

**BARKER WILSON REYNOLDS & BURKE**  
**L A W Y E R S**

KENNETH E. BARKER"  
MICHAEL A. WILSON'  
MICHAEL P. REYNOLDS"  
JOHN W. BURKE"  
JEFFERY D. COLLINS

www.bwr.com

4200 BEACH DRIVE  
P.O. BOX 9335  
RAPID CITY, SD 57709-9335  
605.718.8000 • FAX: 605.718.8010

211 ZINNIA STREET  
P.O. BOX 100  
BELLE FOURCHE, SD 57717-0100  
605.723.8000 • FAX: 605.723.8010

REPLY TO: RAPID CITY

May 24, 2005

*C. Attorney  
South Dakota  
Mayor*

**VIA HAND DELIVERY**

Finance Office  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701-2724

Re: Epic Outdoor Advertising Appeal pursuant to Code Section 15.28.270(I)

To Whom it May Concern:

This firm represents the interests of Epic Outdoor Advertising ("Epic"). Recently, Epic appealed to the Sign Code Board of Appeals ("Board") the Building Official's preliminary decision that the four electronic sign structures Epic has commenced constructing violate the Rapid City Municipal Code. On May 18, 2005, the Board considered Epic's appeal. Although a majority of the voting members indicated that they believed Epic's arguments carried the day, and that the Building Official and the City Attorney's Office were incorrect in their assessment of the situation, the Board indicated that it felt it necessary for this matter to be decided by the City Council, thus upholding to Building Official's preliminary decision by a vote of 2 to 1 (Councilman Hadley voting against the Building Official).

Please consider this our formal appeal of the Sign Code Board of Appeals' May 18, 2005 decision, pursuant to Section 15.28.270(I) of the Rapid City Municipal Code. The grounds for appeal are as follows.

In a nutshell, Epic has the right and authority to erect these reader boards pursuant to a recent amendment to the Rapid City Municipal Code, Sec. 15.28.080(B)(10). That provision states that a party is exempt from the permitting requirements of the Rapid City Municipal Code if the signs are "specifically authorized for a public purpose. . . ." This "public purpose" exception applies in the case of Epic's proposed signs due to the fact that Epic intends to utilize these boards to promote "public," charitable and civic programs and events, such as the Rushmore Plaza Civic Center, the Journey Museum, Rapid City Convention & Visitor Bureau,

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May 24, 2005

Page 2

and the Rapid City Area Hospitality Association, to name a few. These promotions will run on the reader boards at no cost to the respective public, charitable or civic organizations. In order to defray the costs of the construction and operation of these electronic boards, Epic will obtain private sponsors who will also receive promotions at a cost. This practice of obtaining paying sponsors is consistent with the practice established by the Rushmore Plaza Civic Center as it relates to its electronic board.

That is, in addition to promoting Civic Center events, the Civic Center independently advertises private paying companies, such as the Silverado, Black Hills Power, Coca-Cola, First Western Bank, the Eye Institute, and others.

**There is No Language in the Exemption that Requires Authorization from a "Governing Body Such as a City."**

The City Attorney's Office has articulated two bases for the Staff's opinion that Epic should not be allowed to use this "public purpose" exemption recently passed. First, the Staff argues that in order to utilize the exemption, "there must be action specifically authorizing the sign by a governing body such as a city, county, state or board that has the authority to make such decisions and derives its authority to do so from one of the previously mentioned governing bodies." See Landeen Memo, p. 1. While the Staff's statement sounds nice in the abstract, there is one fundamental flaw in the argument – **the ordinance doesn't set forth any such requirement of "approval" by a "governing body such as a city."**

That is, when the City drafted this exemption, we assume it "meant what it said and said what it meant." Hanig v. City of Winner, 2005 SD 10. **Nowhere** in that exemption, however, does it state that the "public purpose" has to be authorized by a "governing body such as a city," as the Staff argues.<sup>1</sup> Instead, the provision is silent as to who has the power to authorize. If the City wanted authority to come from the City Council, or the Building Official, or the Planning Department, or even this Board, it could have easily put such language into the ordinance – but it did not.

The Staff's argument is also contrary to basic rules of contract construction. It is a well-settled principle of law that "[a]mbiguities arising in a contract should be interpreted and construed against the scrivener." Campion v. Parkview Apartments, 1999 SD 10, 588 NW2d 897 citing Production Credit Ass'n, 474 NW2d at 740 and Forester v. Weber, 298 NW2d 96, 97 (SD 1980). "This is a rule of construction to be applied against one who drafted an ambiguous contract." Production Credit Ass'n, 474 NW2d at 740. This same principle applies to a party drafting an ordinance, rule or regulation. See Peters v. Spearfish ETJ Planning Com'n, 1997 SD 105, 567 NW2d 880; Matter of Sales Tax Refund Applications, 298 NW2d 799, 803 (SD 1980); Appeal of AT&T Information Systems, 405 NW2d 24, 27 (SD 1987). Put in layman's terms,

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<sup>1</sup> Which is perhaps why the Staff does not cite the ordinance in support of its argument.

