BT**”) Project administered by the Northern Colorado Water Conservancy District (“**NCWCD**”).

WHEREAS, for Louisville to accept water in lieu of water tap fees, Section 13.12.040(E) of the City Code requires Fresca to pay all costs and fees, including transfer fees, associated with transferring the water to Louisville for use in its municipal water system.

WHEREAS, Fresca has identified 4 Units of C-BT Project water (“**Leased Water**”) owned by Christen and Kyle Kolb, whose address is 11820 Niwot Road, Longmont, CO 80504 (hereinafter collectively referred to as “**Lessor**”), available to lease to Louisville pursuant to a 5-year lease

agreement (the “**Lease**”), a copy of which is attached hereto as **Exhibit A** and the terms and conditions of the Lease are hereby incorporated by reference into this Addendum.

WHEREAS, Fresca desires to have the Leased Water serve as a sufficiently dependable supply of water for Louisville to use in its municipal water system pursuant to the 5-year Lease. To comply with Section 13.12.040(E) of the City Code and the Water Tap Expansion Agreement and continue to be a viable supply during the life of the Lease, the lease payments for the Leased Water must be made by Fresca.

WHEREAS, for Louisville to agree to the Lease and to accept the Leased Water as the supplemental water supply required by the Water Tap Expansion Agreement for the 5-year Lease term to offset the increase in Fresca’s annual water usage at the Property, among other things, Louisville requires that Fresca agree to be financially responsible for all fees and costs associated with the Leased Water.

WHEREAS, Louisville and Fresca mutually desire to set forth their understanding as to Fresca’s financial responsibilities for the Leased Water, to further clarify each Party’s respective obligations regarding the Final Agreement, and the obligations of Fresca to secure a future supplemental water supply after the 5-year Lease term.

NOW, THEREFORE, for the consideration set forth herein, the sufficiency of which is mutually acknowledged by the Parties, Louisville and Fresca agree as follows:

1. Agreement. Fresca shall be responsible for the payment of all fees and costs associated with the Leased Water, including any fees required by NCWCD to transfer the Leased Water to Louisville for use in its municipal water system, and Fresca accepts full financial responsibility for all charges due under the Lease. Fresca agrees to pay Lessor directly for the annual cost of the Leased Water in accordance with the dates set forth in this Addendum. Fresca shall remain financially responsible for all charges due under the Lease for the entire term of the Lease, including any Lease extension or renewal, and Fresca shall not be released from its obligations without written consent from Louisville.

2. Effect of this Addendum. This Addendum shall be read and construed together with the Water Tap Expansion Agreement and the Extension, and the rights and obligations of the Parties shall be determined in accordance with the covenants, agreements, conditions, representations, and warranties made herein and in the Water Tap Expansion Agreement and the Extension thereto. Except as supplemented and/or modified hereby, the Water Tap Expansion Agreement and Extension remain in full force and effect and shall continue to be effective and enforceable in accordance with its terms. In the event there is a conflict between the terms and conditions of the Water Tap Expansion Agreement, the Extension, and this Addendum, this Addendum will control. The Water Tap Expansion Agreement, the Extension, and this Addendum shall constitute one contract and shall be the Final Agreement of the Parties.

3. Final Agreement. Upon the Effective Date of this Addendum, the Final Agreement requirement set forth in Paragraph 2 of the Water Tap Expansion Agreement shall be deemed satisfied.

4. Term; Subsequent Addendum to Remedy Deficiency.

4.1. Addendum Term. This Addendum shall become effective on the date that the Louisville City Council approves this Addendum (the “**Effective Date**”) and shall continue until the expiration or earlier termination of the Lease, which expiration date is December 31, 2029.

4.2. Continuing Obligation to Remedy Deficiency. Fresca anticipates that its commercial operations at the Property will continue after the Lease terminates on December 31, 2029, and, therefore, Fresca is required to pay Louisville additional water tap fees or introduce additional water to Louisville’s municipal water system to cover Fresca’s projected water usage from January 1, 2030, and beyond.

4.3. Subsequent Addendums. At least one (1) year prior to the end of this Addendum, or by December 31, 2028, Fresca is required to secure a supplemental water supply or pay Louisville additional water tap fees pursuant to a renewal, extension or subsequent addendum to the Water Tap Expansion Agreement containing terms and conditions addressing the Deficiency to the satisfaction of Louisville. So long as the essential terms and conditions of this Addendum and the Water Tap Expansion Agreement are not altered by a subsequent addendum to the Water Tap Expansion Agreement, such subsequent addendum may be administratively approved by the City Manager. Unless otherwise extended by mutual agreement, failure of Fresca to renew, extend or enter into a subsequent addendum to the Water Tap Expansion Agreement on or before December 31, 2028, shall constitute a material breach of this Addendum and the Water Tap Expansion Agreement and Louisville shall have the option to exercise its rights and remedies under Paragraph 8, below.

