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The Mandan City Commission met in regular session at 5:00 p.m. on September 4, 2012 in the Ed “Bosh” Froehlich Room at City Hall, Mandan, North Dakota. Commissioners present were Van Beek, Tibke, Rohr, Frank, and Braun. Department Heads present were Finance Director Welch, Police Chief Bullinger, City Administrator Neubauer, Director of Public Works Wright, Fire Chief Nardello, Business Development and Communications Director Huber, and Engineering Project Manager Bechtel. Absent: City Attorney Brown and City Assessor Barta.

MINUTES: *Consider approval of the minutes for August 21, 2012 regular meeting minutes.* Commissioner Tibke moved to approve the minutes as presented of the August 21, 2012 regular meeting minutes. Commissioner Frank seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

PUBLIC HEARING:

1. *Public Hearing to consider an Ad Valorem tax exemption for Novaspect Holdings, Inc.* In the absence of City Assessor Barta, Business Development and Communications Director Huber presented for consideration a tax exemption for Novaspect Holdings, Inc. Novaspect is proposing to construct a 20,000 sq. ft. building at 2813 37<sup>th</sup> Street Northwest on a portion of Lot 2, Block 2, Mandan Industrial Park First Addition, Mandan, North Dakota. The building will house 3,000 sq. ft. office space and the remainder will be shop/service space. Within five (5) years they anticipate employing 35 fulltime employees. The structural value of the building is estimated at approximately \$1.6 million. The Mandan Growth Fund Committee (MGF) reviewed this project and recommended approval by a unanimous vote to recommend 100% for five years with verification of the minimum number of jobs requirement by the end of year two, sustained through year five. The recommendation also included a contingency upon receipt of lease agreement documentation indicating the benefit will pass to the tenant. There was no input or opposition to this application. Huber stated that the Park and School Districts and Morton County have been notified. Michael Franz, CFO for Novaspect Holdings was present for discussion.

Michael Franz, CFO for Novaspect Holdings came forward to comment. He stated that Novaspect is a privately owned company that has been in business for 76 years, based out of Minneapolis. Commissioner Frank asked what percentage of the business operation is taxable. Franz replied that the amount of sales vs. services in North Dakota is a 60/40 split. The product sold is industrial equipment, control valves, and control systems and the adjunct services come afterwards. The business is basically product driven with services afterwards which will employ more people.

Mark Bitz, Morton County Commissioner came forward and commented that the Morton County Commission has reviewed the application. He stated that it appears it is a very strong company and they pay good benefits and good wages to the employees. In review of the application, in years 3, 4, and 5, this company is very profitable. Also on the application, “warehouse” is checked and he pointed out that “warehouses” are not subject

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to tax exemptions. He stated that the Morton County Commission voted to support a full two year tax exemption for the reasons stated.

Mayor Van Beek once again stated this is a public hearing and invited anyone interested to come forward to speak. Hearing none, this portion of the public hearing was closed.

Commissioner Rohr commented that this is the type of business sector that the City of Mandan looks forward to bringing to the city.

Commissioner Rohr motioned to approve a three year 100% tax exemption and then a 75% and 50% thereafter. Commissioner Braun seconded the motion.

Commissioner Frank commented that the motion by Commissioner Rohr indicates inconsistency when addressing these matters and that deviating from the policy shows that inconsistency. She stated she feels it is important that businesses who are interested in bringing a business to the community are able to rely on consistency when these matters are addressed. She reiterated that it was discussed at the last meeting that the MGF consider minimizing the exemption to a certain extent. She recommended that this project be voted on under the current guidelines and after that, conversations occur regarding moving forward with future requests.

Commissioner Rohr motioned to amend the original motion to approve a two year 100% tax exemption, 75% year three, 50% year four and 25% year five. Commissioner Braun seconded the Amended Motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: No; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

Mayor Van Beek invited discussion on the motion that was just passed. Commissioner Tibke pointed out the importance of a business opportunity and from her perspective it would be appropriate to grant the five year exemption at 100%.

Commissioner Braun asked for clarification from Mr. Franz that the business is not a manufacturer but rather that they buy the pieces and then they put them in? Mr. Franz concurred that is correct, that they do not manufacture the original product; however, the company will remanufacture after it has been in service for a while.

