

RESOLUTION NO. 4129

A RESOLUTION APPROVING A REAL PROPERTY LEASE AGREEMENT BETWEEN THE CITY OF MILES CITY, AND NOLLEY'S WELDING AND MACHINE, INC., FOR CERTAIN REAL PROPERTY OWNED BY MILES CITY, MONTANA

WHEREAS, the City of Miles City leases certain property to Nolley's Welding and Machine, Inc., a Montana corporation, hereinafter referred to as "Tenant," for certain real property located in Custer County, Montanan, to wit:

Legal Description: Lots 33 and 34, Tract "E" of the Industrial Site west of Miles City, Montana, containing approximately 71,742 square feet, more or less;

AND WHEREAS, Tenant owns substantial permanent improvements upon said leasehold, consisting of a shop and outbuildings, and desires to continue leasing said property at the current lease rates adopted by the City of Miles City, as authorized by Resolution 4100 regarding leaseholds upon which tenants own substantial permanent improvements;

NOW THEREFORE, IT IS RESOLVED BY THE CITY COUNCIL OF THE CITY OF MILES CITY, MONTANAN AS FOLLOWS:

The City Council hereby authorizes and approves the terms and condition of the Lease Agreement between the City of Miles City, and Nolley's Welding and Machine, Inc., attached hereto as Exhibit "A", and adopts the Staff Report prepared by City Planner Dawn Colton, attached hereto as Exhibit "B", both of which are made a part hereof by this reference; and hereby authorizes the Mayor of the City of Miles City to execute such lease and bind the City of Miles City thereto and to perform the terms and conditions of such lease.

SAID RESOLUTION FINALLY PASSED AND ADOPTED BY AN AFFIRMATIVE VOTE OF 2/3 OR THE MEMBERSHIP OF THE CITY COUNCIL OF THE CITY OF MILES CITY, MONTANA, THIS 13TH DAY OF FEBRUARY, 2018.



John Hollowell, Mayor

ATTEST:



Lorrie Pearce, City Clerk

CITY PROPERTY LEASE AGREEMENT

THIS AGREEMENT, made and entered into this 13th day of February, 2018 by and between the CITY OF MILES CITY, MONTANA, a Montana municipal corporation, of 17 S. Eighth Street, Miles City, Montana 59301, hereinafter referred to as the "*CITY*" and **NOLLEY'S WELDING AND MACHINE, INC.**, a Montana corporation, of 21 Water Plant Road, Miles City, Montana 59301 hereinafter referred to as "*TENANT*".

RECITALS:

WHEREAS the CITY owns certain real property located in the City of Miles City, Custer County, Montana, more particularly described as follows:

Legal Description: Lots 33 and 34, Tract "E" of the Industrial Site west of Miles City, Montana, containing approximately 71,742 square feet, more or less, hereinafter "Leasehold".

AND WHEREAS it is the desire of TENANT to lease the above described Leasehold for a term of five (5) years, subject to the option to renew as hereinafter provided.

AND WHEREAS CITY is agreeable to providing such five (5) year term lease, together with the option to renew for additional five year terms, upon the Leasehold under the following terms and conditions;

NOW, THEREFORE, the parties hereto mutually covenant and agree as follows:

I. AGREEMENT

The CITY, for and in consideration of the rents to be paid and the covenants to be performed by TENANT, does hereby demise, lease, and let unto TENANT the real property located in the Miles City Industrial Site and more particularly described as follows:

Lots 33 and 34, Tract "E" of the Industrial Site west of Miles City, Montana, containing approximately 71,742 square feet, more or less, hereinafter "Leasehold". See Attachment A for location.

II. INITIAL TERM

The term of this Agreement shall be for a period of five (5) years, beginning on July 1, 2018 and expiring at midnight on June 30, 2023, hereinafter, "*THE INITIAL LEASE TERM*", subject to the option to renew this lease as provided for in Article IV of this lease.

III. RENTAL

The annual rental for the initial lease term described in Section II shall be in accordance with the rates established by the CITY, as follows:

Lots 33 and 34, Tract "E" of the Industrial Site west of Miles City, Montana, containing approximately 71,742 square feet, @ \$0.025 per sq. ft.) for a total rental of One Thousand Seven Hundred Ninety Three and 55/100 Dollars (\$1,793.55) for each year of the initial lease term. Payments in shall be due and payable in advance of July 1st of each year of the lease term, commencing July 1, 2018 through June 30, 2023.