May 24, 2005

Page 3

since the exemption does not say what the Staff wants it to say, and the City drafted the ordinance, the ordinance must be construed against the City. The City's "wish" about what the exemption should have said, then, must be ignored.

With regard to the Civic Center electronic board, it was the Civic Center Board *itself* which "authorized" itself to put up the sign – not any party inside City Hall. In the case of Epic, Epic has already obtained specific authorization from the Rapid City Area Hospitality Association, the Black Hills Family Channel and the landowners, the Dakota, Minnesota & Eastern Railroad Company – and will continue to obtain such specific authorizations as the operation of the electronic signs nears. Others, such as the Journey Museum and the Rapid City Convention and Visitors' Bureau, have already articulated an express desire to use the signs once they are built. Once again, Epic employed the exact same means as the Civic Center did in obtaining its authorization, except it has obtained broader authorization than did the Civic Center.

In sum, and put simply, if the City wanted the exemption to say, "such a sign must be authorized by the Planning Department," it would have taken two seconds, and little thought, to articulate that concept in the exemption. It did not, and it can't read something into the language of the exemption that isn't there.

**The Use of the Ordinance in the Fashion Proposed by the City in Unconstitutional.**

In addition, the use of the ordinance to further only the City's interest is a constitutional violation. Specifically, an ordinance is unconstitutional if it "is being applied in an unconstitutionally discriminatory matter." Lawson v. City of Kankakee, Illinois, 81 F. Supp. 2d 930 (2000). The Rapid City Municipal Code, Section 15.28.080(10) is being applied in an unconstitutional manner because it provides unnamed City officials unlimited discretion to approve some signs, yet deny others. The court in Lawson stated:

Although the ordinance does not require a "permit" or "license," it does require "consent" from City, which owns the property on which Plaintiff seeks to post his sign. Yet the ordinance does not explain how one goes about getting such consent; nor does it set forth guidelines to ensure that the City will not give or withhold its consent in an effort to accommodate or censor particular viewpoints. On its face, it grants unnamed City officials unbridled discretion to allow some signs to remain while authorizing the removal of others. Even if the City could properly limit its residents' posting of signs on terraces in the first place, it cannot subject those residents to the unchecked whims of its officials. Because the City's sign ordinance fails to provide even the semblance of "narrow, objective, and definite standards to guide" its decision to consent, it is invalid as an unconstitutional prior restraint. See Diamond v. City of Taft, 29 F. Supp. 2d 633, 650 (E.D.Cal. 1998) (citing Shuttlesworth, 394 US.at 151).

May 24, 2005

Page 4

The manner in which the Rapid City ordinance is being applied is very similar to the sign ordinance in Lawson. RCMC 15.28.080(10) does not state who can specifically authorize the signs and it does not give “narrow, objective, and definite standards to guide.” For these reasons alone, Epic should be allowed to construct its billboards.

Since the ordinance does not state who can “specifically authorize” the signs, Epic has gained approval from a number of public entities. In essence, this is what the Civic Center Board did when it gained approval for its sign. If the Civic Center can approve its own signs, then Epic should be allowed to approve its own signs. The United States Supreme Court addressed this issue of preferential treatment, it stated, “one who is accorded equal treatment under the laws, but cannot readily as others obtain preferential treatment under the laws, has been denied equal protection of the laws.” Romer v. Evans, 517 US 620 (1996).

For the above reasons alone, Epic should be allowed to construct its billboards pursuant to Rapid City Municipal Code Section 15.28.080(10).

**The Staff's Argument that the Use of the Sign Should be Ignored in Determining Whether it Serves a Public Purpose is Meritless.**

The Staff's second argument is that this Board should ignore the intended “message” of the Epic signs, and only look to the “sign itself” in determining whether the sign fulfills a public purpose. What the Staff seems to be saying is since the profits from the Civic Center electronic board goes to the Civic Center (a City-owned entity), it fulfills a public purpose. Since any profits from the Epic signs go to Epic, and Epic is not a municipal department, its signs do not fulfill a public purpose.

