



Item: City Commission to consider settlement of claims with Grant Noonkester, d/b/a Par Golf Construction and execution of GENERAL RELEASES of all claims by each party.

From: Sara R. Sexe, City Attorney and Kevin Meek

Initiated By: Sara R. Sexe, City Attorney and Kevin Meek

Presented By: Sara R. Sexe, City Attorney

Action Requested: Approve GENERAL RELEASES as presented.

Suggested Motion:

1. Commissioner moves:

“I move that the City Commission (approve/reject) the settlement agreement and two General Releases with Grant Noonkester, d/b/a Par Golf Construction, and instruct the City Manager to execute the City of Great Falls’ General Release.”

2. Mayor calls for a second, discussion, public comment, and calls the vote.

Background: In July 2004, after a competitive bidding process, the City and Grant Noonkester d/b/a PAR GOLF entered into a contract for the installation of the irrigation system and incorporation of soil additives for what later became the Seibel Soccer Park.

Thomas, Dean and Hoskins, Inc. (TDH) was designated as the City’s engineering consultant for the project. The City claimed Mr. Noonkester did not reach substantial completion on the project until May 9, 2005, 232 days after September 20, 2004, the contractually required substantial completion date under the construction schedule, including extensions. As such, the City withheld \$109,000 of the total contract payments. Mr. Noonkester claimed that the City, weather conditions, and other contractors on site caused his delay and that he was owed for additional work and other damages totaling over one million dollars.

The dispute continued for around 10 years, during which time the City and Mr. Noonkester participated in three separate mediation conferences, extensive discovery and pretrial motions. Ultimately, through their respective attorneys, the City and Grant Noonkester reached a settlement agreement and have agreed on terms of two corresponding General Releases, where each party, as a part of the settlement, would release all claims, thereby resolving all contract disputes arising out of the irrigation contract with the Seibel Soccer Park, pending City Commission approval.

The City's risk management pool, Montana Municipal Interlocal Authority (MMIA) does not cover contract disputes in their memorandum of coverage.

Fiscal Impact:

The proposed settlement agreement payment is \$150,000. Of the \$150,000, the City retained \$75,658.04 from the original bond issue. The remaining balance of \$74,341.96 will be paid from the city manager's contingency fund. The City already incurred \$54,803.46 in legal fees associated with discovery and depositions. The cost estimate through trial was \$50,000.

Alternatives: Continue to litigate the matter in State District Court in/with a jury trial.

Attachments/Exhibits: 1) General Release of Grant Noonkester, d/b/a Par Golf Construction
2) General Release of City of Great Falls

Cc: Jim Rearden, Public Works Director
Greg Doyon, City Manager
Melissa Kinzler, Fiscal Services Director
Kevin Meek, Counsel for City of Great Falls
Cory Gangle, Counsel for Grant Noonkester

GENERAL RELEASE

RELEASOR: Grant Noonkester, d/b/a Par Golf Construction

RELEASEE: City of Great Falls

DATE OF CASUALTY: July 2004 through May 2005

DESCRIPTION OF CASUALTY: Alleged Breach of Contract, Claimed Contract and Tort Damages, Equitable Claims, and Declaratory Judgment Claim

TERMS OF SETTLEMENT: \$150,000. In addition to the terms set forth herein see also the General Release contemporaneously executed and signed by the City of Great Falls.

CIVIL CAUSE: Cause No. ADV-05-1536 in the Montana Eighth Judicial District Court, Cascade County

1. Release

The undersigned Releasor acknowledges receipt of the above sum of money and in consideration for payment of such sum, fully and forever releases and discharges Releasee, Releasee's heirs, personal representatives, successors, assigns, agents, partners, employees and attorneys from any and all actions, claims, causes of action, demands, or expenses for damages or injuries, whether asserted or unasserted, known or unknown, foreseen or unforeseen, arising out of the described casualty.

2. Future Damages

Inasmuch as the injuries, damages, and losses resulting from the events described herein may not be fully known and may be more numerous or more serious than it is now understood or expected, the Releasor agrees, as a further consideration of this agreement, that this Release applies to any and all injuries, damages and losses resulting from the casualty described herein, even though now unanticipated, unexpected and unknown, as well as any and all injuries, damages and losses which

have already developed and which are now known or anticipated.

