

## CITY OF LINCOLN'S APPEAL STATEMENT

The Commissioners of the City of Lincoln have voted to proceed with the appeal of certain issues in the lawsuit entitled Plaintiff Lincoln Land Development, LLP vs. Defendant City of Lincoln (“the LLD lawsuit”). We believe an appeal of the lawsuit is necessary and in the interests of the City of Lincoln for a variety of reasons.

The LLD lawsuit was extremely contentious. City believed all along and continues to believe that it was in the right and had valid legal defenses to LLD’s claims under North Dakota law. LLD made extremely unreasonable damages demands, despite the fact LLD’s claims were lacking in evidence and merit. The following discussion illustrates these points:

- LLD sued the City of Lincoln (“City”) on January 31, 2014 and asserted the following claims:
  - Count I: Inverse Condemnation – Lagoon Road;
  - Count II: Trespass; and
  - Count III: Nuisance.
- LLD then agreed to dismiss Counts II and III of the Complaint as they were legally defective claims (docket 24).
- On March 3, 2016 LLD demanded \$1.1 million in total damages for it’s lawsuit claim related to Lagoon Road. (docket 239).
- Later on March 30, 2016 LLD served an Amended Complaint (docket 72) on the City of Lincoln, adding several new inverse condemnation claims to the Lagoon Road claim, including the following:
  - (1) inverse condemnation due to increased surface water drainage,
  - (2) inverse condemnation due to formation of wetlands,
  - (3) inverse condemnation due to the City using LLD’s property as a storm-water detention pond, and
  - (4) inverse condemnation due to inability to develop because of City’s prior development decisions.
- The City and its attorneys did not view any of the LLD’s claims to be valid or meritorious, and believed North Dakota law was favorable as to the City’s actions in originally building and later improving Lagoon Road.

- The parties therefore proceeded to a bench trial in September of 2017 with LLD moving forward on all five (5) of its inverse condemnation claims and insisting it had been damaged on all claims. At trial, LLD lost all but one of the five (5) inverse condemnation claims due to a lack of any supporting evidence for those claims. (docket 429 – *see e.g.*, paragraphs 22 & 89).
- However, the Court determined at the bench trial that the City had proven it held a public easement through prescriptive use (a/k/a “prescriptive easement”) in Lagoon Road (docket 429 – paragraphs 73 & 91) *and* that LLD had proven that the prescriptive easement was a taking that mandated compensation (docket 429 – paragraph 99).
- City believes the Court’s ruling there was both a prescriptive easement and that the prescriptive easement is a taking are incorrect and erroneous under North Dakota law. City agrees with the Court that it had a prescriptive easement but disagrees a prescriptive easement is a taking.
- Despite what City believed to be an erroneous legal ruling by the Court after the bench trial, anticipating a later appeal of the Court’s ruling, and considering the time, effort and expense of such an appeal, the City decided to make a generous offer of settlement to LLD. LLD rejected the offer.
- The parties were then required to present the case to a jury trial in December of 2017 on the damages, if any, arising out of the single Lagoon Road inverse condemnation claim.
- After hearing the evidence, the jury found the LLD had been damaged by City’s improvement of Lagoon Road in the total amount of \$8,294 plus interest at the rate of 1.33 % per annum. (Jury Verdict – docket 650).
- Despite the jury deciding the City’s total liability was less than \$10,000 and despite the fact the City successfully defended and defeated all but one of LLD’s claims, the Court determined LLD was “the prevailing party” and ordered the City of Lincoln to pay costs and statutory disbursements to the LLD in the amount of \$18,106.95, attorneys’ fees in the amount of \$122,705.50, along with the jury’s verdict, all totaling \$150,504.19. (docket 696).

- City believes the Court’s determination that LLD was the “prevailing party” was erroneous under North Dakota law.

The foregoing points and timeline illustrate the necessity of taking an appeal from what the City views as erroneous determinations made by the Court in the LLD lawsuit.

Another consideration for the City’s decision to appeal the lawsuit is a companion lawsuit entitled Plaintiffs Great Western, LLC and Mike Heinsohn vs. Defendant City of Lincoln, Civil No. 08-2015-CV-00347 (“the Great Western lawsuit”). The inverse condemnation claims and issues involved in the Great Western lawsuit are nearly identical to the LLD lawsuit. Moreover, the legal rulings made by the Court in the Great Western lawsuit following the bench trial conducted in August of 2017 are essentially the same as those made in the LLD lawsuit. The Great Western Court ruled similarly, and the City believes erroneously, that the City’s prescriptive easement is an unconstitutional taking that mandates compensation. (docket 284 – paragraphs 33, 41, 42, 69, & 76). The City believes that ruling by the Great Western Court cannot stand under the North Dakota statute providing for a prescriptive easement and under binding North Dakota Supreme Court legal precedent. There were also other rulings by the Court in the Great Western case that the City believes were incorrect.