Roll call vote on the original motion: Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: No; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

2. *Public Hearing to consider the vacation of the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE, as platted in Helmsworth-McLean Addition.* Engineering Project Manager Bechtel reviewed with the Commission a request to vacate from Sanela Alagic, the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE. He provided a photo of a map of the area and also indicated that

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the owners started renovations in the area which are to include building a garage to the existing home. They found out they were encroaching on the right-of-way and thus the request for the vacation in order to move forward with the renovation of their home. He stated that the request is not to vacate the entire 80' right-of-way. Bechtel stated that he supports the vacation due to the fact that there will never be a street through that area due to the elevation of the land.

Mayor Van Beek stated this is a public hearing and invited anyone interested to come forward to speak.

Richard Ames came forward and stated that he lives just an angle away across from that property. He said he supports the vacation of the right-of-way as requested by the property owner, indicating that it would be very expensive to construct a street in that area. He also supported the construction the homeowner is planning, stating that it will improve the property.

Tom Bair came forward to speak stating that he is representing DeNae Kautzmann, an adjacent owner of the land of the proposed vacation. He indicated that in North Dakota there is only one way to vacate a street that is set forth by statute and that cities just do not go forward with vacating a street. NDCC Section 40-39-05 addresses Vacating of Streets. It states: "No public street shall be vacated except on a petition signed by all of the owners of the property adjoining the plat to be vacated". He explained that Ms. Kautzmann has never signed the petition. State law prohibits this body from vacating that right-of-way. One other item for consideration is the ownership of land when a street runs across it. Section 47-10-10 addresses that: "Title to highway street alley and public right-of-way." It says that the public has a right-of-way and that adjoining landowners own property to the midpoint of the right-of-way, to the mid-point of the street. Ms. Kautzmann and her husband own the north half of that street and therefore they are adjoining land owners and they have not consented to the petition. If this were granted it would be an illegal vacation of a public right-of-way. Bair requested this Commission pass a motion to deny the request to vacate the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE, as platted in Helmsworth-McLean Addition. He said that Section 40-39-04 states that if there is any type of public utility in that right-of-way it cannot be vacated. He indicated that would also prohibit a vacation of the right-of-way.

Engineering Project Manager Bechtel spoke on behalf of City Attorney Brown who wasn't present at the meeting, stating that this matter was reviewed and Attorney Brown gave his opinion on those sections of the century code addressed by Mr. Bair. Attorney Brown has indicated that the City of Mandan has followed procedure and the procedure has been followed correctly.

Sanela Alagic came forward to speak. She stated she is the landowner requesting the vacation of the right-of-way. She indicated that when they purchased the property there was a garage on the property and they removed it because it was in really bad condition. She remarked that no one said anything about it then. She said that since this matter

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came to this Board a couple months ago, she has had discussions with Bechtel who said that there would never be a street there and no one uses the area for anything because it is inaccessible for use. She said that she talked to all the neighbors and there were no objections and she feels that legally what is being proposed is fine. She requested the Commission consider approval to pass the request to vacate the right-of-way.

Debbie Holter came forward and mentioned that she is one of the adjoining landowners to the subject property. She stated she owns the lots to the east of the property and that the non-vacated street is the only access to that property and there is a water line in that easement. She reviewed her version of access to the lots. She indicated that there are two homes on top of the hill without access to the property. She stated that the problem is an easement over private property. She pointed out that 10<sup>th</sup> Avenue was vacated because it is straight up a hill. She mentioned that when she bought her property the street was there and not vacated. If vacated, it would almost double their property and her street access would be taken away. She requested the Commission not grant the request to vacate the right-of-way.

Mr. Bair returned to the podium and stated that he believes the law is clear on this and that City Attorney Brown is wrong. He read the following statutes verbatim: Section 47-01-16: An owner of land bounded by a road or street is presumed to own to the center of the way but the contrary may be shown. Section 40-39-05: No public grounds, streets, alleys, or parts thereof within a municipality maybe vacated or discontinued by the governing body except on a petition signed by all of the owners of the property adjoining the plat to be vacated. Mr. Bair once again requested the Commission deny the request to vacate the right-of-way.

Debbie Holter returned to the podium and pointed out that Mr. Brown is not present and Mr. Bechtel is not an attorney as he indicated. There are three attorneys present in the audience that agree that the proper law is not being followed.

Commissioner Rohr suggested leaving out the legal part of the matter and looking at the practical side of it for the moment. If it has been said that it is never going to be a street for many many years, that it's not going to be anything; is your only contention of what it might be as opposed to what it is right now, is that what would be an impingement on your property? But that's never going to be a street. Where is your concern? (Addressing the landowners in opposition to the vacation of the right-of-way.)