5. Incorporation of Lease Terms and Conditions. To the extent this Addendum incorporates by reference the provisions of the Lease, such provisions shall be deemed a part of this Addendum. Nevertheless, as between Louisville and Fresca, if there is any conflict among the terms and conditions of this Addendum and the Lease, the terms set forth in this Addendum shall prevail.

6. Lease Payments and Reporting Obligations.

6.1. Initial Prepayment. Pursuant to the terms of the Extension, Fresca agreed to pay Lessor the Initial Lease Payment described in the Lease in the amount of Twelve Thousand and 00/100 Dollars (\$12,000.00) on or before December 20, 2024.

Lease Year	Lease Deadline if Fresca Fails to Prepay	Total Annual Lease Payment	Fresca’s Prepayment Date
2025	Jan. 15, 2025	\$12,000.00	Dec. 20, 2024

6.2. Future Lease Prepayment Schedule. Fresca agrees to prepay Lessor the annual payments due for the Leased Water for the second through fifth lease years (2026-2029) pursuant to the following payment schedule:

Lease Year	Lease Deadline if Fresca Fails to Prepay	Total Annual Lease Payment	Fresca's Prepayment Due Date
2026	Jan. 15, 2026	\$12,360.00	Nov. 14, 2025
2027	Jan. 15, 2027	\$12,732.00	Nov. 16, 2026
2028	Jan. 18, 2028	\$13,116.00	Nov. 19, 2027
2029	Jan. 16, 2029	\$13,512.00	Nov. 15, 2028

6.3. Notice of Future Lease Payments. It is Fresca's additional responsibility to execute and deliver to Louisville no later than November 30th of each year for the second through fifth lease years (2026-2029) a written statement acknowledging the prepayment of the annual payments for the Leased Water and that, to Fresca's knowledge, no payments are outstanding under the Lease, or specifying any outstanding payments due and owing under the Lease as of a date certain, if such is the situation.

6.4. Additional Charges and Fees. In accordance with Section 13.12.040(E) of the City Code, Fresca shall pay all costs and fees associated with transferring the water to Louisville for use in its municipal water system, including transfer fees, administrative fees, temporary transfer costs, charges for services, NCWCD's Rule 11 charges, and any periodic charges or assessments related to the Leased Water. Fresca shall comply with the following deadlines for payment of such additional charges and fees:

6.4.1. Fee to Review. On or before December 20, 2024, Fresca shall pay NCWCD the Fee to Review the Lease in accordance with Rule 3.3 of NCWCD's Procedures for Subcontracting of Allotment Contracts. It is Fresca's responsibility to notify Louisville in writing that it has paid the required Fee to Review to NCWCD no later than December 30, 2024.

6.4.2. Other Fees and Charges. To the extent that Louisville is invoiced for any administrative fees, temporary transfer costs, charges for services, NCWCD's Rule 11 charges, and any periodic charges or assessments related to the Leased Water, Louisville shall provide a copy of the invoice(s) for such fees and/or charges to Fresca upon receipt. Fresca shall pay such charges and/or fees attributable to the Leased Water directly to Louisville not later than ten (10) business days after receipt of the invoice(s) from Louisville.

6.5. Effect of Missed Deadlines. If Fresca fails to deliver either the annual payments due for the Leased Water to the Lessor or the Notice of Lease Payments to Louisville by the relevant deadline set forth in this Addendum, Louisville shall treat the missed deadline(s) as conclusive evidence that Fresca does not intend to prepay the annual Lease Payment. Upon Fresca's failure to cure after notice is provided pursuant to Paragraph 6.6, below, Louisville shall have the option to exercise its rights and remedies under Paragraph 8, below.

6.6. Notice to Cure. If Fresca misses any of the deadlines described in Paragraphs 6.1 through 6.4, above, or if at any other time Louisville determines, in the reasonable exercise of its discretion, that any payment required under the Lease will not be paid by the Lease deadline or remains unpaid following all applicable notice and cure periods provided for in the Lease, Louisville shall give reasonable written notice to Fresca that a payment is owing and

unpaid under the Lease. The notice shall provide a date certain by which Fresca shall be required to make the payment owing under the Lease, which date shall not be less than forty-eight (48) hours following the delivery of such notice to Fresca.

