

City of Minot

City Attorney's Office



Date: December 29, 2021
To: Mayor/City Council
City Manager
From: City Attorney's Office
Re: Monthly Attorney Report (December, 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 January 3, 2022 City Council meeting:

I. Civil Matters

A. Floodplain Eminent Domain Cases:

1. 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.

The purchase agreement was executed by both parties. The issue of reasonable attorney fees is still being negotiated; if the parties are not able to resolve that issue, it will be resolved by the district court.

December: The parties agreed to a delayed transfer of possession, which was scheduled to occur on December 20, 2021. After the City receives the deed from Nathan Properties, LLC, the City will release the funds.

2. City of Minot v. D&S Rentals II, et al.

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Pending at District Court

On June 21, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On July 16, 2021, the City filed its complaint relating to the eminent domain proceeding.

On August 13, 2021, the Property Owner filed an answer.

December: A scheduling conference occurred on December 15, 2021. A court trial was scheduled for February 18, 2022.

3. City of Minot v. John Dokken, et al.

Counsel: John Warcup

Opposing Counsel: Bruce Schoenwald

Current Status: Pending at District Court

On May 3, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On July 16, 2021, the City filed its complaint relating to the eminent domain proceeding.

On July 30, 2021, the Property Owner filed an answer and also a counterclaim relating to the operation of the business.

On August 23, 2021, the City filed an answer to the Property Owner's counterclaim.

4. City of Minot v. Daniel Pfau

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On June 21, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On July 16, 2021, the City filed its complaint relating to the eminent domain proceeding.

On August 5, 2021, the Property Owner filed an answer.

5. City of Minot v. Anneliese Roberts, et al.

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On May 3, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On July 16, 2021, the City filed its complaint relating to the eminent domain proceeding.

On July 28, 2021, the Property Owner filed an answer.

6. City of Minot v. Trinity Health, a North Dakota non-profit corporation, et al.

Counsel: John Warcup

Opposing Counsel: David Hogue

Current Status: Pending at District Court

On June 21, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On July 22, 2021, the City filed its complaint relating to the eminent domain proceeding. On August 3, 2021, Property Owner filed an answer.

December: A scheduling conference occurred on December 27, 2021.

7. City of Minot v. Loyal Order of Moose Minot Lodge #822

Counsel: John Warcup

Opposing Counsel: Jessica Merchant

Current Status: Pending at District Court

On May 3, 2021, the City Council approved a resolution to move forward with eminent domain relating to this property. On August 19, 2021, the City filed its complaint relating to the eminent domain proceeding. On September 7, 2021, Property Owner filed an answer.

A status conference is scheduled for May 23, 2022.

8. City of Minot v. Palmer Miller

Counsel: John Warcup

Opposing Counsel: Pro Se

Current Status: Pending at District Court

On October 31, 2018, the City entered into a purchase agreement with the Defendant. The City has since tendered to the Defendant the purchase price and requested conveyance of the land, but the Defendant has refused to accept the tender and refused to make the conveyance. On September 14, 2021, the City served and filed a summons and complaint, seeking a judgment requiring the Defendant to specifically perform the purchase agreement. On October 5, 2021, Defendant filed an answer.

December: On December 15, 2021, an order was issued to set a scheduling conference for January 18, 2022.

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. On May 5, 2021, an answer was filed on behalf of the City. The North Dakota Insurance Reserve Fund retained and appointed John Warcup to defend the City in this lawsuit.

December: Discovery is ongoing.

2. City of Minot v. Cypress Development, LLC

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

Opposing Counsel: Attorneys from Schwabe, Williamson & Wyatt P.C.

Current Status: Resolved 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.

On July 12, 2021, a jury trial began. The Honorable Gary Lee presided over the case and a jury of 9 was impaneled to decide the factual issues. The jury returned a verdict in favor of the City, after 3.5 hours of deliberation. The jury determined that Cypress Development breached its contracts with the City; in addition, the jury determined that the City was entitled to damages in the amount of \$2,442,479.94.

Cypress's countersuit, which sought more than \$50 million in damages, was denied by the jury in its entirety. Any notice of appeal must be filed within 60 days of entry of judgment.

Notice of entry of judgment was filed and served on October 12, 2021.

December: On December 13, 2021, Cypress filed a motion for a new trial, alleging juror misconduct and claiming certain selected jurors provided inaccurate answers in voir dire and injected extraneous information into the jury room. The City intends to submit a response to the motion by January 10, 2022.

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

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. 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 of several deficiencies, including but not limited to those outlined in the preceding paragraph, under the Development Agreement and permitted 16th Crossing 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 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 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 and pursue any action necessary to recoup the funds relating to the Development Agreement. The City sent a letter to 16th Crossing on December 8, 2017 advising 16th Crossing the City was placing 16th Crossing in default and terminating the Development Agreement for cause effective December 8, 2017.

The City served a summons and complaint on 16th Crossing on May 7, 2018. On May 29, 2018, the City received 16th Crossing's answer and counterclaims. On June 19, 2018, the City filed and served its answer to 16th Crossing's counterclaims.

On July 23, 2021, the City filed a motion for summary judgment; On July 26, 2021, 16th Crossing filed a partial motion for summary judgment. Both parties filed responses to the motions for summary judgments. Reply briefs for both parties were filed on September 8, 2021. A motion hearing took place on October 1, 2021. The district court took the matter under advisement and will issue an opinion. A bench trial is scheduled for February 15-24, 2022.

December: On December 15, 2021, the City submitted a request for a final pretrial conference.

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 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. Ordinance/Policy Revisions:

- a. **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.
- b. **Administrative Approvals:** This Office is working with the City Manager and Department Directors to review processes for approval of certain matters and determine if ordinance revisions are appropriate.
- c. **Contract Processes:** This Office is working with the City Manager to review current contract processes, policies, and ordinances to determine whether modifications are appropriate.

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 Handset".