

City of Minot

City Attorney's Office



Date: October 2, 2019
To: Mayor/City Council
City Manager
From: City Attorney's Office
Re: Monthly Attorney Report (September, 2019)

Pursuant to Minot City Code of Ordinances, Section 2-30(7), the following items or issues are submitted as a summary of some of the matters addressed by the City Attorney's Office prior to the October 7, 2019 City Council meeting:

I. Civil Matters

A. Floodplain Eminent Domain Cases:

1. City of Minot v. Jane Ballantyne Hegeler Trustee of the Jean Ballantyne Living Trust of 1997, et al.

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On May 31, 2017 the City filed an eminent domain action against the Defendants to acquire property for the construction of a flood control project and related infrastructure. Defendants filed an Answer on June 22, 2017. On December 21, 2017 Judge Todd Cresap entered an order requiring the parties to consider and discuss alternative dispute resolution.

On February 20, 2018, the parties filed an Alternative Dispute Resolution Statement with the Court indicating they believe mediation or a court-sponsored settlement conference would be appropriate in this matter. In response, Judge Cresap indicated that given the North Central Judicial District is understaffed by almost 2 judges, there may be considerable delay in accommodating court sponsored mediation and encouraged the parties to pursue a mediation option outside of court sponsored mediation. A scheduling conference was held February 26, 2018. Prior to the conference, the parties' attorneys had disagreements regarding the order for disclosure of expert witnesses and the burden of proof in eminent domain matters. In response, the City filed a proposed scheduling order with the court along with a memorandum of law regarding the disclosure of expert witnesses in eminent domain matters and judicial review of eminent domain takings. The Defendant's counsel was not prepared to discuss these matters at the scheduling conference, and the Court granted their counsel seven days to file a brief or other documentation supporting their position. A scheduling order has not yet been entered.

On March 5, 2018, the Defendant filed a motion for summary judgment, arguing that a taking is not necessary or permitted, and that the City's taking exceeds the permitted taking authorized by the resolution. The City responded on April 4, 2018 and Defendant replied on April 5, 2018. A hearing took place on April 6, 2018 and the Court took the matter under advisement.

On August 24, 2018, the district court issued an order denying the motions for summary judgment and ordering that the City fully comply with NDCC 32-15-06.1 and (2) that an evidentiary hearing take place to determine what interest in the Defendants' property is necessary to fulfill the public purpose for the taking. That same day, a status conference occurred.

On September 13, 2018, the Court issued a notice of trial date for the taking portion of the eminent domain action. On September 26, 2018, the City inspected the Defendants' property.

A court trial took place on January 14, 2019 with the issue being whether the Defendants' property is necessary to fulfill the public purpose of flood control. The Court directed the parties to submit written closing argument, which were due on January 25, 2019. Attorney Warcup submitted a closing argument on behalf of the City.

The Court issued a written denying Defendants' motion for reconsideration. A jury trial to determine the value of the taking was scheduled for September 17-18, 2019.

On July 2, 2019, a substitution of counsel was filed which indicated Attorney Jessica Merchant will be replacing Attorney Bob Rau for the Ballantynes.

September: The City Council approved a settlement of this matter at the September 23, 2019 Special City Council meeting. The statute relating to eminent domain proceedings provides that the Court may order reasonable attorneys' fees to the property owner in eminent domain matters. Per the agreement of the parties, the attorneys' fees portion of this matter will be determined by the Court.

2. City of Minot v. Paul Miller, et al.

Counsel: John Warcup

Opposing Counsel: Michael Ward

Current Status: Pending at District Court

On March 4, 2019, the City Council approved a resolution to move forward with eminent domain relating to this property. On April 2, 2019, the City filed its complaint relating to the eminent domain proceeding.

September: A scheduling conference took place on September 27, 2019.

3. City of Minot v. Perry Miller, et al.

Counsel: John Warcup

Opposing Counsel: William Black

Current Status: Pending at District Court

On March 4, 2019, the City Council approved a resolution to move forward with eminent domain relating to this property. On April 2, 2019, the City filed its complaint relating to the eminent domain proceeding.

