



# City of Grand Island

Tuesday, March 24, 2020

Council Session

## Item G-2

### Receipt of Official Document – Tort Claim filed by Eakes Office Solutions

Staff Contact: RaNae Edwards

# Council Agenda Memo

**From:** Stacy Nonhof, Interim City Attorney

**Meeting:** March 24, 2020

**Subject:** Receipt of Official Document – Tort Claim filed by Eakes Office Solutions

**Presenter(s):** Stacy Nonhof, Interim City Attorney

## Background

The City of Grand Island has received a Notice of Tort Claim from Eakes Office Solutions alleging blockage in the system causing a sewer backup on December 23, 2019.

Without getting into issues concerning the City's and other parties' liability, and whether the claim of Eakes Office Solutions is fair and reasonable, we are simply providing a copy of this claim to you in compliance with the Nebraska Political Subdivision Tort Claims Act.

For a person to assert a tort claim against the City of Grand Island, a written notice of the claim must be filed with the City Clerk, Secretary or other official responsible for keeping official records. The claim must be filed within one year of the accrual of the claim, and the Council has six months to act on the claim. No suit can be filed until after the Council acts on the claim, or the six months has run.

Historically, the City of Grand Island has simply let the six months run. Not all claims result in a suit being filed, so it makes good sense to not act affirmatively in many instances. In any event, if you wish to look further into this claim, please contact the City Attorney's office, and we will provide you with the information which we have in connection with the claim. Our recommendation is to continue to take no affirmative action on tort claims. It must be emphasized that by providing copies of alleged claims to you, we are not making an admission or representation that a claim has been properly filed in any respect. We also recommend that no comments concerning a particular claim be made during Council meetings, unless you decide to bring the matter on for formal consideration. Even then, we ask that comments be carefully considered so that the legal rights of all parties are preserved.

## **Discussion**

This is not an item for council action other than to simply acknowledge that the claim has been received.

## **Recommendation**

City Administration recommends that the Council take no action other than acknowledge receipt of the claim.

## **Sample Motion**

Move to approve acknowledgement of the tort Claim filed by Eakes Office Solutions.

**SMITH, JOHNSON, ALLEN,  
CONNICK & HANSEN**

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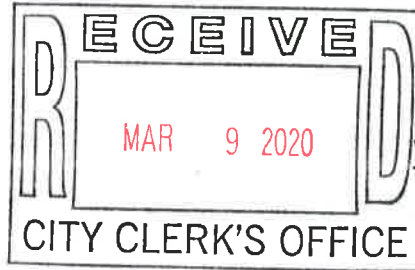
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March 5, 2020

RaNae Edwards, City Clerk  
City Hall  
100 East First Street  
Grand Island, NE 68801

Grand Island City Council  
City Hall  
100 East First Street  
Grand Island, NE 68801



Via Certified Mail

**NOTICE OF TORT CLAIM**

To: RaNae Edwards, City Clerk and City Council of Grand Island, Nebraska:

This office has been retained to represent Eakes Office Solutions with regard to its claims against the City of Grand Island. As discussed below, the City of Grand Island ("City") is liable for this significant loss. Pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901, *et. seq.*, this letter constitutes written notice of a claim against the City and its employees, agents, and apparent agents as a result of a sewer back up on December 23, 2019. This claim is made on behalf of Eakes Office Solutions.

**Description of Events**

On Monday, December 23, 2019, around 2:30 in the afternoon, employees of Eakes began to smell the distinctively recognizable odor of sewage. Eakes swiftly determined that waste water was gushing from a toilet in the southwest section of the southeast quarter of Eakes's office basement. This was captured on video. Chief Financial and Operating Officer Paul McKinney immediately contacted the City via the City Public Works Emergency Sanitary Sewer phone number.

The employees in the affected area went to great efforts to salvage all the equipment and belongings that they could. Employees were evacuated from the area due to the highly offensive and unsafe flow of waste.

Around 3:15 p.m., City employees arrived and took measures to stop the overflow. Mr. McKinney discussed the cause of overflow with City employees. A City representative

cc: HR  
Legal  
3-9-2020

indicated to Mr. McKinney and other Eakes employees that the blockage was definitely within the city sewer main, and they were taking immediate corrective action.

Mr. McKinney called Paul Davis Restoration to secure clean-up services. Paul Davis arrived shortly after 5:00 p.m. and worked nearly four hours straight to begin what would become a weeks-long clean-up process.