DeNae Kautzmann came forward and indicated that her concern goes back to approximately 1986 when the Wetzstein's who owned the majority of that property vacated every right-of-way so she is landlocked except for this section of land. To say that a street will never be put there is presumptuous. She would have no access to a city street in the City of Mandan other than by use of a road that she has an easement to use. It is not on her property. The road is in very bad shape. It is not maintained by the Wetzstein's and she will not be putting money into a road that is not on her property. Commissioner Frank asked if Kautzmann is concerned that the easement she is using is a perpetual easement or if she concerned that the easement will go away and then she

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would ultimately have to use the easement requested to be vacated? Kautzmann replied that she cannot project the future but that Mike Wetzstein once told her that the road may not be available. Right now she does not have a problem with that, but if that section of property is vacated then essentially the Commission has made Kautzmann's property an island within the City of Mandan. Commissioner Frank questioned what kind of easement is in place now with the Wetzstein's. Kautzmann replied that she would have to review the deed. Commissioner Frank said that if the property owners have a request in front of this Board to obtain a vacation on 40 feet of the 80 foot easement, could she not put in a request for the second half of the 80 foot? Kautzmann replied that there is no case law that supports taking one-half of a right-of-way. Kautzmann's argument is that she owns up to the center of the right of way so she is an adjoining landowner and as such under the law she has the right to say whether she agrees or does not agree with that vacation. Kautzmann said the south half of the road is the flattest so it does not make sense to vacate that if the road were to logically be placed there.

Commissioner Rohr inquired if Division Street went through to access the top area would a road be put down in the Kautzmann area? Kautzmann stated that back in 1986 the City Commission vacated the whole right of way in that area and so if the Commission wants to put in Division Street they will have to go through a condemnation process, go through eminent domain and she stated she does not know how long the Wetzstein's will stretch that out.

Commissioner Frank inquired: With the vacation of the 40 ft. of the south half of that 80 ft. easement in the scenario that Ms. Kautzmann would have to use that access to her yard there would have to be some heavy demolition of all the trees and shrubbery in that area, but if a roadway were needed would it be an option to have that road slightly to the north? Bechtel stated that the City would have to acquire some additional right of way if it wanted to do a full size city street, in which the streets are 42 ft. but it could accommodate a smaller street if needed. He stated that by looking at the terrain, it would require huge excavations and additional easements into the hill to the north. It would be cost prohibitive (hundreds of thousands of dollars to get 150'). Bechtel stated that the terrain in that area does not dictate conditions for a road to be in there and that is probably why those right-of-ways were vacated. Commissioner Rohr stated that questions such as these can be posed to the League of Cities and that may be an option. Commissioner Tibke stated that she is not comfortable making a decision without the City's legal counsel present and in the absence of written documentation. Commissioner Frank stated that she is confident that Attorney Brown has provided his opinion after review of the matter and indicated that everything has been done correctly. Based on that, Commissioner Frank recommended that this Board approve the vacation of the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE, as platted in Helmsworth-McLean Addition.

Bechtel stated that on behalf of City Attorney Brown and their review of this matter, they also reviewed the same statutes that Attorney Bair cited and that the opinion of Attorney Brown is that the City has done everything correctly.

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Debbie Holter approached the podium again and stated that Bechtel had the driveway that's been in use ever since she can remember and the area that is being requested to be vacated is level with the driveway so there could be a street put through there all the way to her lot because the driveway is already being used half way. So it is not as hilly as other parts of it.

Commissioner Braun extended appreciation to those speaking to this matter and addressing the law; however he stated that the law is open to interpretation. He does not think a decision has to be made tonight and he would like to hear from City Attorney Brown before moving forward with a resolution.

Mayor Van Beek stated this is a public hearing and invited anyone who is interested come forward to speak. Hearing none, this portion of the public hearing was closed.

Commissioner Frank motioned to approve the vacation of the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE, as platted in Helmsworth-McLean Addition. There was no second to the motion. The motion died for lack of a second.

Commissioner Tibke motioned to table this matter until September 18, 2012, the vacation of the south 40' of 4<sup>th</sup> Street NE public right-of-way of the east quadrant of the intersection of 9<sup>th</sup> Avenue NE and 6<sup>th</sup> Avenue NE, as platted in Helmsworth-McLean Addition. Commissioner Braun seconded the motion.