September: A scheduling order was issued on September 4, 2019. A pretrial conference is scheduled for April 13, 2020.

4. City of Minot v. Tonite We Ride, Inc.

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On April 1, 2019, the City Council approved a resolution to move forward with eminent domain relating to this property. On May 2, 2019, the City filed its complaint relating to the eminent domain proceeding. A scheduling conference occurred on July 1, 2019. A status conference is scheduled for January 27, 2020.

B. Filed Civil Matters:

1. Leanne R. Grondahl, et al v. City of Minot (517 12th Street Southwest)

Counsel: John Warcup
Appointed by NDIRF

Opposing Counsel: Jessica Merchant and Richard Olson

Current Status: Pending at District Court

Since 2017, the City has been attempting to acquire 517 12th Street Southwest from Leanne and Shane Grondahl. The parties have been negotiating but have not reached an agreement on the value of the property.

On December 5, 2018, the City accepted service of a summons and complaint relating to this matter. Plaintiffs claim the value of the property has significantly diminished due to the flood control project and the proposed acquisition of the property and, therefore, a taking has occurred. Plaintiffs, therefore, request just compensation for the property, attorney fees, costs, and any other relief the Court deems just and equitable. The City filed an answer on December 21, 2018.

On March 18, 2019, the Court issued orders for a scheduling conference and alternative dispute resolution. A status conference is scheduled for April 20, 2020.

2. City of Minot v. Cypress Development, LLC

Counsel: Jocelyn Knoll and Kate Johnson
Dorsey Whitney
Appointed by City Council

Opposing Counsel: Attorneys from Perkins Coie

Current Status: Pending at District Court

This matter relates to a mixed development project in the City of Minot. The project involves the construction of two city-owned parking structures on City lots, plus retail or office space and residential units on top of the parking ramps. A private developer, Cypress Development, LLC, was to manage the City's parking structures and develop the residential units and commercial improvements. Several agreements exist, including, but not necessarily limited to, 2015 Lease Agreements, 2015 Management Agreement, 2013 Development Agreement, and a Development and Disposition Agreement. Cypress failed to pay amounts owed to the City as rent and then, upon notice of its material breach, failed to cure its breach within the 120 day period. Cypress failed to properly manage the parking structures. Cypress failed to pay all costs for the development and construction of the Parking Structures in excess of the City's obligation. Because Cypress failed to maintain a lease, due to its failure to pay the rent, Cypress also violated the Development and Disposition Agreement. With that, on March 15, 2018, the City served a summons and complaint on Cypress, initiated a lawsuit in Ward County.

Cypress filed an answer and various counterclaims on April 23, 2018. In its counterclaims, Cypress's claims for relief include indemnification, unintentional misrepresentation, constructive fraud, breach of contract, and declaratory relief. On May 14, 2018, the City filed an answer to the counterclaims.

On July 27, 2018 a hearing on Cypress's motion to change venue took place before Judge Gary Lee. The Court has not issued a decision on that motion.

The City previously served discovery requests on Cypress. In September Cypress provided its responses to those discovery requests. The City's counsel is currently evaluating the responses and determining the appropriate next steps.

On October 23, 2018, the Court issued its order denying Cypress's motion to change venue.

On February 15, 2019, the City and Cypress presented a joint scheduling order to the Court; the Court approved of the scheduling order which lays out deadlines for, among other things, fact discovery, expert disclosures, dispositive motions, and trial length. The scheduling order does not set a specific trial date, but indicates parties shall be ready for trial no later than March 2, 2020.

On March 15, 2019, Cypress filed a motion for leave to amend answer and counterclaims. The City responded, requesting the Court deny the motion on March 29, 2019. Cypress replied on April 5, 2019.

On May 7, 2019, the Court entered an order allowing Cypress to amend its answer and counterclaims. The City filed an amended answer to Cypress's counterclaims on May 23, 2019.