6.7. Reimbursement of Louisville's Costs. Fresca agrees and covenants for itself and its successors and assigns, that, during the Term, if Fresca is in breach of its obligations under the Agreement or this Addendum, it will reimburse Louisville for its reasonable costs and expenses, include, but shall not be limited to, labor costs and attorney's fees incurred in enforcing the terms of the Agreement or this Addendum, including but not limited to, the process of making annual or outstanding payments under the Lease following the notice and cure periods described in Paragraph 6.6, above, regardless of whether Louisville uses its own personnel to correct the matter. In the event Louisville initiates any litigation or engages the services of legal counsel in order to enforce the provisions arising herein, Louisville shall be entitled to its reasonable attorney fees and costs as part of actual costs and expenses, regardless of whether Louisville contracts with outside legal counsel or utilizes in-house legal counsel for the same.

7. Events of Default. The term "Event of Default" shall mean the occurrence of any of the following events:

7.1. Payments. Fresca fails to make a payment in full when due.

7.2. Insolvency or Bankruptcy. The dissolution or insolvency of, the appointment of a receiver by or on behalf of, the application of any debtor relief law, the assignment for the benefit of creditors by or on behalf of, the voluntary or involuntary termination of existence by, or the commencement of any proceeding under any present or future federal or state insolvency, bankruptcy, reorganization, composition or debtor relief law by or against Fresca.

7.3. Business Termination. Fresca dissolves, reorganizes or ends Fresca's business or existence.

7.4. Failure to Perform. Fresca fails to perform any condition or to keep any promise or covenant of this Addendum or the Water Tap Expansion Agreement within ten (10) days after notice of such failure.

7.5. Misrepresentation. Fresca makes any representation or statement that is or proves to have been incorrect or misleading in any material respect when made or conceals a material fact at the time it is made or provided.

8. Rights and Remedies. Louisville's remedies are cumulative and the exercise of any one or more remedies shall not preclude or prevent the taking of any other action available at law or in equity. The remedies listed herein are not exclusive of any other remedies under any applicable federal, state or local law and it is within the discretion of Louisville to seek cumulative remedies.

8.1. Limit Water Use to Water Demand Budget. Require Fresca to immediately reduce its water usage to the corresponding water demand budget, as established pursuant to the City Code and ensuing regulations.

8.2. Restrict Flow. Impose flow restrictions upon the service line to the Property or other flow rate controls or restrictions available to Louisville pursuant to the City Code and ensuing regulations to limit water service to the Property.

8.3. Demand Payment of Increased Water Resource Fee. Require Fresca to pay Louisville the increased water resource fee component of the Expansion Fee for the larger meter size that corresponds to the actual water usage at the price in effect at the time of the default pursuant to the City Code and ensuing regulations to cover the full amount of the Overage.

8.4. Performance by Louisville. Louisville may pay, perform, or otherwise observe the Lease obligations after any Event of Default and use the Leased Water for any lawful purpose, at the discretion of Louisville, and all payments made, or costs or expenses incurred by Louisville in connection therewith, with interest thereon at the maximum rate allowed by applicable law, shall be, without demand, immediately repaid by Fresca to Louisville. Alternatively, Louisville may elect to terminate and/or renegotiate the terms of the Lease upon an Event of Default. No performance of any Lease obligations on the part of Louisville or the termination or renegotiation of the Lease shall be construed a waiver by Louisville of an Event of Default.

8.5. Exercise of Rights under City Code. Louisville may exercise all rights and remedies available to Louisville under the City Code, including Louisville's right to charge a lien upon the Property as the real property to which water service is provided pursuant to Section 13.12.130 of the City Code. This lien is in addition to other remedies available to Louisville to enforce payment for the amounts owed.

8.6. Automatic Termination and Acceleration. Upon the occurrence of any Event of Default described in Paragraph 7.2, above, the unpaid future Lease payments described in Paragraph 6, above, and all other accrued payment obligations under this Addendum and the Water Tap Expansion Agreement shall automatically become immediately due and payable.

8.7. Elective Termination and Acceleration. Upon the occurrence and during the continuance of any Event of Default (other than an Event of Default described in Paragraph 7.2., above), Louisville may, by written notice to Fresca, (i) declare that Louisville's remaining commitments under this Addendum and the Water Tap Expansion Agreement are terminated, and/or (ii) declare the unpaid future Lease payments described in Paragraph 6, above, and all other accrued payment obligations under this Addendum and the Water Tap Expansion Agreement to be immediately due and payable, without demand, notice or legal process of any kind.

