



CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

OFFICE OF THE CITY ATTORNEY

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MEMORANDUM

TO: Mayor and City Council

FROM: Joel P. Landeen, City Attorney

DATE: 12-12-12

RE: Update on Major Active Litigation

There are currently eight active lawsuits that I would characterize as major pending litigation. Of this litigation, the City is the Plaintiff in one of the cases. It is unique for the City to be a Plaintiff in a major case. Unlike most litigation the City is involved in, this case is not covered by insurance and the City is responsible for paying the attorney's fees directly. In the cases that are being defended by the City's insurer, who pays the defense costs depends on the coverage under which the claim is paid. Under all of our coverage except general liability and auto, the legal bills are paid by the insurance company, but are charged to the City's deductible. Under the general liability and auto coverage the insurer pays the defense costs and the City only pays if there is a judgment or settlement. In most of the cases, the City's deductible is \$75,000, but in a few instances the deductible is a \$100,000. A second case is based on a breach of contract claim where we are a defendant, but also have a counter claim. We are not covered by insurance on that claim and are handling it internally. To facilitate awareness of these matters, the Mayor has requested that I provide the City Council and the Community with an update on the status of these legal actions.

OLD CASES:

Lamar Advertising of South Dakota v. City of Rapid City (Lawsuit on the initiated ordinances)

This case arises out of the initiated ordinances regulating off-premises signage which were approved by the City's voters in the summer of 2011. This case was initiated by Lamar in 2011. The case is being handled by Verne Goodsell with the law firm of Goodsell & Quinn. Lamar has alleged several causes of action. The first count alleges that the provisions of the initiated

ordinance which require that sign credits expire after 20 years, the increased minimum distance between billboards, and the ban on digital billboards constitutes a regulatory taking without compensation in violation of the U.S. Constitution. The second count asserts a cause of action under Title 42 of the United States Code Section 1983 alleging that the City has deprived them of their constitutional rights. The third count requests a declaratory judgment that the initiated ordinances constitute a regulatory taking. The fourth count requests a declaratory judgment that the expiration of the sign credits which have been previously issued after 20 years constitutes the removal of outdoor advertising through an amortization schedule in violation of SDCL 31-29-75. The fifth count requests a declaratory judgment that the initiated ordinances have violated the provision of the Federal Highway Beautification Act which requires that the owners of outdoor advertising be paid just compensation for the removal of signs. The sixth count alleges that the initiated ordinances constitute a violation of Lamar's right to equal protection of the laws under the U.S. Constitution. The seventh count alleges that the initiated ordinances violate Lamar's constitutional right to freedom of speech under the U.S. Constitution. The eighth count alleges a second cause of action under Section 1983, based on Lamar's claim that its free speech rights have been violated. The ninth count alleges that the initiated ordinances violate Lamar's equal protection rights under the South Dakota Constitution. The tenth count alleges that Lamar's rights to freedom of speech under the South Dakota Constitution have been violated. The eleventh count alleges that the regulations contained in the initiated ordinances constitute a ban on outdoor advertising in violation of SDCL 31-29-69. Lamar is seeking to have the City prevented from enforcing the regulations contained in the initiated ordinances, compensation for the property it has alleged was taken, damages for the alleged violations of its constitutional rights and attorney's fees. The case is currently in the discovery phase. Production of documents is nearly complete. The next step is identifying expert witnesses. There is a hearing scheduled on pretrial motions in early August. There is no trial date at this time.

SINCE THE LAST UPDATE:

Expert witnesses have been retained. The City has retained an expert with a background in city planning who has experience in billboard litigation to testify about the impact of the initiated ordinances on the sign industry. The City has also retained an expert to testify on the economic issues. The parties have both filed cross motions for summary judgment. A motion for summary judgment asserts that there are no issues of material fact and that the case can be decided on the pleadings. Briefing on the motions for summary judgment were completed in early October and we are waiting for the Court to rule on the motions. The attorney fees are being paid by the City's insurer at this time under a reservation of rights. The City's deductible is \$75,000.

City of Rapid City v. Doyle Estes and Big Sky LLC:

This case involves the condition of the public improvements which were constructed by various corporations owned, or managed, by Doyle Estes in conjunction with the approval of the plats for Big Sky Subdivision. The streets in Big Sky have major settlement issues which need to be resolved. The City initiated this lawsuit in 2008. The Case is being handled by John Nooney with the law firm of Nooney, Solay & Van Norman. The developer claimed that its obligation to build the infrastructure to the City's standards was relieved by the City with a surety which secured

completion of the public improvements. The Circuit Court ruled in favor of the developer. The City appealed to the South Dakota Supreme Court. The South Dakota Supreme Court reversed the Circuit Court's ruling and remanded the case back for further proceedings. Since being remanded, additional parties have been added by Big Sky. One of the new defendants, Rapid Construction, filed a Motion to Dismiss or in the alternative for Summary Judgment.