IV. OPTION TO RENEW.

FOLLOWING the "INITIAL LEASE TERM", TENANT shall have the option to renew this lease a maximum of four (4) times, for renewal periods of five (5) years each. TENANT shall provide notice to the CITY of TENANT'S intent to renew not more than 90 days and not less than 30 days prior to the expiration of the initial or renewal term. Rental rates at each payment period shall be at the standard rates set by resolution adopted by City Council.

V. RESPONSIBILITIES OF THE TENANT

TENANT does hereby acknowledge, covenant and agrees as follows:

A. Purpose.

TENANT desires to lease the premises described above for the following general purposes:

Lot 33: SUBLET PROPERTY TO COMMERCIAL ENTITIES AND/OR SMALL BUSINESS ENTERPRISES

Lot 34: OPERATION OF A WELDING AND STEEL FABRICATION AND SUPPLY COMPANY.

TENANT agrees to use the premises for the stated purpose and the stated purpose only, and covenants that it will not use or occupy said premises, or allow the same to be used or occupied, for any unlawful purpose or any purpose deemed extrahazardous due to fire or otherwise.

B. Compliance with Laws.

TENANT shall comply with, conform to, and obey all present and future laws, ordinances, rules and regulations of all governmental authorities or agencies, respecting the use and occupation of the premises.

C. Independent Investigation.

TENANT acknowledges that it has carefully examined and inspected the premises and improvements and it is fully familiar and acquainted therewith, and agrees to accept the same in their present conditions, and that it is not leasing the premises because of any warranty, representation, information or promises made by the CITY or anyone acting for or on behalf of

the CITY, which are not specifically set forth in this Agreement.

D. Maintenance.

TENANT agrees to keep the premises and improvements thereon in good repair and upkeep, reasonable wear and tear alone excepted, and further agrees neither to permit nor cause any waste on the property, or with respect to any improvements thereon. Tenant shall not create any condition which would be considered a public nuisance as defined in Chapter 15 of the Miles City Code of Ordinances. Tenant shall keep the premises in a clean and orderly condition and not allow accumulations of junked or inoperable automobiles, trucks, farm equipment, or scrap upon the premises.

E. Improvements to Remain.

Within sixty (60) days immediately following the expiration of this lease, the TENANT shall remove any improvements located on the leasehold and shall restore, at TENANT'S expense, the leasehold premises to level with the adjoining property and in a debris free condition. "Improvements" shall not include stormwater drainage facilities or other permanent improvements provided as City Services. If inclement weather during such sixty (60) day period delays such removal and restoration, CITY shall provide TENANT with a reasonable time, not to exceed an additional sixty (60) days in which to remove the improvements and restore the leasehold. If TENANT fails to remove such improvements within such sixty (60) day period, CITY, at its option, may (1) cause the removal of such improvements and restoration of the leasehold premises to be done and shall be entitled to recover all costs and expenses of such removal and restoration from TENANT or (2) may retain all such improvements as property of CITY without compensation to TENANT. Provided, however, that upon termination of the Lease, TENANT, within such same sixty (60) day period, shall have the right to sell the improvements upon the Leasehold to a successor tenant.

In the event that any financial institution holds a security interest upon any of the improvements hereon, then, in the event of termination of this lease, whether by expiration of term or uncured default, the financial institution holding such security agreement shall be allowed to remove any improvements upon which it holds a security interest within the times provided for the TENANT to remove improvements, as set forth in the first paragraph of this subsection.

F. Right to Inspect.

The CITY or the CITY'S authorized agents shall have the right to enter upon the premises after providing twenty-four (24) hours' written notice and during normal business hours, in order to inspect and determine whether TENANT complies with the terms of this Agreement.

G. Utilities.

TENANT agrees to pay for the use and maintenance of all utility services on the premises, including gas, electricity, telecommunications, water, sewer and solid waste disposal,

if applicable.

H. Taxes and Assessments.

TENANT shall pay any and all taxes and assessments which may be lawfully levied against TENANT'S occupancy or use of the premises or any improvements thereon as a result of TENANT'S occupancy.

I. Indemnification.

TENANT shall indemnify and hold the CITY harmless for any loss, damage, claim and/or liability occasioned by, growing out of, or arising or resulting from any default hereunder, or any tortious or negligent act on the part of TENANT, its agents, employees or customers, and TENANT hereby agrees to indemnify and hold harmless the CITY for any such loss or damage. The obligations hereunder shall survive the termination of this lease.