As a threshold matter, we must return to our analysis set forth above – if the City wanted the exemption to be limited to use by only the City or an arm of the City, ***it should have said so.*** Indeed, adding the language to the exemption, “this exemption shall only apply to the City and its departments” would have been simple. But the City did not place that language into the exemption, and it cannot now “read” language into the exemption because it now wishes it would have said something different.

Nor is there any language in that exemption that says “in determining a ‘public purpose,’ one is not to look at the content of the sign.” Again, a simple concept, but one that is not a part of the language of the exemption, and cannot now be read into it by the City.

Second, the Staff's argument is nothing more than a game of semantics. Epic can state, with complete candor, that the underlying purpose of the signs it will construct is principally to promote the municipally-owned and operated Civic Center, events sponsored by the City's Park and Recreation Department, civic programs and meetings, and any other municipal event the City or its departments wishes to promote. In addition, we will be promoting other civic and

May 24, 2005

Page 5

charitable organizations – unlike the Civic Center – and at no cost to the City – unlike the Civic Center. The fact that Epic will have private sponsors – just like the Civic Center does – changes nothing regarding the underlying promotion of the public. In point of fact, Epic is already in the market of promoting such events via its television station, Black Hills Family Channel. Epic has a track record, then, of following through on its commitment to this community.

Moreover, there is nothing wrong with a private company economically benefitting while still promoting a public purpose. For example, in the South Dakota case of Assoc. General Cont. v. Shreiner, 492 NW2d 916 (SD 1992), a party argued that the use of unclaimed non-highway agricultural motor fuel tax refunds to promote the ethanol industry was not a valid “public purpose” because private individuals economically benefitted as a result. Our Supreme Court disagreed, holding that if the situation “promotes the public interest, even though it also confers a private benefit,” the challenge is invalid. “Therefore, even though there is private benefit, the public purpose of HB 204 saves it from violating art. III, 23(9).”

Similarly, in Clem v. City of Yankton, 83 SD 386, 160 NW2d 125 (1968), a similar argument about private benefit was made. The Court noted:

The parties agreed that the realization of the project would result in incidental benefits to Morgen and because the city was involved in the project the funds therefor would be obtained at a lower rate of interest than would be the case if the city were not involved. Plaintiff characterizes this as a subsidy to a private industry. This may well be the effect, but it does not destroy the public purpose of the act.

Importantly, the Clem court also noted that “to promote, stimulate and develop the general economic welfare and prosperity of the state of South Dakota” is “clearly” a public purpose. Epic is trying to do *exactly* the same thing for the City – promote, stimulate and develop the general economic welfare and prosperity of the City and its citizens. When more people are made aware of Civic Center events, they attend and spend more money. When they are apprised of events at the Boy’s Club, or the Journey Museum, or conventions, or tourism events, the local economy is stimulated, and the welfare and prosperity of the City is enhanced. Indeed, because of the broader message Epic is promoting, it provides substantially greater promotion of the economic welfare of the City than does the Civic Center electronic board, which serves only to promote its own events.

As such, the fact that Epic might profit from private sponsorships (just as the Civic Center is doing) has no bearing on the issue of whether a public purpose is served. As the cases cited above indicated, as long as a public purpose is being served, there is nothing wrong with a party making money as a result. This is exactly why Epic has called this situation “win-win” from its inception. Additionally, while we are not privy to the precise relationship between the Civic Center and Daktronics, the manufacturer of the electronic sign, undoubtedly Daktronics is profiting from the relationship. Once again, public purpose is not undermined simply because there is an attenuated private benefit.

May 24, 2005

Page 6

**The Concern that "Others" Will Follow Epic's Lead is Wrong and Irrelevant.**

As an aside, the Staff expresses concern that if Epic is allowed to utilize the exemption, everyone will do so, rendering the Sign Code moot. First of all, that is not an issue this Board can consider. The issue is how the exemption is implemented in this particular situation, without regard to what others might do. Second, the universe of parties that are willing to risk millions of dollars in capital start-up costs for the primary purpose of promoting the public interest – like Epic has – would presumably be very small. Third, the City has already conceded that the exemption is ambiguous and needs to be revised.

In that regard, the City recently passed a moratorium which prevents any further construction under this exemption. Specifically, the City has now placed a temporary moratorium on any new sign construction using Chapter 15.28.080(B)(10), and further requested that the City Attorney's Office draft two ordinance amendments 1) repealing the public purpose exemption from the sign code and 2) clarification of the exemption in terms of the "specific authorization." As such, the only party that can continue the construction already commenced prior to the moratorium is Epic, and the fear of a barrage of signs from others is not only erroneous, but impossible, based on the moratorium and the intent to tighten up or repeal the exemption.