Commissioner Rohr requested clarification that the public hearing has occurred and the matter tabled is limited to clarifying the facts and making a decision, correct? Mayor Van Beek confirmed that was correct.

Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: No; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

BIDS:

1. *Consider bid for new Fire Truck.* Fire Chief Nardello reviewed with the Commission a date-related technicality on the advertising for the new fire truck and subsequently received a legal opinion from City Attorney Brown that all bids received on August 13, 2012 and August 14, 2012, could be considered. Nardello stated that a total of six bids were received and that Front Range was the low bidder on the base bid for a demo unit. However there were exceptions to that bid that did not meet the specifications. Spartan ERV was the base bidder meeting all the specifications in the amount of \$399,471; however, there were some duplication in equipment and items that exceeded the specifications which allowed for a reduction in the bid proposal. In addition, ERV allows for a prepayment discount if 50% of the vehicle is paid for at the time of the contract signing. With these additional cost savings, the cost of the new fire truck has been reduced to \$385,329. There are funds available in the budget to cover the costs outlined. Nardello recommended selling the 1989 truck rather than trading it in. He

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recommended awarding the new fire truck to the low bidder, Spartan ERV in the amount of \$385,329 and also amending the 2012 Fire Reserve Budget to allow for the 50% prepayment for a total of \$193,886 to the 2012 budget.

Commissioner Frank motioned to award the bid for a new fire truck to Spartan ERV in the amount of \$385,329 with a 50% payment due at contract signing and the other 50% due upon vehicle delivery and also to amend the 2012 Fire Reserve Budget to allow for the 50% prepayment for a total of \$193,886 to the 2012 budget. Commissioner Rohr seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

CONSENT AGENDA:

1. *Consider games of chance for the following: (i) Vietnam/Legacy Vets Motorcycle Club of ND at Colonial Lounge from September 15, 2012 through December 14, 2012; and (ii) Mandan Girls Swim and Dive at the Braves Center from September 4, 2012 through November 23, 2012.* The Board approved of the games of chance for the following: (i) Vietnam/Legacy Vets Motorcycle Club of ND at Colonial Lounge from September 15, 2012 through December 14, 2012; and (ii) Mandan Girls Swim and Dive at the Braves Center from September 4, 2012 through November 23, 2012.

2. *Consider for approval the final plat of Skinners 1<sup>st</sup> Addition.* The Board approved of the final plat of Skinners 1<sup>st</sup> Addition.

3. *Consider Permit Tech revision and Bldg. Insp. Position requirement.* The Board approved of the Permit Tech revision and Bldg. Insp. Position requirement.

Commissioner Frank moved to approve the Consent Agenda as presented.

Commissioner Rohr seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

OLD BUSINESS:

NEW BUSINESS:

1. *Introduction of employees to new or vacant positions within the City Staff:*  
*(i) Street Department Equipment Operators:* Jeff Wright, Director of Public Works introduced the following: Clayton Maloney, Alan Fleck and Pete Finck; and *(ii) Wastewater Treatment Plant:* Steve Himmelpach, WWTP Superintendent introduced the following: Rodney Knoll, Ryan Malsam.

2. *Consider bidding process for Class A Liquor License.* City Administrator Jim Neubauer reviewed with members a request to determine the process for issuing an existing Class A General Retail on and off premise liquor license. Currently there is one Class A license available and there are two interested parties. He recommended using a sealed bid process similar to the process used previously. He requested the Commission provide guidance if they wish to issue the Class A General Retail license and if so what

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process would be appropriate to issue the license. Commissioner Frank commented that consistency of the process for distribution should take place and she felt that the sealed bid process worked well in the past. She inquired if staff has recommendations for minimum bid amounts and if input from other communities would be helpful.

Administrator Neubauer stated he has not received input from other communities as to what their minimum bid is. He stated that a Class D license is more valuable because it is just off sale and Class A is both on and off sale. He suggested somewhere between the \$7,500 and the \$40,000 for consideration. Neubauer stated there has been one letter of interest received, however, there have been several verbal requests.