9. Notice: Any notice required to be given hereunder to either Party shall be in writing and shall be sent to the following addresses unless written notice of a change of address has been previously given pursuant hereto:

If to Louisville: City Manager
 The City of Louisville
 749 Main Street
 Louisville, Colorado 80027

With copy to: Ashley Pollock Zahedi
Curtis, Justus, & Zahedi, LLC
1333 W. 120th Ave., Suite 302
Westminster, CO 80234
(303) 285-9251
ashleyz@cjzwaterlaw.com

If to Fresca: Fresca Holding Company, LLC.
c/o Zan M. Powell
195 CTC Blvd.
Louisville CO 80027
Zan.Powell@frescafoodsinc.com

With copy to: Lyons Gaddis
Scott E. Holwick
P.O. Box 978
Longmont, Colorado 80502
(303) 776-9900
sholwick@lyonsgaddis.com

If to Lessor: Christen and Kyle Kolb
1182 Niwot Road
Longmont, CO 80504
kyle@yccs.com
(303) 319-6992

All notices shall be transmitted either by personal delivery, reliable overnight courier (such as Federal Express or UPS), or through the facilities of the United States Post Office, postage prepaid, certified or registered mail, return receipt requested. Any such notice shall be effective upon delivery, if delivered by personal delivery or overnight courier, and seventy-two (72) hours after dispatch, if mailed in accordance with the above.

10. Indemnification and Hold Harmless: To the extent authorized by law, Fresca agrees, for itself and its successors, that it will indemnify, defend, and hold Louisville harmless from any and all loss, costs, damage, injury, liability, claim, lien, demand, action, and causes of action whatsoever, whether at law or in equity, arising from or related to Fresca's negligent or intentional acts, errors or omissions, or the negligent or intentional acts, errors, or omissions of its agents, officers, servants, or employees in or related to the Lease. Any costs incurred by Louisville in enforcing the terms of this Addendum and/or the Water Tap Expansion Agreement against Fresca, its successors or assigns, including, without limitation, court costs, shall be borne by Fresca, its successors and assigns. Nothing in this Paragraph, except as expressly provided below, shall be deemed to waive or otherwise limit the defense available to Louisville pursuant to the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et. seq.*, or as otherwise provided by law.

11. Miscellaneous.

11.1. Binding Effect. All grants, covenants, provisos, agreements, rights, powers, privileges, and liabilities contained in this Addendum will be read and held as made by and with, granted to and imposed upon, the respective Parties hereto, and their respective successors, and assigns.

11.2. Severability. In the event any Court of competent jurisdiction declares any part of this Addendum to be unenforceable, such declaration shall not affect the enforceability of the remaining parts of this Addendum.

11.3. Third Parties. This Addendum does not and shall not be deemed to confer upon or grant to any third party any right to claim damages or to bring any lawsuit, action, or other proceeding against either Louisville or Fresca because of any breach hereof or because of any terms, covenants, agreements, or conditions contained herein.

11.4. Applicable Law and Venue. This Addendum and all matters arising hereunder or in connection herewith shall be governed by and construed and enforced in accordance with the laws of the State of Colorado. Any disputes regarding or arising out of this Addendum shall be brought in the courts of Boulder County, Colorado.

11.5. Amendment. This Addendum may be amended by mutual agreement of the Parties only if the amendment is agreed to in writing and signed by both Parties.

11.6. Counterparts. This Addendum may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages shall all be attached to a single original instrument.

11.7. Recording. Louisville shall record this Addendum at Fresca's expense in the office of the Clerk and Recorder, County of Boulder, State of Colorado.

11.8. Covenant to Run with Property. This Addendum shall run with the Property and shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto.

IN WITNESS WHEREOF, the Parties have executed this Addendum to the Water Tap Expansion Agreement as of the dates set forth below.

CITY OF LOUISVILLE, COLORADO

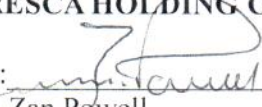
Acting by and through the City of Louisville
Water and Wastewater Activity Enterprise

By: _____

Date: _____

Title: _____

FRESCA HOLDING COMPANY, LLC

By:  _____
Zan Powell

Date: 12/13/24

Title: Chief Administrative Officer