J. Insurance.

TENANT agrees to maintain with a good and reputable insurance company a policy of fire and extended coverage insurance covering the improvements on the premises involved herein to the maximum insurable value, and said policy of insurance shall have a loss-payable clause specifically naming and covering the interests of the CITY. TENANT further agrees to carry minimum liability insurance in the amount of ONE MILLION AND NO/ 100THS DOLLARS (\$1,000,000.00) each accident, and to carry Worker's Compensation Insurance as required by the laws of the State of Montana. TENANT shall provide evidence of such current and valid insurance upon approval of this lease by the City Council of Miles City and, thereafter, each year on or before July 1st or upon demand by the lease administrator of the CITY.

K. Environmental Warranty.

TENANT warrants and agrees to neither cause nor allow to be caused any release of hazardous substances from, into, or upon the premises, nor to cause or allow to be caused any contamination by hazardous waste or substances with respect to the premises, and that, when applicable, TENANT shall comply with all local, state and federal environmental laws and regulations.

TENANT agrees to indemnify, defend and hold harmless the CITY, its employees, agents, members, successors and assigns, from and against any and all damage, claim, liability, or loss, including reasonable attorneys and other fees, arising out of, or in any way connected to, any condition in, on or of the property, that is caused or allowed to be caused by TENANT, its agents, employees or customers. Such duty of indemnification shall include, but not be limited to, damage, liability or loss pursuant to all local, state and federal environmental laws and regulations, strict liability and common law. The obligations hereunder shall survive the termination of this lease.

Should the occupancy involve activities that include hazardous materials, the City may

require the TENANT to store those materials in a separate containment unit in accordance with local building and fire codes.

TENANT shall not be responsible under this Section for preexisting environmental hazards, if any.

L. Compliance with ADA.

TENANT agrees to comply with the Americans with Disabilities Act as the same may apply to TENANT.

M. Non-Discrimination.

TENANT hereby agrees that the premises not be used in any manner that would discriminate against any person or persons on the basis of sex, age, physical or mental handicap, race, creed, religion, color, or national origin.

VI. ASSIGNABILITY OF INTEREST

TENANT shall not assign this Lease, nor sublet the premises, nor any part thereof, without the prior written consent of the CITY, which consent shall not be unreasonably withheld. No permitted sublease shall release TENANT from its obligations under this Lease.

VII. DEFAULT

If TENANT shall at any time be in default in the payment of rent due hereunder, or in the performance of any of the covenants or provisions of this Lease, and TENANT shall fail to remedy such default within thirty (30) days after receipt of written notice thereof from the CITY, then it shall be lawful for the CITY to enter upon the premises, and again repossesses and enjoy the same as if the Lease had not been entered into, and thereupon this Lease and everything herein contained on the part of the CITY to be done and performed shall cease and terminate, without prejudice, however, to the right of the CITY to recover from TENANT all rent due up to the time of such entry. In the case of such default and entry by the CITY, the ownership of any and all improvements on the premises shall vest in the CITY (if the same shall not have already vested), and the CITY may re-let the premises for the remainder of TENANT'S term for the highest rent obtainable and may recover from TENANT any deficiency between the amount so obtained and the rent due hereunder from TENANT. If the default is in the performance of any of covenants or provision of this Lease, other than failure to timely pay the rental called for herein, and, by the nature of the default, it cannot reasonably be cured within a thirty (30) day period, so long as TENANT commences and diligently pursues a cure of such default promptly within the initial thirty (30) day cure period, then TENANT shall have a further reasonable time to complete such cure, not to exceed an additional sixty (60) days after the expiration of the initial thirty (30) day cure period. Payments not received by the City within thirty (30) calendar days of the annual due date shall be subject to a late fee at a rate of 10% per annum.

IX. MISCELLANEOUS PROVISIONS

It is further mutually understood and agreed as follows:

A. Notice.

Any notice hereunder shall be in writing and may be delivered personally or by registered or certified mail with postage prepaid. Postal notice shall be deemed complete when deposited in a United States Post Office addressed to the tenant with proper postage attached.

B. Oral Modification Prohibited.

No modification or alteration of this Agreement shall be valid unless evidenced by a writing signed by the parties hereto.

C. Attorneys Fees and Costs.

Should either party incur any costs or expenses, including reasonable attorney fees, in enforcing this Agreement or any provision hereunder, or protecting its rights and interest hereunder, the other or unsuccessful party shall reimburse the prevailing party upon demand.

