

City of Minot

City Attorney's Office



Date: September 2, 2020
To: Mayor/City Council
City Manager
From: City Attorney's Office
Re: Monthly Attorney Report (August, 2020)

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 September 8, 2020 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. A bench trial was held on whether there was a public purpose for the taking; the Court determined there was a public purpose. A jury trial was scheduled to determine the value of the property, but the parties were able to reach a resolution prior to that trial beginning.

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 settlement agreement of the parties, the attorneys' fees portion of this matter will be determined by the Court.

On November 25, 2019, the district court signed the order for entry of judgment.

August: On November 13, 2019, the Defendants' counsel filed a motion for an award of attorneys' fees, costs, and expenses, seeking \$138,217.45. On August 14, 2020, the Court issued an order awarding the Defendants attorneys' fees in the amount of \$91,334.65 and costs/expenses in the amount of \$4,229.71, for a total of \$95,564.36.

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.

August: The August 4-5, 2020 trial was continued due to a COVID-19 related order and rescheduled for September 17-18, 2020.

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.

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

On April 22, 2020, JP Morgan Chase Bank filed a motion to intervene as it is the present owner of the note and mortgage relating to the property.

A status conference is scheduled to occur on October 5, 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 took place on February 18, 2020.

A jury trial is scheduled for October 27-28, 2020.

5. City of Minot v. Deborah A. Luetzen, et al.

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Pending at District Court

On March 2, 2020, the City Council approved a resolution to move forward with eminent domain relating to this property. On May 12, 2020, the City filed its complaint relating to the eminent domain proceeding. On July 13, 2020, the City filed a motion for default judgment.

6. City of Minot v. David P. Cox, II, et al.

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Pending at District Court

On March 2, 2020, the City Council approved a resolution to move forward with eminent domain relating to this property. On May 13, 2020, the City filed its complaint relating to the eminent domain proceeding.

On June 11, 2020, the City filed a motion for default judgment. On July 1, 2020, the Court granted the City's motion for default judgment.

August: On August 12, 2020, the Court issued a final order of condemnation, granting the City fee title to the subject property.

7. City of Minot v. Nathan Properties, LLC, et al.

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On March 2, 2020, the City Council approved a resolution to move forward with eminent domain relating to this property. On May 27, 2020, the City filed its complaint relating to the eminent domain proceeding.

On June 8, 2020, Nathan Properties, LLC filed an answer; Nathan Properties, LLC also filed counterclaims for governmental liability and a violation of due process under 42 § 1983. The North Dakota Insurance Reserve Fund has agreed to pay for the cost to defend the City against the counterclaims. On June 29, 2020, Attorney Warcup filed an answer to the counterclaims on behalf of the City.

August: A jury trial is scheduled for June 21-23, 2021.

8. City of Minot v. Karen Borman, et al.

Counsel: John Warcup

Opposing Counsel: Shelby Larson

Current Status: Pending at District Court

On March 2, 2020, the City Council approved a resolution to move forward with eminent domain relating to this property. On May 27, 2020, the City filed its complaint relating to the eminent domain proceeding.

On June 25, 2020, Ms. Borman filed an answer; Ms. Borman also filed counterclaims for violations of due process clauses of the United States and North Dakota constitutions and a violation of 42 § 1983.

B. Filed Civil Matters:

1. Dawn Wilkie, individually and on behalf of Oscar Wilkie III, deceased v. Ward County, et al.

Counsel: Randall Bakke
Appointed by NDIRF

Opposing Counsel: Amanda Corey

Current Status: Pending at Federal District Court

On January 10, 2020, a complaint was filed with the U.S. District Court of North Dakota by Plaintiff against, among others, the City of Minot and individual Minot Police Department officers. The complaint stems from the death of Oscar Wilkie III while he was in custody of the Ward County Jail, after being arrested on a bench warrant and transported to the Ward County Jail by Minot police officers. The complaint alleges deliberate indifference to civil rights; deliberate indifference to serious medical needs; negligence; and wrongful death. The North Dakota Insurance Reserve Fund retained and appointed Randall Bakke and other attorneys at Bakke Grinolds Wiederholt to defend all Defendants named in this lawsuit. Attorney Bakke filed an answer on behalf of the defendants on March 5, 2020. Discovery is ongoing.