\* \* \*

In sum, Epic has followed the express language of the exemption to the letter. The provisions the Staff wishes to read into the exemption simply do not exist. If it intended something different than the language set forth in the exemption, it should have drafted it that way. Moreover, it is clear that if Epic's sign are found not to comport with the exemption, then the Civic Center sign is illegal as well. Epic, which has suffered due to the monopoly that was created in favor of Lamar when the Sign Code was passed, asks now to be treated the same as every other citizen – and this would include the City. Finally, it cannot even be legitimately argued that Epic's proposal does not serve the public purpose. By establishing free advertising for public, charitable and civic events, Epic is unequivocally promoting, stimulating and developing the general economic welfare and prosperity of the City – frankly in a fashion superior to the Civic Center's sign. The fact that Epic might also profit from its private sponsors as a result changes none of the public good it is serving.

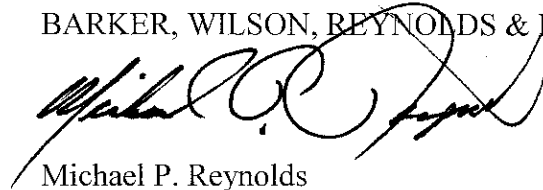
May 24, 2005

Page 7

Epic remains willing to answer any questions or concerns you may have, and looks forward to a favorable outcome to its appeal.

Very truly yours,

BARKER, WILSON, REYNOLDS & BURKE

A handwritten signature in black ink, appearing to read "Michael P. Reynolds", written over the printed name below.

Michael P. Reynolds

MPR:mjm

Enclosure

Cc: Joel Landeen, Esq.  
Clients

Dear Members of the Sign Code Board of Appeals:

On Wednesday you will be hearing an appeal brought by our company, Epic Outdoor Advertising. While the appeal is characterized as a request for variance, we view this appeal as nothing more than a request to apply the Sign Code to Epic in the same fashion as it has been applied to another corporate citizen, i.e., the City of Rapid City. Set forth below is a brief overview of our position.

In early March, Epic Outdoor Advertising began constructing 4 structures for 8 community electronic advertising signs in Rapid City. The City of Rapid City then ordered our company to stop work. At that time, we delivered a 3-page explanation of our position to each city council member and the mayor. This document is intended to be a quick and easy to read version of that original letter.

Four Locations – Omaha St. (Hubbard Mill Area), East North Street, East St. Patrick Street (near Nash Finch), West Main Street (the gap)

1. As background, for 2 years, local businesses and landowners have been unable to have a legitimate choice for their off-premise advertising needs. This is a direct result of a sign code designed by the city of Rapid City and a committee led by the general manager of Lamar Outdoor Advertising. As the biggest player in this market, closing the door to other businesses served to benefit Lamar and only Lamar.
2. The City sign code is currently one of the strictest in the country and anti-competitive.
3. In 2004 the Civic Center researched the feasibility of placing an electronic marquee and wall signs on or near the Civic Center. Because of the anti-competitive sign code, the City learned that multiple provisions of the sign code (in excess of 20) would be violated if they went forward with the plan.
4. The City then created an exemption to the sign code that would allow the Civic Center to circumvent that code, with the express intent of avoiding the same permit rules applicable to every other citizen. As a result, it now advertises not only Civic Center events, but private companies as well, turning Rapid City, overnight, into the 2<sup>nd</sup> highest grossing off-premise advertiser in the City.
5. Importantly, nothing in the language of the sign code exemption limits its use to public entities. Instead, it says, “signs required or specifically authorized for a public purpose” are exempted from the sign code requirements. If the City wished to limit this exemption to public entities only, it would have been simple to add the language, “this exemption applies to public entities only.” It did not.
6. With regard to the language that the signs must be “authorized for a public purpose,” again, nothing in the exemption requires that this authorization be issued by a public entity. We have obtained specific authorizations from several entities, including the DM&E Railroad and the Rapid City Area Hospitality Association, and others, such as the Rapid City Convention and Visitors Bureau and the Journey Museum, have indicated a keen desire to promote their events on these signs once they are constructed. We will bring the written acknowledgments with us to Wednesday’s meetings.
7. Epic’s proposal fits precisely within the same “public purpose” exemption as utilized by the City, with a couple of exceptions. First, our signs will cost the City nothing, unlike the Civic Center signs. Second, we will be advertising public issues on a much broader scale than the City, fostering the programs of many civic organizations. In point of fact, then, our signs will further the public purpose for less cost, more effectively and broader than the City’s signs.
8. Epic Outdoor Advertising has a history of broadcasting community events, non-profit messages, and tourism advertising on our Black Hills Travel TV Channel 79.