September: Discovery is ongoing with regard to this matter. Thousands of documents have been exchanged between the parties; the City expects that additional documents will be provided. Depositions are anticipated to take place throughout the Fall of 2019. The fact discovery deadline was previously extended to January 2020. A status conference is scheduled for February 3, 2020.

3. City of Minot v. 16th Crossing, LLC

Counsel: Shawn Grinolds and Brad Wiederholt
Appointed by City Council

Opposing Counsel: Wayne Carlson and Todd Zimmerman

Current Status: Pending at District Court

In 2013, the City entered into a Development Agreement with 16th Crossing, LLC. The City contributed five million dollars in CDBG-DR funds to provide water, sewer, drainage, and access infrastructure to 16th Crossing, LLC's development. In exchange, 16th Crossing, LLC agreed to, among other things, within two years, (1) construct 178 townhomes, of which a minimum of 51% of the proposed townhome would be set aside and offered at a price affordable to LMI buyers; and (2) provide 350 manufactured homes, of which a minimum of 51% of the manufactured homes lots would be set aside and leased to LMI households.

On August 1, 2017, the City notified 16th Crossing, LLC of several deficiencies, including but not limited to those outlined in the preceding paragraph, under the Development Agreement and permitted 16th Crossing, LLC with thirty days, per the Development Agreement, to either cure the deficiencies or provide documentation of diligent efforts to correct the failures. If 16th Crossing, LLC failed to cure the deficiencies or provide documentation of diligent efforts to correct the failures, the City set a termination date of September 15, 2017. City staff has extended the termination date two additional times to allow for 16th Crossing, LLC to provide proposals for resolving this matter without litigation.

The current termination date was set for December 8, 2017. This matter was discussed in executive session at the December 4, 2017 City Council meeting. Following executive session, the City Council convened in public session and moved to terminate the Development Agreement with 16th Crossing, LLC and pursue any action necessary to recoup the funds relating to the Development Agreement. The City sent a letter to 16th Crossing, LLC on December 8, 2017 advising 16th Crossing the City was placing 16th Crossing, LLC in default and terminating the Development Agreement for cause effective December 8, 2017.

This matter was discussed in executive session on January 8, 2018 by the City Council pursuant to N.D.C.C. 44-04-17.1, 19.1, and 19.2 so that Attorney Shawn Grinolds could advise the Council regarding the pending action, and deliver his advice and guidance on the legal risks, strengths, and weaknesses, which, if held in public, would have an adverse fiscal effect on the Council. Attorney Grinolds also allowed for an opportunity for the Council to discuss negotiating strategy and provide negotiating instructions, which if held in public, could have an adverse fiscal effect on the bargaining or litigating position of the City.

On May 29, 2018, the City received 16th Crossing, Inc.'s Answer and Counterclaims. On June 19, 2018, the City filed and served its answer to Defendant's Counterclaims.

On September 7, 2018, the Court issued an order for a scheduling conference and an order for alternative dispute resolution. At a special meeting on October 1, 2018, the City Council will discuss this litigation matter in executive session.

On October 11, 2018, the Court issued a scheduling order setting motion and discovery deadlines for the parties.

Discovery was served on 16th Crossing and is ongoing. In June 2019, the parties agreed to amend the scheduling plan to allow for more time to conduct discovery, including depositions. A status conference is scheduled for March 16, 2020.

4. First Western Bank & Trust v. ND Port Services; City of Minot

Counsel: Shawn Grinolds
Appointed by City Council
Appointed by NDIRF against NDPS Counterclaim

Opposing Counsel: FWBT: Richard Olson/Jessica Merchant
NDPS: Jon Brakke

Current Status: Pending at District Court

In 2009, the City entered into a lease relating to city-owned property with NDPS. At the same time, the City agreed to a subordination agreement with State Bank of Kenmare, where the City agreed that NDPS could use its interest in the lease as security for one or more loans. A subsequent subordination agreement was signed in 2013 to amend the vender from State Bank of Kenmare to FWBT.

Allegedly, NDPS has defaulted on its obligations to FWBT. As a result, FWBT initiated foreclosure proceedings by filing a Summons and Complaint against NDPS and the City on May 16, 2017.

