



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## OFFICE OF THE CITY ATTORNEY

300 Sixth Street

Joel P. Landeen, City Attorney  
City web: [www.rcgov.org](http://www.rcgov.org)

Phone: 605-394-4140  
Fax: 605-394-6633  
e-mail: [joel.landeen@rcgov.org](mailto:joel.landeen@rcgov.org)

### MEMORANDUM

TO: Mayor and City Council

FROM: Joel P. Landeen, City Attorney

DATE: 8-20-13

RE: Update on Major Active Litigation

This memo contains a list of the major litigation that the City is currently involved in. Of this litigation, the City is the Plaintiff in two 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, these cases are not covered by insurance and the City is responsible for paying the attorney's fees directly. One of the cases is being handled internally by the City Attorney's Office so no attorney fees are being incurred. In the cases that are being defended by the City's insurer the payment of 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.

In addition to the active litigation, the City is also involved in four contested hearings in front of the Department of Labor. One involves an employee termination dispute and three are workers compensation claims. The City is defending two of these matters internally. Two of the worker's compensation claims has been assigned to outside counsel by the City's worker's compensation insurer. Since these matters involve personnel and medical claims, I will not be providing any additional summaries of these matters in this update.

## **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. 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 2012 and we are waiting for the Court to rule on the motions.

## **SINCE THE LAST UPDATE:**

I spoke with an attorney at Verne Goodsell's office this week and they are still waiting for a decision on the motion for summary judgment. Any decision will almost certainly be based on a

lengthy legal opinion and it is likely the judge in the case is still drafting the opinion. For cases in the federal court system these time frames are not out of the ordinary. 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. 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.

SINCE THE LAST UPDATE:

Hani Shafai, the developer's engineer has been added as a party to the lawsuit by one of the other parties. He is in the process of filing an answer. While the parties to the lawsuit are finalized, discovery will continue. Over the next year the parties will begin to conduct depositions of the witnesses. There will be many witnesses that will need to be deposed. I would estimate that this case may require 20-30 depositions. Based on the number of depositions required, it is likely discovery will not be completed until the end of next year. The City has retained an engineer as an expert for trial. City legal and engineering staff met with John Nooney and the expert this week to discuss the problems with the streets and to discuss the formulation of a plan to move forward with mitigating the damage to the subdivision infrastructure. After we have formulated a plan, we will bring it forward for Council consideration. This will likely occur within the next few months. Once discovery is completed the next step will be to obtain a scheduling order setting deadlines for motions and ultimately a trial date. It is likely that a trial on this case will not occur prior to the middle of 2015. The amount the City has expended prosecuting this case through the beginning of this month is \$86,636.00. The majority of the legal fees up to this point were expended 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. The pleadings have been filed and we are beginning the discovery process. A scheduling hearing was held on November 15<sup>th</sup> 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. 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.

#### SINCE THE LAST UPDATE:

Carla Cushman and I travelled to Boise earlier this summer to participate in the deposition of Bill Spickelmire who was retained as the corrosion expert on this project. Since the deposition, Northwest Pipe has sued Mr. Spickelmire's company Rustnot, Ferber Engineering and DOWL HKM. The other firms being sued were the City's engineers and consultants on this project. The parties have agreed to mediation in early October to try and resolve this dispute. This case is being handled internally so no attorney fees have been incurred at this time. Any expenses which are incurred will be paid out of the Water Enterprise Fund.

#### *Soltesz v. Rushmore Plaza Civic Center:*

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. On January 17, 2012, the Court granted the Civic Center's motion to compel the production of the Plaintiff's sales tax records. Of note is the fact Mr. Soltesz is currently incarcerated.

SINCE THE LAST UPDATE:

In March of this year Mr. Soltesz was sentenced to 27 months in federal prison for conspiracy to distribute a controlled substance. In light of his situation, the Civic Center offered to drop its counter claim in exchange for Mr. Soltesz dismissing his claims, but he refused to do so. John Nooney has challenged the testimony of Mr. Soltesz's expert on his economic damages. We are still awaiting the judge's ruling on that issue. This week Mr. Nooney's office also filed a motion with the court to set a date for trial. The Civic Center has not incurred any fees on the counter claim at this point.

*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.

SINCE THE LAST UPDATE:

The parties have been taking depositions of the witnesses. There are still two fact witnesses that Mr. Nooney would like to depose. Upon completing the depositions of the fact witnesses, there will likely be depositions of the medical witnesses and if necessary, the City may need to obtain its own medical expert. Upon completion of discovery, a hearing will be set to get a scheduling order and set a trial date.

*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 City has filed its answer and the case is in the discovery phase. The ruling on the motion for summary judgment in the *Lamar* lawsuit will also influence how this lawsuit proceeds. Once the decision in *Lamar* is handed down we will be in a better position to decide how to proceed. 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.

SINCE THE LAST UPDATE:

The parties have deposed Randy Meidinger, Lt. Pete Ragnone of the RCPD and Mayor Kooiker. The plaintiff agreed to voluntarily dismiss Jerry Wright from the lawsuit this week. The next step will most likely be for the City to file a motion for summary judgment. A motion for summary judgment asserts that there are no genuine issues on the material facts and that the defendant is entitled to a judgment in their favor as a matter of law.

