



TO: Mayor Shaun Sipma
Members of the City Council

FROM: John R. Zakian, DR Grant Program Manager & Chief Resilience Officer

DATE: June 6, 2019

SUBJECT: APPROVE SETTLEMENT AGREEMENT TO ACQUIRE PROPERTIES AT 210 7TH STREET NE AND 706 4TH AVENUE NE FOR FLOOD CONTROL PROJECTS

I. RECOMMENDED ACTION

City Council approve Settlement Agreement of the matters entitled Kenn Simensen, Lynette Simensen, and United Community Bank of North Dakota, plaintiffs, v. City of Minot, defendant, Ward County District Court Case Nos. 51-2019-CV-00028 and 51-2019-CV-00029 for a purchase agreement for the subject properties in the amount of \$1,750,000 with such agreement representing full and complete resolution of all issues between the parties in these actions, and authorize the Mayor to execute any and all documents necessary to the settlement and acquisition of the properties.

II. DEPARTMENT CONTACT PERSONS

John R. Zakian, DR Program Manager & Chief Resilience Officer, 423-4528

III. DESCRIPTION

A. Background

Kenn and Lynette Simensen initiated an Inverse Condemnation against the city in October, 2017 with the bank subsequently joining in the court action because it holds mortgages on both properties. From a compliance standpoint with HUD and URA rules, the city had not caused this Inverse Condemnation because at the time that this action was filed in the courts in November, 2018, the city was still open and offering negotiations on a purchase price and had not sought authority from the City Council to pursue acquisition of these properties through Eminent Domain. This is important to note for the record because Grantees are specifically barred from taking action which forces a property owner to commence Inverse Condemnation in an Involuntary Acquisition. The total purchase price offer made by the city for the two properties based on the URA required independent appraisal process was \$1,455,000 and this offer was initially made in October, 2017. The property owners submitted a counter offer a month later for the two properties which totaled \$2,227,000 supported by an independent appraisal completed on behalf of the bank in 2016.

During 2018, the negotiation process continued with the city remaining with its initial offer and the property owners remaining with their counter offer. The Appeals Committee process at this time remained in place and the property owners were offered the option of appearing before the Appeals Committee. The property owners elected to use that process. The result of the Appeals Committee hearing the matter was a unanimous decision to support the city's offer. I communicated to the property owners through their attorney advising the Appeals Committee decision and leaving open the opportunity for the property

owners to continue negotiating. It was at this point that the property owners initiated the Inverse Condemnation.

The attorney for the property owners recently approached the city through our Eminent Domain Attorney and floated the idea of seeking resolution of the matters through a mediator. Both the HUD rules and the URA requirements strongly encourage all possible efforts be made by a Grantee (city in our case) to reach an amicable purchase price within the “necessary and reasonable” standards governing all grant expenditures. Therefore, the city agreed to the mediation which occurred on June 5, 2019 with the city represented by me, Dave Lakefield, Finance Director and Acting City Manager, Kelly Hendershot, City Attorney, and John A. Warcup, representing the city as outside counsel. It should be known that in this matter since it was an Inverse Condemnation, the city’s attorney costs are being paid by NDIRF which means that John A. Warcup had been engaged through the NDIRF process and not as the city’s Eminent Domain Attorney.

The result of the lengthy, all day mediation session was reaching agreement on the purchase price of \$1,750,000. It should be noted that the difference between the two parties was \$772,000 which was unusually wide a difference from the usual differentials in flood project negotiation price points. The mid-point between the two offers was \$1,841,000 which means the settlement price is appreciably below the mid-point. As noted above, the settlement purchase price is all inclusive including plaintiff’s attorney fees. While we were confident in our positions should the matter go to trial, it could have been costly and very lengthy and the disparity between the two offers is an unusually high difference to risk going to trial in which a decision could be made for one or the other price, or a price in between. Therefore, the purchase price reached through the mediation process for \$1,750,000 meets the necessary and reasonable standards.

B. Proposed Project

The Settlement Agreement sets forth that a closing on the acquisition of the two parcels will occur within 45 days after City Council approval. The agreement terms include acknowledgement that it is a full complete resolution of all of the issues between the parties in these actions. It also sets forth that the purchase agreement shall include payment of all outstanding liens and encumbrances on the property including but not limited to liens claimed by United Community Bank of North Dakota. All of these payments and resolution of claims are included within the agreed upon purchase price of \$1,750,000. There are also several years of property taxes owed on the properties which the owners will have to pay along with any related fees. These two properties are needed by the city in support of flood control projects being undertaken in coordination with the Joint Souris Water Board and the Army Corps of Engineers on a timely and needed basis.

IV. IMPACT:

A. Strategic Impact:

This settlement meets HUD and URA standards which encourage amicable resolution of purchases of property through Involuntary Acquisition and meet the necessary and reasonable cost standards.

B. Service/Delivery Impact:

Assures the ability to continue meeting needed schedule acquisitions for flood control projects which are expected to be undertaken between now and end of 2020.

C. Fiscal Impact:

The \$1,750,000 will be funded through the State Water Commission match to the city's CDBG-NDR grant.

V. ALTERNATIVES
N/A

VI. TIME CONSTRAINTS
N/A

VII. LIST OF ATTACHMENTS

- i. Copy of the Settlement Agreement