On June 8, 2017, the City filed an Answer to the FWBT Complaint and a Crossclaim against NDPS, alleging NDPS materially breached the lease agreement by failing to pay rent and failing to promptly pay and discharge real estate taxes and assessments against the subject leased property. On June 28, 2017, NDPS filed an Answer and Crossclaim against the City, alleging that the City is in breach of the lease agreement because it failed to return the lease property to the condition it was in prior to commencement of construction activities pursued by the City; it failed to insure proper drainage with respect to City improvements on or near the leased property; and construction of improvements on or near the leased property prevented NDPS from being able to properly use and develop the leased property. Additionally, NDPS's Crossclaim alleges that the City failed to permit NDPS to exercise its right to purchase certain portions of the leased property pursuant to the lease agreement because the City was unable to convey title to the subject property to NDPS. On July 19, 2017, the City responded to the Crossclaim, denying NDPS claims.

On November 15, 2017, NDPS filed a Motion for Summary Judgment against FWBT, arguing that FWBT did not fully comply with the statutory requirements relating to the foreclosure notice and complaint. The motion was not directed at the City.

The matter is still pending in District Court. On December 4, 2017, FWBT filed a brief in opposition to the Motion for Summary Judgment, arguing that it met all the statutory requirements relating to the foreclosure notice and complaint, and that even if it did not, NDPS is not entitled to summary judgment. On December 7, 2017, NDPS filed a response replying to NDPS's assertions claiming that FWBT's failure to meet the statutory notice requirements renders their foreclosure fatally defective and the Court should award summary judgment in their favor.

On January 25, 2018, First Western Bank & Trust filed proposed orders regarding the pending motions for summary judgment. Neither proposed order directly implicates the City.

On March 1, 2018, the Court granted Summary Judgment to First Western Bank & Trust to foreclose on NDPS's leasehold and other security interests and denied NDPS's motion for summary judgment. The Court did conclude however, that a genuine issue of material fact remains as to the amount owed First Western Bank & Trust by NDPS, and has requested affidavits be filed with the Court within 20 days describing the amounts owed for purposes of entry of final judgment on the foreclosure action. The City's claim against NDPS for accrued rents, and NDPS's cross-claim against the City for alleged damages, remain pending before the Court.

On April 19, 2018, Attorney Grinolds filed a motion for summary judgment on behalf of the City. On April 11, 2018, Attorney Grinolds mailed a notice to terminate the lease, and on May 31, 2018 the lease between the City and NDPS terminated.

On August 3, 2018, an amended judgment was entered in favor of FWBT establishing the specific amount owed to the bank. Previously, the Court entered judgment in favor of FWBT finding breach of the loan documents by NDPS. On August 22, 2018, the Court issued a special execution ordering the Sheriff to proceed with the sale of the property described in this matter. On August 28, 2018, the City filed a motion to amend the special execution to clarify that the Sheriff should include only NDPS's underlying interest in the lease with the City, not City's real property.

On September 7, 2018, the Court issued its order granting summary judgment and finding that NDPS materially breached the lease agreement by failing to pay rents in 2016, 2017, and 2018 and failing to pay real estate taxes in 2016, 2017, and 2018 through the termination date. The Court granted the City monetary damages against NDPS for breach in the amount of \$248,216.59 in relation to the 129.16 acres not genuinely in dispute; the Court also determined there is a genuine issue of material fact in dispute with regard to 5.70 acres leased to NDPS and summary judgment was not granted with regard to that portion of the lease. In addition, on September 19, 2018 the Court granted its order that the special execution should be amended and on September 21, 2018 an amended special execution was issued by the Court.

On October 31, 2018 a sheriff's sale for NDPS's real property, personal property, and interest in the City of Minot lease were auctioned at the Ward County courthouse. FWBT was the only bidder.

On November 28, 2018, the Court issued an order confirming the sale; the redemption period expired on December 30, 2018.

In March and April, City officials met with FWBT to discuss current operations of the site.