3. No Admission of Liability

It is understood that the above-mentioned sum is accepted as the sole consideration for full satisfaction and accord to compromise a disputed claim, and that neither the payment of the sum by Releasee nor the negotiations for settlement shall be considered as an admission of liability.

4. No Additional Claims

Releasor represents that no additional claims are contemplated against any other party potentially liable for the losses, damages, and injuries for which this Release is given. In the event any additional claim is made by Releasor which directly or indirectly results in additional liability exposure to Releasees for the losses, injuries, and damages for which this Release is given, Releasor covenants and agrees to indemnify and save Releasees harmless from all such claims and demands, including reasonable attorneys' fees and all other expenses necessarily incurred.

5. Stipulation for Dismissal With Prejudice

Releasor stipulates and agrees that Releasor's attorney of record shall dismiss with prejudice, as fully settled upon the merits, the above-described civil action. Each party shall pay their respective costs and attorneys' fees.

6. Disclaimer

Releasor has carefully read the foregoing, discussed its legal effect with Releasor's attorney, understands the contents thereof, and signs the same of Releasor's own free will and accord.

7. Representation of Comprehension of Document

In entering into this Settlement Agreement and Release, the Releasor represents that Releasor has relied upon the advice of Releasor's attorneys, who are the attorneys of Releasor's own choice, concerning the legal consequences of this Settlement Agreement and Release; that the terms of this Settlement Agreement and Release have been completely read and explained by Releasor's attorneys; and that the terms of this Settlement Agreement and Release are fully understood and voluntarily accepted by Releasor.

8. Taxation

Neither Releasee nor Releasee's attorney make any representations about the taxability of any portion of the consideration made in exchange for this Release and Settlement. Releasor shall bear the sole responsibility for any and all tax consequences related to this Release and Settlement Agreement, and shall fully indemnify Releasee and Releasee's attorney for any tax liability that arises thereof, including any fees and costs related to enforcement of this clause.

9. Governing Law

This Settlement Agreement and Release shall be construed and interpreted in accordance with the laws of the State of Montana.

10. Severability

Should any provision of this Agreement be determined to be unenforceable, all remaining terms and clauses shall remain in force and shall be fully severable.

11. Additional Documents

All parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to give full force and effect to the basic terms and intent of this Settlement Agreement and Release.

This Release shall be binding upon Releasor's heirs, successors, personal representatives and assigns.

DATED this ____ day of _____, 2015.

CAUTION: READ BEFORE SIGNING!

RELEASOR

STATE OF MONTANA)
 : ss
County of _____)

On this ____ day of _____, 2015, before me, a notary public of the State of Montana, personally appeared _____, known to me to be the person named in the foregoing Release, and acknowledged to me that _____ executed the same as _____ free act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR THE STATE OF MONTANA
Residing at _____
My commission expires _____

APPROVED BY:

Attorney for Releasor

GENERAL RELEASE

RELEASOR: City of Great Falls

RELEASEE: Grant Noonkester, d/b/a Par Golf Construction

DATE OF CASUALTY: July 2004 through May 2005

DESCRIPTION OF CASUALTY: Liquidated damages claim and Declaratory Judgment action, Breach of Contract Claim

TERMS OF SETTLEMENT: \$1.00 and other valuable consideration. In addition to the terms set forth herein see also the General Release contemporaneously executed and signed by Grant Noonkester, d/b/a Par Golf Construction

CIVIL CAUSE: Cause No. ADV-05-1536 in the Montana Eighth Judicial District Court, Cascade County

1. Release

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2. Future Damages

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have already developed and which are now known or anticipated.

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10. Additional Documents

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This Release shall be binding upon Releasor's heirs, successors, personal representatives and assigns.

DATED this ____ day of _____, 2015.

CAUTION: READ BEFORE SIGNING!

RELEASOR

STATE OF MONTANA)
 : ss
County of _____)

On this ____ day of _____, 2015, before me, a notary public of the State of Montana, personally appeared _____, known to me to be the person named in the foregoing Release, and acknowledged to me that _____ executed the same as ____ free act and deed, for the uses and purposes therein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

NOTARY PUBLIC FOR THE STATE OF MONTANA
Residing at _____
My commission expires _____

APPROVED BY:

Attorney for Releasor