2. 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.

A court trial is scheduled for October 20-21, 2020.

3. 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. On March 15, 2018, the City served a summons and complaint on Cypress.

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 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.

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. The parties are also in the process of scheduling depositions.

A pretrial status conference is scheduled for October 9, 2020. A jury trial is scheduled for November 9-20, 2020.

4. 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.

The City served a summons and complaint on 16th Crossing, Inc. on May 7, 2018. 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.

A scheduling conference is scheduled for January 29, 2021.

August: Discovery is ongoing. A deposition of 16th Crossing representatives is scheduled for September 11, 2020.

5. 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 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.

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 district court should award summary judgment in their favor.

On March 1, 2018, the district court granted summary judgment to FWBT to foreclose on NDPS's leasehold and other security interests and denied NDPS's motion for summary judgment. 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 April 19, 2018, Attorney Grinolds filed a motion for summary judgment on behalf of the City. On September 7, 2018, the district 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 district 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 district court also determined there was 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.

On October 31, 2018 a sheriff's sale for NDPS's real property, personal property, and interest in the City 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.

On December 30, 2019, the City and NDPS filed a stipulation for order for judgment, where the parties agreed that the City is entitled to an additional \$104,661.51 from NDPS (the amount relative to the 5.70 acres not included in the prior summary judgment); the parties also agreed that the dismissal of NDPS's remaining cross claim against the City was appropriate. On January 9, 2020, a judgment was issued for the dismissal of the remaining claims and the additional \$104,661.51.

On February 7, 2020, Attorney Grinolds served NDPS with post-judgment discovery (interrogatories and requests for production of documents). Correspondence regarding discovery has occurred, but discovery is ongoing.

6. 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.

C. Other Civil Matters

1. Ordinance Revisions:

- a. **Movie Theater Alcoholic Beverage License:** This Office worked with the Police Department to develop an alcoholic beverage license specific to movie theaters. The proposed ordinance was approved, on first reading, at the August 17, 2020 City Council meeting. The proposed ordinance is on second reading at the September 8, 2020 meeting.
- b. **Traffic Fines:** This Office is working with the Police Department to develop a recommendation for increasing traffic fines in the City.
- c. **Cigarette Ordinances:** This Office is working with the Police Department to revise the City’s cigarette ordinances to ensure they are consistent with federal law.
- d. **Garbage/Sanitation Ordinances:** This Office is working with the Public Works Department to revise the City’s garbage/sanitation ordinances.
- e. **Sidewalk/Street Ordinances:** This Office is working with the Engineering Department to revise the City’s sidewalk/street ordinances.

2. Committee Participation:

- a. **Problem Properties Unit:** This Office participates in the Problem Properties Unit, which consists of various City staff and community members. The group is reviewing current nuisance and code violations processes.
- b. **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.
- c. **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. 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.

On February 19, 2020, the City received a Notice of Decision from the Office of the State Engineer. The State Engineer reversed the District’s decision and order and dismissed the complaint.

August: The aggrieved party filed a motion for summary judgment on July 17, 2020. The Office of the State Engineer responded on August 17, 2020. Due to the pending motion for summary judgment, the hearing scheduled for August 18-19, 2020 was cancelled and will be rescheduled, if necessary, after the motion is resolved.

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, 2020, Attorney Morgan Glines began prosecuting City of Minot ordinance violations at municipal and district court and she will maintain that role for 2020.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Kelly Hendershot". The signature is written in black ink and is positioned above the printed name.

Kelly Hendershot