5. Envy Gentlemen's Club Lawsuit

Counsel: Bryan Van Grinsven,
Appointed by NDIRF

Opposing Counsel: William Delmore

Current Status: Pending at District Court

In November of 2010, the City of Minot was served with a Summons and Complaint with regard to a prior zoning decision rendered by the City wherein a liquor establishment employing exotic dancers was required in July of 2011, to be located and operated only in an M-2 Zoning District, which is designated as an industrial zone. The Plaintiff's lawsuit asserted United States constitutional violations, an unconstitutional taking of property, and a request for attorneys' fees with respect to the filing of this action. This case is being defended by the City and the North Dakota Insurance Reserve Fund has appointed Bryan Van Grinsven of the McGee Law Firm in Minot, North Dakota, to represent the City's interests. The City filed a motion seeking to vacate the temporary injunction which had been previously granted against the City in the enforcement of the zoning restriction. On September 20, 2011, District Court Judge William McLees granted the City's request to vacate the temporary injunction and thereby allowed the City, at that time, to prohibit the operation of the sexually oriented business. Remaining issues have been left before the Court with respect to the sufficiency of alternative sites available within the City. The Court administratively closed this file.

On May 30, 2017, the City of Minot was served with a Summons and Complaint by Envy's Gentlemen's Club. This matter is filed in federal court. The Summons and Complaint relate to a zoning ordinance change that was effective in September 2011 which required adult entertainment centers to be located in M-2 zoning districts. The Complaint alleges a takings claim and requests that the Court either permit Plaintiff to have adult entertainment pursuant to grandfathering, or award Plaintiff damages for the loss of value in its property. On June 20, 2017, the City filed an Answer. The matter is ongoing at federal district court.

On February 19, 2018, the City filed a motion to dismiss the federal litigation due to the ongoing state court proceeding in Ward County District Court.

A hearing on the City's motion to dismiss was held on July 20, 2018. After the hearing, Judge Miller issued an order suspending pending discovery deadlines and cancelling the pretrial conference and trial. On July 26, 2018, Judge Miller issued an order staying the federal court proceedings. This essentially shifts jurisdiction, at this point, back to state court.

6. Austin Bergstrom v. City of Minot Water Distribution and Sewage Treatment

Counsel: Jason Vendsel
Appointed by NDIRF

Opposing Counsel: Pro Se

Current Status: Pending at District Court

On August 12, 2019, Austin Bergstrom filed a claim in small claims court against the "City of Minot Water Distribution and Sewage Treatment" relating to an issue relating to a purported sewer backup issue that allegedly caused damage to his home. The City was not served properly with the claim. NDIRF has been involved with this claim and appointed Attorney Jason Vendsel to defend the City. On September 9, 2019, Attorney Vendsel filed a motion to dismiss the complaint based on improper service.

7. Berger Enterprises, LLC v. City of Minot

Counsel: John Warcup

Appointed by NDIRF

Opposing Counsel: Theodore Sandberg

Current Status: Unfiled

On September 27, 2019, the City received a mailing which contained a summons and complaint in which Berger Enterprises, LLC alleges a contract claim against the City relating to the 2018 demolition contract. NDIRF appointed Attorney John Warcup to defend the City. The matter has not been filed in district court.

C. Other Civil Matters

1. Ordinance Revisions:

- a. **Small Cell Ordinance:** This Office is working with the Engineering Department to review and draft a small cell ordinance.
- b. **Purchasing Ordinances:** This Office is working with other departments to review and, if necessary, revise current purchasing policies and ordinances. The draft purchasing policy has been through review by department heads, but is currently on hold, pending any recommendations from the Buy Local Task Force.
- c. **Sales Tax Ordinance:** This Office is working with the City Manager and Finance Director on a proposed sales tax ordinance that, if approved, would become effective after the expiration of the current second penny.
- d. **Hotel/Motel Zoning Ordinance:** This Office worked with the Planning Department on a proposed amendment to the zoning code relating to hotels and motels. The ordinance is before the City Council, on first reading, at the September 3, 2019 regular City Council meeting.