On December 24, 2019, Eakes's Leadership Team determined no one should work in the office as the environment was not conducive to safe working. Due to the business-mandated closure, Eakes determined it needed to pay all employees who were scheduled to work for the day's work. Those who could work from home, did. Eakes had numerous employees on site to assist Paul Davis with clean up.

At 9:00 a.m., Eakes executives met with a representative of another local business in town about the possibility of renting some of their unused office space during the clean-up period. The cost to relocate the business temporarily would have been \$15,000.00 per month in rent, plus moving and temporary service expenses.

At 11:00 a.m., Eakes executives spoke with City employees. Eakes did not get the City employees' full names, but one of the employees is named Glen. The City employees stated to representatives of Eakes that they were there to vacuum the main line. They also admitted the cause was a block created by a brick and piece of tile or asphalt that was 70 feet to the west of the manhole cover near Elm Street. Once the blockage was created, the raw sewage backed up into the toilet at Eakes. The City employees gave Eakes an insurance card with instructions on how to file claim with City. The card noted that if an issue is caused by a main line, then the City is liable.

Shortly after this conversation, Eakes notified Mayor Steele of the issue. Thirty minutes later, around 11:30 a.m., City Head Engineer John Collins stopped by Eakes at the request of Mayor Steele. John indicated another nearby business was also affected and that blockages of this kind do happen from time to time.

Around noon on December 24, 2019, Eakes's Leadership Team determined no one would work Christmas day. Employees had to work on December 26<sup>th</sup> to perform business critical tasks. The employees worked only in blocks of two hours due to the ongoing smell. As you can imagine, even within the first 24 hours of this incident, Eakes suffered a noticeable loss of business, sales, and revenue. This loss would continue as the office remained uninhabitable.

On December 26, 2019 at 9:15 a.m., Mayor Steele called Eakes's President/CEO Mark Miller to indicate that the City was looking for the person who had the camera that showed the blockage. Mayor Steele indicated he had not found that person yet, though many City employees were on vacation during this holiday season. Notably, during this conversation, Mayor Steele speculated that Eakes's insurance coverage through

Nationwide would initially pay for the damages and Nationwide would assert a claim against EMC as the insurer of the liable party.

That afternoon, Eakes received an e-mail from Scott Vala indicating that EMC was denying the liability claim made by Eakes Office Solutions. Also that afternoon, Eakes's Leadership Team determined that employees could return to work on Friday, December 27, as tolerated. On December 27 and 28, 2019, decontamination efforts and contents removal continued with a team from Eakes and Paul Davis. These efforts were completed about 2:00 p.m. on Saturday, December 28.

After receiving the denial letter from the City's insurance company, Mr. McKinney and Mr. Miller opened the manholes close to Eakes's facility to inspect the situation. These were completely open and easy to access; no lockable manhole covers were used by the City in this location. They found that both manholes had loose bricks in the bottom of the pits and the structure itself was decaying, which would reasonably constitute the type of main line block that caused this entire incident.

On December 30, 2019, Eakes began reconstruction efforts, including repairing flood cuts in walls, carpet glue grinding, drywall repairs, and total restroom reconstruction. While these reconstruction efforts continue to date, Eakes believes it has determined its approximate damages, notwithstanding any unforeseeable setbacks or complications in the future.

### **Discussion of Liability**

Clearly, and as personally admitted by multiple City employees, Grand Island is liable for this costly error.

Grand Island is liable on a theory of negligence.

By failing to recognize a blockage in the system prior to beginning work, Grand Island was negligent.

"The legal standard of care is necessarily articulated in general terms, such as a duty to conform to the legal standard of reasonable conduct in light of the apparent risk." *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 262 Neb. 66, 74, 628 N.W.2d 697, 704 (2001). Whether Grand Island had actual knowledge the blockage would matter if the claim was one of willful or wanton negligence. But in this case, where the City of Grand Island took no reasonable steps before jetting the line to determine it was free of blockages, the City breached its standard of care by failing to do reasonable investigation in light of the apparent risk of sudden backflow of sewer water.

Grand Island is liable on a theory of res ipsa loquitur.

There are three elements that must be met for res ipsa loquitur to apply: (1) The occurrence must be one which would not, in the ordinary course of things, happen in the absence of negligence; (2) the instrumentality which produces the occurrence must be under the exclusive control and management of the alleged wrongdoer; and (3) there must be an absence of explanation by the alleged wrongdoer. *McLaughlin Freight Lines, Inc. v. Gentrup*, 281 Neb. 725, 728, 798 N.W.2d 386, 389 (2011)

In this case, the occurrence of sewage backup causing damage to multiple businesses is not one which, in the ordinary course of things, happens in the absence of negligence. In this case, it is clear the backup was not caused by flood or natural occurrence. Rather, there is a direct causal relationship between the City's jetting the line and the backup of sewage. This relationship was established by more than one City representative.

