

Special City Council Meeting  
Monday, October 26, 2020 at 3:00 PM  
City Council Chambers, City Hall

This meeting will be conducted with social distancing modifications consistent with the recommendations of the CDC. Members of the public may attend but are encouraged to view the live airing of the City Council meeting on Channel 19 or streamed through the City's YouTube channel.

1. ROLL CALL
2. PLEDGE OF ALLEGIANCE
3. CITY MANAGER SETTLEMENT AGREEMENT AND MUTUAL RELEASE

Documents:

[SETTLEMENT AGREEMENT AND MUTUAL RELEASE \(SIGNED 10-23-20\).PDF](#)

4. ADJOURNMENT

## SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS

THIS SETTLEMENT AGREEMENT AND MUTUAL RELEASE OF CLAIMS (“Release” or “Agreement”) is entered into by Thomas H. Barry (“Barry”) and the City of Minot, North Dakota (“City”). Barry and City are collectively referred to as the “Settling Parties” or the “Parties” and each singularly as a “Settling Party” or “Party”.

### RECITALS

A. WHEREAS, on December 12, 2016, Barry assumed the position of City Manager for City pursuant to a contract entitled “Employment Agreement” dated November 1, 2016. The Employment Agreement was executed by Barry and Mayor of Minot Chuck Barney on behalf of City. Certain provisions of the Employment Agreement were subsequently amended by a document entitled “Amendment 1 to Employment Agreement” dated December 4, 2018, and executed by Barry and Mayor of Minot Shaun Sipma on behalf of City. Certain provisions of the Employment Agreement were further subsequently amended by a document entitled “Amendment 2 to Employment Agreement” dated December 2, 2019, and executed by Barry and Mayor of Minot Shaun Sipma on behalf of City. The Employment Agreement, Amendment 1 to Employment Agreement, and Amendment 2 to Employment Agreement are collectively referred to as the “Contracts”.

B. WHEREAS, on April 20, 2020, the Minot City Council terminated Barry’s employment as City Manager (the “Termination”).

C. WHEREAS, the Settling Parties have each made certain claims against the other.

D. WHEREAS, the Settling Parties desire to avoid the cost, expense and uncertainty of pursuing, prosecuting, and/or defending against the claims and potential claims the Settling Parties have or may in the future arise against one another related to or arising from the Contracts, Barry’s employment as City Manager for City, and/or the Termination. Accordingly, the Settling Parties have agreed to enter into this Agreement in order to fully and forever resolve, release, settle, and compromise the aforescribed claims, and any and all other disputes, injuries, disagreements, claims, causes of action, counts, or damages, known or unknown, that have been raised and/or could have been raised by the Parties in relation to the Contracts, Barry’s employment as City Manager for City, and/or the Termination. Neither of the Parties admit any liability or wrongdoing in entering into this Agreement.

**NOW, THEREFORE, IN CONSIDERATION** of the foregoing and of the covenants and promises set forth herein and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties promise, agree, and covenant as follows:

1. Incorporation of Recitals. The recitals above are hereby incorporated as if fully set forth herein, and are material terms of this Agreement.
2. Binding Effect. The terms of this Agreement, including the recitals above, are considered binding and effective promises, agreements, and covenants, fully

enforceable by the Settling Parties. This Agreement shall inure to the benefit of the Settling Parties and any of their heirs, successors, personal representatives, officers, and assigns of each.

3. **Barry's Release.** In consideration of the payments described herein and the other promises, agreements, and covenants made herein, the receipt and sufficiency of which are acknowledged, Barry hereby releases and forever discharges City and its respective partners, agents, attorneys, employees, representatives, directors, officers, managers, members, participants, affiliated entities, sureties, self-insurance pool, North Dakota Insurance Reserve Fund ("NDIRF"), predecessors, successors, and assigns from and against Barry's claims and any and all claims, damages, injuries, or other causes of action that Barry has asserted or reasonably could have asserted or that arise from, or in any way relate to the Contracts, Barry's employment as City Manager for City, and/or the Termination, and the facts and circumstances surrounding the Contracts, Barry's employment as City Manager for City, and/or the Termination. Barry's Release specifically includes, but is not limited to, all claims, damages, costs, and any legal or equitable relief of any kind, including but not limited to attorneys' fees and costs, arising under any and all federal, state, and local statutory and common laws (whether such claims sound in breach of contract, tort, employment law, constitutional law, and/or equity), claims based upon wrongful termination, due process, breach of contract, defamation, or retaliation, and/or any claims that are known or unknown, whether conceivable or inconceivable, or which in the future may arise related to the Contracts, Barry's employment as City Manager for City, and/or the Termination, including without limitation, any and all claims sounding in breach of contract, tort, including but not limited to damages for lost employment, out of pocket costs, lost earnings, lost earning capacity, profit sharing, retirement plans, benefits, or any claims made or which could have been made. Barry specifically releases and forever discharges City, its individual employees or representatives, and NDIRF for any injuries he sustained or may in the future sustain or that he has claimed were caused or worsened as a result of City's conduct relating to the Contracts, Barry's employment as City Manager for City, and/or the Termination, or the facts and circumstances surrounding the Contracts, Barry's employment as City Manager for City, and/or the Termination, or which in the future may arise or worsen. Barry further agrees that he expressly waives any and all rights under Section 9-13-02, N. D. Cent. Code. That section reads as follows:

9-13-02. Extension to known claims. A general release does not extend to claims which the creditor does not know or suspect to exist in the creditor's favor at the time of executing the release, which if known by the creditor, must have materially affected the creditor's settlement with the debtor.