SINCE THE LAST UPDATE:

The Court ruled against Rapid Construction on its Motion to Dismiss and they remain in the case. Discovery is continuing. John Nooney has been in the process of obtaining an expert for trial. Once the expert is retained, additional testing of the streets will be performed. Once discovery is nearing completion the next step will be to obtain a scheduling order setting deadlines for motions and ultimately a trial date. The amount the City has expended prosecuting this case through early November is \$68,792.23. The majority of this cost was to pay for the successful appeal to the South Dakota Supreme Court. The funding source is the City's general funds/unencumbered cash.

City of Rapid City v. Highmark Inc and Northwest Pipe:

This case is based on a water transmission main which was installed between the new Jackson Springs Water Treatment Plant and Canyon Lake Park. Highmark was the general contractor who was awarded the bid to install the pipe. Northwest Pipe, a corporation from Oregon, manufactured the pipe to be installed. The pipe was manufactured with a liner to prevent it from corroding in order to ensure that it lasted for many years. The specifications for the pipe had a minimum adhesion requirement for the lining. The pipes initially passed the adhesion test performed at the factory, but a significant number failed follow up tests which were conducted when the pipe reached the work site. The failure to meet the adhesion requirements significantly delayed the project. Furthermore, the contractor had already installed pipe which fails to meet minimum specifications and must be addressed. The City has retained enough in liquidated damages to cover the additional out of pocket costs incurred by the failure of the pipe and to install an active protection system which will ensure that the pipe which was installed meets its intended design life. Earlier this year, Highmark filed a lawsuit against the City in state court seeking recovery of the amounts owed under its contract. Highmark had previously filed a lawsuit against Northwest Pipe in Federal Court. The City has filed its answer, a counter-claim against Highmark, and third party complaint against Northwest Pipe.

SINCE THE LAST UPDATE:

The pleadings have been filed and we are beginning the discovery process. A scheduling hearing was held on November 15th to set deadlines for this case. The deadlines were tentatively set to match the dates in the federal case, but no scheduling order has been signed by the Court yet. At the scheduling hearing we requested that we be provided the documents the parties had already produced in the federal case, so we could catch up with the other parties. It is my understanding that thousands of documents have been produced by the parties in the federal case. The documents were supposed to be produced by last week, but were not. We sent a follow up letter

requesting they be provided and just received them today. Highmark and Northwest Pipe are attempting to schedule depositions in the federal case for early January. I initially hoped that we could participate in these depositions, but since the discovery was just produced and involves thousands of documents, I see no way I will be able to be prepared for depositions by early January. The City has also formally notified the company which issued the performance bond on this project of the alleged default and we are considering the next step in relation to the performance bond. This case is being handled internally so no additional attorney fees have been incurred at this time. Any expenses which are incurred will be paid out of the Water Enterprise Fund.

Rupert v. Rapid City:

This case was brought by the Ruperts in 2009 alleging that the magnesium chloride solution the City used to deice the streets during snow events killed approximately 40 trees on their property. The case is being handled by Tim Becker with the law firm of Banks, Johnson, Kappelman & Becker. The Rupert's claims were tried to a jury in October of 2011. The jury awarded the Ruperts damages of \$126,530. The City has appealed this case to the South Dakota Supreme Court. Some of the issues on appeal are: whether the trial court properly granted partial summary judgment in favor of the Ruperts on their claim of inverse condemnation, whether the trial court improperly prevented the jury from hearing the City's evidence of the before and after value of the Rupert's property, whether the trial court erred in excluding evidence of the fair market value of the Rupert's property, whether the trial court erred in allowing the testimony of the Rupert's expert witness and whether the jury instructions on the damages issues were in error. The trial transcripts were recently provided to the trial counsel and briefing has begun. It will take approximately three months to brief. After that it is up to the Supreme Court. It will take a minimum of several months for an opinion to be issued. It may take longer if oral arguments are scheduled. If the Supreme Court finds in the City's favor on any of the issues, the case will likely be sent back to the Circuit Court for additional proceedings.

SINCE THE LAST UPDATE:

The South Dakota Supreme Court granted oral arguments which were held on November 6th. We are awaiting the decision of the Supreme Court which may take several months. The City's deductible is \$100,000. The deductible has been reached through payment of attorney's fees. All current attorney's fees and the judgment, if upheld, are the responsibility of the insurer. The funding source is the City's Liability Fund.

