

City of Minot

City Attorney's Office



Date: April 28, 2021
To: Mayor/City Council
City Manager
From: City Attorney's Office
Re: Monthly Attorney Report (April, 2021)

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 May 3, 2021 City Council meeting:

I. Civil Matters

A. Floodplain Eminent Domain Cases:

1. 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.

At the September 21, 2020 regular City Council meeting, the City Council approved the acquisition of this property for \$193,000.00. The only remaining issue is the property owner's reasonable attorneys' fees and costs.

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

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Resolved 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.

On September 2, 2020, the district court signed a findings of fact, conclusions of law, and order for judgment. The City deposited \$167,000.00 with the clerk of district court, which represents the full payment for just compensation and is equal to the amount of the City's appraisal.

City staff is working with the defendants on relocation issues.

April: At the April 19, 2021 regular City Council meeting, the City Council approved a resolution allowing staff to initiate eviction proceedings against the Defendant.

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

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Resolved 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 district court granted the City's motion for default judgment.

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

City staff is working with the defendant on relocation issues.

4. 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.

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

5. 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.

On December 31, 2020, the City filed a motion to compel discovery. On February 3, 2021, the district court issued an order granting the City’s motion to compel discovery and directed the Defendant to submit answers no later than February 12, 2021.

Defendant failed to provide answers to the City’s discovery requests by February 12, 2021 and the City notified the district court.

The district court issued another order and directed Defendant to submit answers no later than 9:00 AM on February 22, 2021 and indicated that failure to do so would result in default judgment rendered against the Defendant.

The City did not receive answers from Defendant by 9:00 AM on February 22, 2021 and notified the district court. Defendant’s counsel informed the district court that discovery responses were previously provided, but that the pleadings would be forthcoming due to computer issues. The City responded and informed the district court that no discovery responses were received by 9:00 AM on February 22, 2021 and requested that default judgment be entered.

On March 3, 2021, the district court issued an order authorizing the City to acquire fee simple title to the property for the amount of \$220,000.00 (the amount of the City’s appraisal).

April: A hearing was initially scheduled for April 16, 2021 on the issue of whether attorney’s fees should be paid related to the City’s motion to compel discovery and for sanctions. The district court rescheduled the hearing to May 20, 2021.

B. Filed Civil Matters:

1. RMM Properties LLLP v. Xcel Energy; City of Minot

Counsel: John Warcup
Appointed by NDIRF
Opposing Counsel: Nici Meyer (RMM Properties LLLP)
Patrick Mahlberg (Xcel Energy)

Current Status: Pending at District Court

On April 13, 2021, the City was served with a summons and complaint by Plaintiff against Xcel Energy and the City of Minot. The complaint stems from Xcel Energy's placement of a transformer in public right-of-way. It is an action for declaratory relief; inverse condemnation; and nuisance. The North Dakota Insurance Reserve Fund retained and appointed John Warcup to defend the City in this lawsuit. Attorney Warcup will file an answer on behalf of the City.

2. 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.

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 district court deny the motion on March 29, 2019. Cypress replied on April 5, 2019. On May 7, 2019, the district 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.

The parties participated in mediation on November 19, 2020. No settlement was reached.

The jury trial is scheduled to occur on July 12-23, 2021.

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 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 deposition of 16th Crossing representatives was scheduled for October 24, 2020. On October 21, 2020 Defendant filed a motion to stay discovery and other deadlines for 30 days to allow for bankruptcy filings to be completed.

April: A Rule 30(b)(6) deposition of Defendant occurred on April 13, 2021.

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 district 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 district 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.

C. **Other Civil Matters**

1. **Contracts:**

- a. **LSS Housing – CDBG NDR:** This Office is working with John Zakian and the City Manager to resolve issues relating to two sub-recipient agreements between the City and LSS Housing. The City Council approved a Termination Agreement at the March 15, 2021 regular City Council meeting. The City is waiting for the district court in Cass County to approve the agreement.
- b. **MAGIC Fund – CTE Agreement:** This Office is working with the City Manager and Finance Director to finalize this agreement. A lease between the MSU Foundation and Dakota College is required as an exhibit to the agreement and those parties are currently

negotiating that document. The Development Agreement is on the May 3, 2021 regular City Council agenda for consideration.

- c. **Magic City Discovery Center – Sub-Recipient Agreements:** This Office is working with the Finance Director to finalize sub-recipient agreements between the City and MCDC and the City and Minot Park District – both related to the Magic City Discovery Center. The two sub-recipient agreements were approved at the April 19, 2021 regular City Council meeting.

2. **Ordinance Revisions:**

- a. **Traffic Fines:** This Office is working with the Police Department to develop a recommendation for increasing traffic fines in the City.
- b. **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.
- c. **Garbage/Sanitation Ordinances:** This Office is working with the Public Works Department to revise the City’s garbage/sanitation ordinances.
- d. **Sidewalk/Street Ordinances:** This Office is working with the Engineering Department to revise the City’s sidewalk/street ordinances.
- e. **Civil Service/Personnel Ordinances:** This Office is working with the Human Resources Department and the City Manager to revise the City’s civil service and personnel ordinances and related policies.

3. **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.

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.

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.

The aggrieved party filed a motion for summary judgment on July 17, 2020. The Office of the State Engineer responded on August 17, 2020.

On November 4, 2020, the administrative law judge assigned to this matter issued recommended order granting summary judgment in favor of the Office of the State Engineer. On November 18, 2020, a petition for review, urging modifications to the recommended order, was filed by the attorney representing the Office of the State Engineer. The City provided proposed modifications to the recommended order.

April: On April 1, 2021, the Interim State Engineer issued an order granting summary judgment in favor of the Office of the State Engineer, as recommended by the administrative law judge.

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.

Respectfully Submitted,

Handwritten signature in cursive script, appearing to read "Kelly Handberg".