D. Binding Effects.

This Agreement shall be binding upon and inure to the benefit of the heirs, legal representatives, successors and assigns of the parties hereto; provided, however, that no assignment by, from, through or under TENANT in violation of the provisions hereof shall vest in the assignee(s) any right, title, or interest whatsoever.

E. Time of the Essence.

Time is of the essence of this Agreement and all obligations of this Agreement shall be performed on or before the dates set forth herein.

F. Incorporation of Recitals.

The Recitals set forth above are incorporated into the terms and conditions of this Agreement and made a part hereof by reference.

G. Executed Copy.

Each of the parties hereby acknowledges receiving an executed copy of this Agreement.

H. Interpretation.

This Agreement shall be governed and construed in all respects according to the laws of the State of Montana.

I. Contingent Upon approval of City Council.

This Agreement shall not become effective until a resolution approving this lease has been adopted by the affirmative vote of two-thirds of the membership of the City Council of the City of Miles City, pursuant to §7-8-4201(2) MCA.

IN WITNESS WHEREOF, the parties hereto have executed the Agreement the date and year first hereinabove written.


CITY OF MILES CITY

By: 
JOHN HOLLOWELL, Mayor

ATTEST:

By: 
LORRIE PEARCE, City Clerk

TENANT:

By: 
GREG KMETZ, PRESIDENT
NOLLEY'S WELDING

ATTACHMENT "A"



-Exhibit B
City Council Staff Report
Industrial Site Leases
Renewal of Nolley's Welding Lease
Meeting Date: February 13, 2018

NOLLEY'S WELDING LEASE HISTORY:

Greg Kmetz of Nolley's Welding began leasing Lots 31 & 34 in 1981. The most recent lease agreement is for September 4, 2008 through June 30, 2018. Mr. Kmetz has substantial improvements on the property and wishes to continue to lease the property; however, the current agreement has no renewal provision after June 30, 2018. Current yearly lease rate is \$1,578.

POLICY

The expiration dates of the above-described lease brought to light some flaws in City policy for land leases. The policies did not anticipate long-term lease renewals; neither did they provide for automatic or negotiated renewals on leases that had substantial improvements constructed on the leased property. These leases simply expire. In this case, per State and Local regulations, the property must go out to bid to the public for those properties. Should the tenant not be the successful bidder, any improvements on the property may be removed, torn down, or given to the City. In order to be a successful bidder on the lease, the tenant who owns the improvements would in essence be bidding against other individuals as to the lease value of improvements which they themselves own. None of those options seemed appropriate or user-friendly for lessees with active businesses.

The City Council has recently approved Resolution #4100 that includes the following provision:

Section 4. Extension of Leases With Substantial Permanent Improvements.

The City has previously leased parcels of real property and allowed the tenants to construct substantial permanent improvements upon the same. Given the impracticality for a tenant to relocate such improvements upon lease expiration, the City may, in the City's sole discretion, agree to renew such leases in circumstances where the City has allowed the Tenant to construct substantial permanent improvements, without advertising the same for lease under the provisions of Section 1. Should the City Council determine that a renewal is appropriate; any extension granted by the City Council shall be at the current lease rates established by the City Council. "Substantial Permanent Improvements" shall be determined by the City Council and shall include buildings and other improvements of significant value, but shall not include fencing or corrals.

RENEWAL PROPOSAL

Mr. Kmetz is proposing to renew his leases on both lots per the new lease policy described above. Lot 34 is occupied by Nolley's Welding and Machine, Inc., owned and operated by Mr. Kmetz. He has subleased Lot 33 to an auto-wrecking yard for several years and is in the process of ending that sublease and cleaning up the lot.

PROCEDURE:

Prior to expiration of the lease on June 30, 2018, lessee and staff shall review the attached "Standard Form of Lease Agreement" and present to the Finance Committee and Council for approval. The parties may negotiate the lease terms. Council will decide to approve or deny the lease agreement. If approved, Mr. Kmetz may continue his business operations on Lot 34 and 33. Any future sublease proposal will require Council approval.

RECOMMENDATION:

**City Council Staff Report
Industrial Site Leases
Renewal of Nolley's Welding Lease
Meeting Date: February 13, 2018**

After review of the of the applicable regulations, staff recommends that the City Council adopt this staff report as findings of fact and recommend approval of granting a new 5-year lease agreement with 5-year renewal increments for next twenty (20) years.

Dawn Colton