NEW CASES:

Soltesz v. Rushmore Plaza Civic Center:

This is not actually a new case, but was not included on the previous litigation update. Since this case is against the Civic Center it is being managed by the Civic Center Board, but in the event it gets media coverage I wanted you to be aware of it. Mr. Soltesz was a pizza vendor at the Civic Center. He got in an altercation with one of his employees during the Stock Show which was

captured on video. After the incident the Civic Center terminated its relationship with him. He sued for breach of contract and damages. The Civic Center filed a counter-claim to recover monies Mr. Soltesz owes under the parties agreement. The claims against the Civic Center are being covered by insurance and the counter claim is being funded by the Civic Center. John Nooney was retained by the insurer to represent the Civic Center and is also handling the Civic Center's counter claim. Discovery in the case is nearly complete and the witnesses have been deposed. The primary discovery issue remaining is that John Nooney is attempting to obtain Mr. Soltesz's sales tax records from the Dept. of Revenue. Mr. Soltesz is attempting to block his attempt to have access to this information. A hearing has been scheduled to resolve this request. Once discovery is complete, a trial date will be set. Of note is the fact Mr. Soltesz is currently incarcerated awaiting sentencing after pleading guilty to felony drug charges. In light of his present situation, the Civic Center has offered to drop its counter claim in exchange for Mr. Soltesz dismissing his claims, but so far he has refused to do so. The Civic Center has not yet expended any funds prosecuting the counter claim.

LeBrae Beautiful Bald Eagle v. Rapid City:

This case arises out of an automobile accident between the Plaintiff and a Rapid Transit bus in 2009. The allegation in the complaint is that the transit driver was negligent and failed to yield the right of way causing the accident. Ms. Bald Eagle filed suit at the end of November 2011. The case is being defended by the City's insurer and John Nooney has been retained to defend the case. The City has denied the complaint asserted various defenses and has filed a counter claim. Discovery is ongoing. The City had to file a motion to compel this spring in order to get discovery responses from the Plaintiff. At this point, depositions have been completed and the parties are awaiting the transcripts.

Epic Outdoor Advertising v. Rapid City:

This case also arises out of the initiated ordinances regulating off-premises signage which were approved by the City's voters in the summer of 2011. The claims filed by Epic are virtually identical to those filed by Lamar Advertising in the federal case identified above. Epic did go farther than Lamar and allege that the City exceeded its authority when it created sign credits as part of the Sign Code adopted in 2002. The claim is being defended by the City's insurer under a reservation of rights. The insurer has retained John Nooney to represent the City. The next step will be for the City to file an answer to the complaint. Since the case is being defended by the insurer, the City has not directly paid any fees to defend this case.

Meidinger v. Rapid City et.al:

This case arises out of the fraud which occurred at the City landfill. The Plaintiff Randy Meidinger was a scale house attendant at the landfill during the time that the fraud by Fish Garbage Service occurred and was implicated in the scheme. This resulted in the Pennington County State's Attorney filing criminal charges against him and the City including him in the civil law suit filed against Fish Garbage Service. He was acquitted of the criminal charges after a jury trial and the City dismissed its claims against him in the civil case after reaching a settlement

with Fish Garbage Service. Mr. Meidinger then filed this suit against the City, Mayor Sam Kooiker, Chief Steve Allender, Lt. Pete Ragnone, former Landfill Superintendent Jerry Wright and former Scale House supervisor John Leahy. In the first count of his complaint Mr. Meidinger alleges a claim under Section 1983 of the U.S. Code claiming that his due process rights were violated based on claims for reckless investigation, failure to disclose exculpatory evidence and fabrication of evidence. The second count alleges a cause of action under Section 1983 for unconstitutional customs, policies and/or practices. The third count alleges a Section 1983 claim for supervisory responsibility against Chief Allender. Mr. Meidinger is seeking unspecified damages to be determined at trial. The City's insurer is defending the case and has retained John Nooney to represent all of the defendant's except Jerry Wright. Jerry Johnson has been retained to represent Jerry Wright. The City initially filed a procedural motion requesting that the Plaintiff be required to strike portions of the complaint and provide a more concise statement of the issues, but the Court denied the motion. The City has since answered the complaint and denied the allegations Mr. Meidinger has made in the complaint. Mr. Meidinger's attorneys have also voluntarily dismissed the claims against the individual defendants in their "official capacities" on the grounds that these claims were redundant with the claims already made against the City. Legally, a claim against a City official/employee in their official capacity is the same as a claim against the City. The result is that all of the named individuals are now sued solely in their individual capacities. Discovery has commenced and John Nooney has begun the process of getting depositions scheduled. The City has incurred no legal fees at this time.