As to the second element, the instrumentality, the sewer is within the exclusive control and management of the City. The Grand Island City Codes provides:

**The director shall control and supervise** the construction, repair, and maintenance of **all sewers and drainage systems** in the planning area, whether the sewers are publicly or privately owned. [*Director* shall mean the Director of the Department of Public Works or his or her authorized representative. *Planning Area* shall mean the Grand Island planning area as adopted by the Regional Planning Commission.]

§30-2. Supervision of Sewers and Drains (emphasis added). Clearly, the City had exclusive control not only over the repair and maintenance of the sewer, but any privately owned system which may have contributed to this blockage as well. Accordingly, the instrumentality causing the damage was in the exclusive possession and control of the City.

Finally, there must be an absence of explanation by the alleged wrongdoer. EMC and the City have not and cannot provide any alternative explanation for this accident, and that is because no alternative explanation exists. The City of Grand Island bears sole responsibility for the damage caused by the jetting and blockage, regardless of the procedure by which it performed this repair.

Grand Island is liable on a theory of inverse condemnation.

Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no

intention or willingness of the taker to bring such proceedings. *6224 Fontenelle Blvd. v. Metropolitan Util. Dist.*, 22 Neb. App. 872, 863 N.W.2d 823 (2015).

Where the government or governmental entity causes flooding, even of a finite nature, such flooding can be compensable under the Takings Clause if the invasion is intended or is the foreseeable result of authorized government action. See e.g., *Henderson v. City of Columbus*, 285 Neb. 482, 827 N.W.2d 486 (2013); *Arkansas Game and Fish Com'n v. United States*, 568 U.S. 23, 133 S.Ct. 511, 184 L.Ed.2d 417 (2012).

The jetting of the sewer line in this case was an intentional act which foreseeably and actually caused damage to Eakes's property. The City intentionally undertook this project. The forceful jetting was an effort to repair the City's sewer and allegedly enhance its longevity. Accordingly, this was not a passive failure of the system, this was an intentional act which foreseeably and actually caused harm to Eakes Office Solutions as well as other local businesses and buildings.

Eakes is accordingly entitled to compensation for the taking as no condemnation proceedings have occurred nor does it appear there is any intention or willingness by Grand Island to bring such proceedings.

### **Demand for Compensation**

Eakes suffered damages in the following amounts, and compensation is hereby demanded for:

#### **Mitigation**

Mitigation Wages - Dec 24th	\$3,696.35
Mitigation Wages - Dec 25th	\$240.79
Mitigation Wages - Dec 26th	\$4,907.73
Mitigation Wages - Dec 27th	\$2,067.58
Mileage	\$198.94
Hotel	\$111.29
Mitigation Services	\$49,815.62
Company Items - Used for Mitigation	\$403.09
Purchased Items - Used for Mitigation	\$283.26

#### **Wage Damages**

Lost Wages - Dec 23rd	\$5,287.88
Lost Wages - Dec 24th	\$3,223.03
Lost Wages - Dec 26th	\$1,732.40
Lost Wages - Dec 27th	\$103.85
Lost Wages - Dec 28th to Jan 12th	\$12,701.25



**Restoration**

Restoration Wages - Jan 13th	\$1,878.23
Restoration Wages - Jan 14th	\$1,912.61
Restoration Wages - Jan 15th	\$1,993.89
Mileage	\$293.48
Restoration Services	\$21,347.21
Purchased Items & Services - Used for Restoration	\$12,651.72
Company Items - Used for Restoration	\$22.52

**Property Losses**

Company Items Destroyed	\$12,632.84
Personal Items Destroyed	\$890.04

**Business Losses**

Salesperson Inactivity/Lost Sales	\$53,030.32
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**GRAND TOTAL** **\$191,425.90**

- Eakes Office Solutions demands compensation for the losses for forth above.
- If we do not hear from you on or before September 5, 2020, appropriate legal action will be taken to move this claim forward against the City.

If you have any questions, comments, or concerns, please do not hesitate to contact me.

Very truly yours,

SMITH, JOHNSON, ALLEN,  
CONNICK & HANSEN



TANYA J. HANSEN  
TJH/mo  
191-8/815033

cc: Stacy Nonhof, Grand Island Assistant City Attorney, via e-mail  
Paul McKinney  
Mark Miller