*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.

#### SINCE THE LAST UPDATE:

Discovery is completed. A trial on Ifrit's request for a declaratory judgment is scheduled for October 16<sup>th</sup> and 17<sup>th</sup>. Since this case is being defended by the City Attorney's Office no legal fees have been incurred.

#### ***NEW CASES SINCE THE LAST UPDATE:***

##### *Dlorah Inc. v. Zoning Board of Adjustment of the City of Rapid City:*

This case arises out of the City denying Dlorah's request for a building permit for a commercial building on property that is zoned Medium Density Residential. Dlorah is the owner of a parcel on the corner of Fairway Hills Drive and Sheridan Lake Road. In 1976 the City approved the Fairway Hills Planned Residential Development (PRD). Under the rules at the time the PRD was allowed to have certain commercial uses even though the underlying parcel was zoned residential. The commercial uses were limited to those that were permitted in the City's Neighborhood Commercial Zoning District at that time. Over the years since its approval, the City has approved a number of amendments to the original PRD and the development as it exists today is significantly different from what was proposed in 1976. In 2010 Dlorah requested to rezone the property in question from residential to general commercial. The City Council denied its request. Dlorah then asserted that it had an absolute right to build a commercial building on the parcel based on the original PRD. Staff went back and reviewed the original ordinance under which the PRD was approved and discovered that if the PRD was not completed within three years of approval, the PRD was expired unless it was specifically extended by approval of the City. Staff gave Dlorah the benefit of the doubt and treated any amendments to the PRD as the equivalent to "extensions" for purposes of the ordinance, but found gaps of more than three years between amendments. Staff determined that based on the gaps of more than three years the PRD had expired by operation of law and a building permit could not be issued. Dlorah appealed this decision to the City's Zoning Board of Adjustment's (ZBoA) which upheld the staff's determination and denied Dlorah's appeal. Pursuant to SDCL 11-4-25, Dlorah has appealed the decision of the zoning board to State Circuit Court requesting that the court compel the City to issue the building permit. Even if Dlorah convinces the court that the PRD has not expired it is the City's position that a major amendment to the PRD would need to be approved before any permit could be issued. The parties are currently in the discovery phase. Upon completion of discovery, the parties will set a trial date. Since the case is being defended by the City Attorney's Office no legal fees have been incurred.

*Gary Taylor Kruitbosch v. Steve Allender, et.al., John and Jane Does A-Z; 1 thru 9, Rapid City Police Dept.:*

Mr. Kruitbosch is a registered sex offender. He has sued Chief Allender, the Rapid City Police Dept. and various unknown officers asserting that the sex offender location verification program and the sex offender registry generally violate his constitutional rights. He is representing himself. He is requesting that all DNA, fingerprints, photographs etc. in the possession of the South Dakota Division of Criminal Investigation be “wiped clean,” that the Court enter an order that he does not have to register as a sex offender. He is further requesting \$6.5 million in cash (tax free) be deposited in his bank account and that he be issued a South Dakota driver’s license until his 85<sup>th</sup> birthday July 26, 2039, no matter what state he moves to. The City has filed a motion to dismiss his complaint based on several procedural issues including the fact that the State of South Dakota would be a necessary party to any suit challenging the legality of the State’s sex offender registry laws. We are in the process of scheduling a hearing in front of the judge on our motion to dismiss. Since this matter is being handled by the City Attorney’s Office no attorney’s fees have been incurred.

*Johnstone v. City of Rapid City and U.S. Bank and G.J. Holsworth and Son Inc.:*

This is not a new case, but has not been included in previous updates. The case arises out of a fall that occurred outside of the main U.S. Bank branch in downtown Rapid City. Mr. Johnstone slipped on ice outside the bank and died as a result of his injuries. His estate has sued the City, U.S. Bank and the contractor who built a ramp from the right of way up to the entrance of the building. The City’s insurer retained Jerry Johnson of Banks, Johnson, Kappelman & Becker to defend the City. The City believes the fall occurred on the bank property and the City has no liability. The parties have scheduled a mediation to try and resolve the case for the beginning of September.

#### ***CASES RESOLVED SINCE LAST UPDATE:***

*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 handles 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 ruled in the City's favor on several key issues and remanded the case for trial. After the Supreme Court decision, the parties agreed to mediation. The mediation was successful and without the threat of being awarded triple damages for the destruction of the trees the City and Ruperts were able to agree to settle for a \$50,000 payment to compensate them for the loss of trees and cleanup of the property. The City likely would have expended in excess of this amount on legal fees alone if this case was taken to trial a second time and appealed to the Supreme Court. Since Wildwood Drive was in need of work, the City also agreed to do a project on Wildwood Drive which would incorporate design elements that will resolve the problems of runoff from up the hill pooling on the Rupert's property and killing more trees in the future. In exchange for the City incorporating the design elements to minimize runoff onto their property, the Ruperts agreed to sign a document releasing the City from future claims for the death of trees on their property. 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 agreed upon payment are the responsibility of the insurer. The funding source is the City's Liability Fund.