Barry's Release shall not include claims arising out of a breach of this Agreement, and a claim of breach of this Agreement is not subject to the terms of, or otherwise released in, this Agreement.

4. City's Release. In consideration of Barry's Release contained in paragraph 3, above, City hereby releases and forever discharges Barry of any and all claims that are known or unknown, or which in the future may arise in relation to City's claims arising from the Contracts, Barry's employment as City Manager for City, and/or the Termination, except as provided for in Paragraph 8 of this Agreement.

If the City is contacted by a prospective employer of Barry and/or a prospective employer's agent, City agrees the prospective employer shall be directed to speak only to City's Human Resources Director. If City's Human Resources Director is contacted by a prospective employer of Barry, and/or a prospective employer's agent, he or she shall provide no information or comment about Barry other than to acknowledge standard employment verification information, including but not limited to the dates of Barry's employment at City, his job title, and/or his rate of pay as City Manager. City shall exclude the Monson report and this Settlement Agreement from Barry's personnel file. Barry however acknowledges that the Munson report and the final executed Agreement is a public record, which would need to be produced by the City in response to an open records request.

5. Payment. In consideration of Barry's Release of claims of liability as set forth in paragraph 3 above, and other promises made by Barry in this release, City will make the following payment as settlement proceeds, which Barry agrees to accept:

*Cash Payment:* Barry is to execute this Release and return it to counsel for City before October 24, 2020. In return for the executed Release, the City shall pay to Barry the amount of \$140,510.55 (One Hundred and Forty Thousand, Five Hundred and Ten Dollars and Fifty-Five Cents). Payment to Barry shall be made as a reimbursement on the next available payroll.

*Attorney's Fees:* City agrees to pay Barry's reasonable attorneys' fees up to a maximum of \$5,000.00 (Five Thousand Dollars) in relation to the claims Barry has or could have made against City related to or arising from the Contracts, Barry's employment as City Manager for City, and/or the Termination. Payment to Wilking Law Firm Trust Account in the gross amount of \$5,000 (Five Thousand Dollars) shall be made no later than fifteen (15) days after both parties have provided an executed copy of this agreement to all counsel. Barry shall be liable to pay his own attorneys' fees in excess of \$5,000.00 (Five Thousand Dollars) in relation to the claims Barry has or could have made against City related to or arising from the Contracts, Barry's employment as City Manager for City, and/or the Termination.

6. Liability of the Parties Extinguished. Other than identified in this Agreement, the Parties understand and agree that the purpose, intent, and legal effect of this Agreement is to resolve, release, compromise, settle, and extinguish the entire liability of the Parties arising out of or related to the Contracts, Barry's employment

as City Manager for City, and/or the Termination for claims for breach of contract, violation of due process, defamation, retaliation, fraud, constructive fraud, and fraud in the inducement.

7. Adequate Compensation and Denial of Liability. Barry agrees and acknowledges that he has reviewed the terms of this Release and does accept payment of the above settlement amount pursuant to this Release as a full, complete, final, and binding compromise of matters involving disputed issues regardless of whether too much or too little may have been paid; that payment of the settlement amount by City shall not be considered an admission of any liability or wrongdoing; and that no past or present wrongdoing on the part of City shall be implied by such payment or negotiations.
8. Non-disclosure of Confidential or Closed Information Obtained by Barry

Barry agrees that during the term of his employment as City Manager he received certain confidential records and information as defined by N.D.C.C. § 44-04-17.1(3) and certain closed records and information as defined by N.D.C.C. § 44-04-17.1(1) and (2). Barry agrees that he will keep this information strictly confidential. If Barry is found to have violated this section by a court of competent jurisdiction, the City may seek appropriate remedies commensurate with the proven violation as allowed by law, but such proven violation, if it occurs, will not be deemed a breach of this Agreement and will not allow the City to void the entire Agreement or recapture the payments described in Paragraph 5 above. If the court of competent jurisdiction determines Barry violated this provision, Barry shall pay City's attorneys' fees associated with enforcing this provision. If the court of competent jurisdiction finds no violation by Barry, the City shall pay Barry's attorney fees incurred in defending against the City's legal action.

9. Entire Agreement. This Agreement supersedes all prior and contemporaneous negotiations and agreements between the Settling Parties, oral or written. All prior and contemporaneous negotiations and agreements are incorporated and merged into this Agreement or are abandoned if not so incorporated. No representations, oral or written, are being relied upon by the Settling Parties in executing this Agreement, other than the express representations of this Agreement. This Agreement cannot be changed or terminated without the express written consent of the Settling Parties, executed by all Settling Parties, and that unequivocally indicates the Settling Parties' intention to modify this Agreement.

The Parties agree that if any portion of this Agreement is ever determined to be unenforceable, such determination will not affect the enforceability of any other clause or the remainder of this Agreement. In the event that any portion of this Agreement is ever determined to be unenforceable, the Agreement will be, to the extent possible, interpreted and enforced in a manner that is most consistent with the letter and spirit of all of the terms of this Agreement as executed.

10. Governing Law. This Agreement shall be construed and governed by the laws of the State of North Dakota.
  
11. Agreement and Release Knowing and Voluntary. By his signature below, Barry represents that he has carefully read the Agreement, understands its terms and effect hereof, and has signed this Agreement freely and with consideration of the act. Barry further represents that he knows and fully understands the contents of this Agreement, that he intends to be legally bound by this Agreement and the Release contained herein, and that he is signing this Agreement voluntarily and of his own free will and without coercion.

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