Commissioner Frank motioned that the minimum bid be set at \$25,000. Commissioner Rohr seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

Commissioner Frank motioned to put one Class A General retail on and off premise liquor license up for public bids in accordance with the schedule and the minimum bid of \$25,000 as proposed. Commissioner Rohr seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

3. *Consider a change order to have Northern Improvement do the emergency street repairs on 37<sup>th</sup> Ave NW and 34<sup>th</sup> Ave NW.* Director of Public Works Wright reviewed with the Board a request to consider a change order on street repairs on 37<sup>th</sup> Avenue NW and 34<sup>th</sup> Avenue NW. He explained that these roads were put in in 2006/2007 but repairs are needed due to the result of high ground water conditions over the past two or three years in addition to the increased truck traffic in that area causing damages along with increased pot holes. Wright stated that Toman and Wenck Engineering have completed water studies in this area and recommended that the deteriorating areas of 37<sup>th</sup> and 34<sup>th</sup> Avenues be torn out, which will include 18" of sub base material and the existing asphalt and an under drain system installed along both sides of the curb. He explained that the under drain system will be installed by the street department due to high contractor prices and the street crews ability to do the work. He then explained that Northern Improvement will then replace the saturated sub base material and a geo-textile fabric and then finish with asphalt.

Commissioner Tibke inquired if the road damage is a result of the wet years or the topography to begin with? Wright stated that prior to 2009 there were many residents that had zero ground water problems. He indicated that 2009 was a year with a lot of snow and rain and residents that lived there for 30 years for the first time ever got ground water that year coming into their basements. The water problems got worse in 2010 and 2011 and eventually the water was running above ground. Prior to that there was no problem with sub base or water problems. Commissioner Frank inquired if drain tile systems that are proposed would be over aggressive? Wright replied that he did not want to go through replacing all the sub-base replacement with no underground system in place. According to the estimates, the under drain and installation will cost over

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\$160,000 to have a contractor do it. Wright priced out the one foot trench by having city staff do the work stating that it could be done for approximately \$20,000.

Commissioner Rohr motioned to approve the Change Order for Northern Improvement to do the street repairs on 37<sup>th</sup> and 34<sup>th</sup> Avenues Northwest with the funding split 50% General Fund and 50% Sales Tax and have the Street Department install the under drain system with funding from the Water and Sewer Utility Fund. Commissioner Braun seconded the motion. Roll call vote: Commissioner Rohr: Yes; Commissioner Tibke: Yes; Commissioner Frank: Yes; Commissioner Braun: Yes; Commissioner Van Beek: Yes. The motion passed.

#### RESOLUTIONS & ORDINANCES:

##### OTHER BUSINESS:

1. *Update on Mandan Growth Fund Committee discussion on Commercial Property Tax Exemption Policy.* City Administrator Neubauer reviewed with the Board an update from the MGF Committee related to the policy on tax exemption for commercial property. As a result it was recommended to have a work-in-session with members of the Mandan Growth Fund and the City Commission to discuss the matter in one group. As an alternative, the City Commission could appoint some commissioners to meet with the Growth Fund Committee. Commissioner Tibke recommended the City Commission meet with the MGF Committee. The Commission requested Administrator Neubauer to schedule a meeting to include all City Commission members and all Mandan Growth Fund Committee members to discuss the Commercial Property Tax Exemption Policy.

2. *Update on North Mandan Street Maintenance Project.* Engineering Project Manager Bechtel reviewed with the Board the street maintenance project that took effect after Measure 2 wherein Northern Improvement was the contractor on the project. A link has been attached to the City of Mandan's homepage ([www.cityofmandan.com](http://www.cityofmandan.com)) for residents to access. Bechtel gave an overview of what the contents of the link contains in relation to street projects going on. There are six areas within the project and each of them is defined and can be accessed by clicking on them individually. The reports are updated at least weekly. A timeline of the construction project is located on the report and will outline when the project is due to be completed.

3. *Mandan Fire Department Through the Smoke Road Race Event.* Commissioner Tibke announced that on October 6<sup>th</sup> the Fire Department will be sponsoring an event called "Through the Smoke Road Race" that will include a 10K run and 5K run/walk at Raging Rivers. She encouraged the Mayor and all Commissioners to participate in the 5K run/walk.

There being no further actions to come before the Board of City Commissioners, Commissioner Rohr moved to adjourn the regular meeting at 6:30 p.m. Commissioner Frank seconded the motion. The motion received unanimous approval of the members present. The motion passed.

/s/ James Neubauer  
James Neubauer,  
City Administrator

/s/ Arlyn Van Beek  
Arlyn Van Beek,  
President, Board of City  
Commissioners