CASES RESOLVED SINCE LAST UPDATE:

Rapid City v. Fish Garbage Service Inc.:

This case was settled by the City at the end of August this year. After the filing of a motion which disclosed that the City had clear evidence in its possession that Fish Garbage had misdeclared loads it dumped at the landfill and then charged its clients for dumping fees which it had not paid, the City was approached about the possibility of a settlement. After reviewing the financials of George and Clifford Fish, the City agreed to accept an immediate cash payment of \$55,000 and the assignment of the remaining payments owed to the Fishes by Red River Sanitation in the amount of \$320,000. The City has received the \$55,000 payment from the Fishes and is awaiting the first payment from Red River which is due this month. The City expended \$363,482.51 prosecuting this case. Of this amount \$328,474.01 was paid to Nooney, Solay & Van Norman and \$35,008.45 was paid to Banks, Johnson, Kappelman & Becker. The payments to Banks, Johnson Kappelman & Becker were for the defense of the individual employees who were specifically named in the suit. The fees were paid out of the Landfill Enterprise Fund and the monies we recover will be placed back in that fund.

Lamar of South Dakota v. Rapid City (Lamar's appeal of its denial to convert 6 static billboard faces to digital faces):

The South Dakota Supreme Court reversed the decision of the Circuit Court and ruled that the City improperly denied the issuance of permits to convert six existing static billboards to

electronic billboards. Based on the Court's ruling, the City is required to issue the permits to Lamar. This case was handled internally so no additional attorney's fees have been incurred.

Ifrits Hookah Lounge v. Glenn Brenner and Steve Allender:

This is a declaratory judgment action filed by Ifrits seeking to have the Court declare that Hookah is not regulated under the State's smoking ban. The State's ban prohibits smoking in all public places except tobacco shops. Tobacco shops are prohibited from being licensed alcohol establishments. Glenn Brenner, as the Pennington County State's Attorney, notified Ifrits that they would not be allowed to continue both the smoking of hookah and the serving of alcoholic beverages. They were required to choose one or the other. Based on the determination of the State's Attorney, Police Chief Steve Allender informed the owners that the police department would begin enforcing the smoking ban. In response Ifrits filed this suit. Ifrits also sought an injunction which would have prohibited enforcement of the law until the Court rules on its declaratory judgment request. The Court denied Ifrits injunction request. We are in the process of discovery. The parties have disclosed expert witnesses. The deadline to complete discovery is February 15th and the deadline to file motions is March 15th. A pre-trial conference is set for March 25th. A trial date will be set at the pre-trial conference.



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NEW CASES:

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Meidinger v. Rapid City et.al:

This case arises out of the fraud which occurred at the City landfill. The Plaintiff Randy Meidinger was a scale house attendant at the landfill during the time that the fraud by Fish Garbage Service occurred and was implicated in the scheme. This resulted in the Pennington County State's Attorney filing criminal charges against him and the City including him in the civil law suit filed against Fish Garbage Service. He was acquitted of the criminal charges after a jury trial and the City dismissed its claims against him in the civil case after reaching a settlement with Fish Garbage Service. Mr. Meidinger then filed this suit against the City, Mayor Sam Kooiker, Chief Steve Allender, Lt. Pete Ragnone, former Landfill Superintendent Jerry Wright and former Scale House supervisor John Leahy. In the first count of his complaint Mr. Meidinger alleges a claim under Section 1983 of the U.S. Code claiming that his due process

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Rapid City v. Fish Garbage Service Inc.:

This case was settled by the City at the end of August this year. After the filing of a motion which disclosed that the City had clear evidence in its possession that Fish Garbage had misdeclared loads it dumped at the landfill and then charged its clients for dumping fees which it had not paid, the City was approached about the possibility of a settlement. After reviewing the financials of George and Clifford Fish, the City agreed to accept an immediate cash payment of \$55,000 and the assignment of the remaining payments owed to the Fishes by Red River Sanitation in the amount of \$320,000. The City has received the \$55,000 payment from the Fishes and is awaiting the first payment from Red River which is due this month. The City expended \$363,482.51 prosecuting this case. Of this amount \$328,474.01 was paid to Nooney, Solay & Van Norman and \$35,008.45 was paid to Banks, Johnson, Kappelman & Becker. The payments to Banks, Johnson Kappelman & Becker were for the defense of the individual employees who were specifically named in the suit. The fees were paid out of the Landfill Enterprise Fund and the monies we recover will be placed back in that fund.

***Lamar of South Dakota v. Rapid City* (Lamar's appeal of its denial to convert 6 static billboard faces to digital faces):**

The South Dakota Supreme Court reversed the decision of the Circuit Court and ruled that the City improperly denied the issuance of permits to convert six existing static billboards to electronic billboards. Based on the Court's ruling, the City is required to issue the permits to Lamar. This case was handled internally so no additional attorney's fees have been incurred.