2. Committee Participation:

- a. **Buy Local Task Force:** This Office participates in the City Manager's Buy Local Task Force. The group is reviewing local preference options and determining what, if any, local preferences should be implemented into City ordinances, policies, or procedures.
- b. **Nuisance Task Force:** This Office participates in the Nuisance Task Force, which consists of various City staff and community members. The group is reviewing current nuisance and code violations processes.
- c. **Zoning Steering Committee:** This Office participates in the Zoning Steering Committee meetings and provides feedback on draft amendments to the City of Minot Zoning Supplement.
- d. **Operations Committee:** This Office participates in the City Manager's Operations

Committee. Among other things, the group is reviewing the City's ordinances relating to permitting and the processes relating to permitting.

3. Alleged Open Meeting Violation:

On August 5, 2019, this Office received a copy of a letter from the Office of the Attorney General requesting information relating to an allegation of an open meeting violation. The Complainant alleged that the City Council Retreat, which was held in Washburn, ND, violated the open meetings laws because the City Council has held recurrent meetings outside of Minot. On behalf of the City, this Office provided a written response to the allegations to the Office of the Attorney General.

4. Dean Melius and Margo Ehr v. City of Minot:

Counsel: City Attorney's Office

Opposing Counsel: Debra Hoffarth (Melius Ehr)
Bryan Van Grinsven (Water Board)

Current Status: Pre-litigation/Appeal to Office of State Engineer

Dean Melius and Margo Ehr own property outside of the corporate city limits. Melius and Ehr ("Property Owners") filed a complaint with the Ward County Water Resource Board on July 7, 2014, alleging that their property has been damaged because City development has caused storm water drainage to be diverted to their property. The Board determined the complaint was not valid. The Property Owners appealed that decision to the State Engineer, and the State Engineer returned the complaint to the Board for further review after finding that the Board failed to determine whether any activities conducted upstream of the Property Owner's property were conducted contrary to NDCC Title 61.

The City Engineer and City Attorney met with members of Board and Property Owners in February 2016. The City Engineer was tasked with researching the developments and/or storm sewer districts in Minot. In September, 2016, the City Engineer and City Attorney met with members of Board and Property Owners in September 2016. The Board asked its engineer survey the property.

On January 22, the City of Minot received notice from the Ward County Water Resource Board that an apparent drain (as defined by N.D.C.C. § 61-21-01) appears to have been constructed on property, some of which is owned by the City of Minot. The Ward County Water Resource Board alleges that this drain is an unpermitted drain opened or established contrary to N.D.C.C. Title 61 and has asked the City to either remove the unpermitted drain or obtain a drainage permit. Failure to do so would result in the Board procuring closure of the drain and assessing the cost of doing so against the City's property.

On February 12, 2018, a hearing was held regarding the notice to remove an unpermitted drain. After the parties presented evidence, Loren Johnson moved that the City be required to remove the drain identified in the Board's notice, and the motion passed 3-2 (Maurice Foley and Tom Klein opposed). Maurice Foley moved to allow the City 6 months to remove the drain; seconded by Jason Zimmerman. The Motion passed 5-0. The City plans to appeal the decision of the Ward County Water Resource Board to the Office of the State Engineer.

On March 23, 2018, the City submitted an appeal to the Office of the State Engineer.

II. Criminal Matters

- A. **Minot Municipal Court** – Handled routine and daily matters in Minot Municipal Court for criminal prosecution (trials) and civil ordinance violations, as well as approval or initiation of criminal complaints for ordinance violations.
- B. **District Court** – Appeared and responded to the scheduling of District Court transfer cases involving initial appearances, motion responses, motion hearings, status conferences, pretrial conferences, and order to show cause proceedings for criminal cases originating in the Minot Municipal Court and subsequently transferred to the Ward County District Court.
- C. **Prosecution Contract** – On January 2, 2019, Attorney Caitlyn Pierson began prosecuting City of Minot ordinance violations at municipal and district court per the City Council’s action to appoint her Special Assistant City Attorney; she will maintain this role for 2019.

Respectfully Submitted,



Kelly Hendershot