9. Epic Outdoor Advertising wishes to continue constructing our electronic signs. We will use these signs for a broad and legitimate public purpose. We will also place these signs in commercial areas and will not be placing them in a public park or memorial area. Specifically, we will be offering free advertising time to charitable non-profits and public entities for their events and fund drives. To help defray our costs (estimated near \$1,000,000) we will be selling commercial advertising to corporate sponsors, in a similar fashion as the City.
10. At its core, our request is that we be treated in the same fashion as others. Your City leaders have often stated that the sign code is "one size fits all." Unfortunately, by currently allowing only the City to enjoy this exemption, this policy is being violated, and equal protection has been affected as a result.

Epic Outdoor Advertising, LLP is committed to being a good corporate citizen. Its roots run deep in this community; we have been civic and charitable leaders in this region for decades. All we seek is fairness--fairness in the application of the rules and a level playing field with our competitors.

Sincerely,  
Brendan P. Casey

## Comparison – Electronic Signs

Community Public Purpose Signs – Epic Outdoor

### **Community & Event Promotion**

Rushmore Plaza Civic Center  
The Journey Museum  
Rapid City Convention & Visitor Bureau  
Rapid City Area Hospitality Association  
Amber alerts for missing children in the region  
SD DOT road conditions in inclement weather  
Proposed Non-profits – YMCA, Children’s Care Rehab,  
Dahl Fine Arts Center, Group Theater, Girls Club,  
Club for Boys, WAVI, Children’s Home Society,  
Big Brothers & Big Sisters, Boy Scouts, Girl Scouts

### **Location**

Hubbard Mill Area – Omaha St  
East North Street  
The Gap  
Nash Finch Area - St. Patrick St.

### **Cost to Rapid City**

None

Memorial Park Sign – City of RC

### **Event Promotion**

Rushmore Plaza Civic Center

### **Location**

Memorial Park

### **Cost to Rapid City**

Installation of Fiber Optic Cable  
Installation of Landscaping  
Creation & placement of graphics  
Maintenance of sign  
Utilities  
Sales staff  
Management staff  
Maintenance staff  
Legal staff



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## OFFICE OF THE CITY ATTORNEY

300 Sixth Street

Joel P. Landeen, Assistant City Attorney  
City web: [www.rcgov.org](http://www.rcgov.org)

Phone: 605-394-4140  
Fax: 605-394-6633  
e-mail: [Joel.Landeen@rcgov.org](mailto:Joel.Landeen@rcgov.org)

### MEMORANDUM

TO: Sign Code Board of Appeals

FROM: Joel P. Landeen, Assistant City Attorney

DATE: 4-29-05

RE: Epic Outdoor Advertising Appeal

It was the determination of City Staff that the signs proposed by Epic Outdoor Advertising were not “required or specifically authorized for a public purpose” and therefore were not exempt from the requirement that a sign building permit be obtained under Sec. 15.28.080(B)(10) of the Rapid City Municipal Code (RCMC).

The basis for this opinion is twofold. First, it is staff’s determination that for a sign to be “required or specifically authorized for a public purpose” that there must be action specifically authorizing the sign by a governing body such as a city, county, state, or by a board that has the authority to make such decisions and derives its authority to do so from one of the previously mentioned governing bodies. To hold otherwise would mean that any citizen or group could decide what was meant by “public purpose” and erect signs with no regard for the City’s sign code. This result is absurd and was clearly never the intention of the City Council when the exception was added to the code in its present form. It is common sense that a decision of what signs are “required or authorized for a public purpose” should be left to governing bodies that are actually accountable to the public and not to citizens or groups that are accountable only to themselves or a limited constituency. If this Board decides that the staff’s determination was incorrect, then the City would essentially cease to have a sign code. Staff would urge the Board to leave the determination of whether or not a sign has been authorized for a public purpose to government bodies which are created to protect the public interest and are accountable to the public for their actions and not leave the determination to private advertising companies that are accountable to no one but themselves.

Second, there seems to be some confusion on the difference between the purpose for the sign itself and the message contained on that sign. Just because a sign contains a message that could be described as a "public service" message does not make it a sign specifically authorized for a public purpose. In order to determine if a sign is for a public purpose you must look at the purpose for the sign itself and not the message or messages it contains. As was pointed out at the meeting there are currently billboards all over the City that contain "public service" messages. This does not make them exempt from the sign code. The purpose of the billboards is to make money for their owners, not to serve a public purpose. The Civic Center sign which Epic complains about was specifically authorized by the Civic Center Board to serve the public purpose of promoting and supporting the municipally owned and operated Civic Center. The messages contained on the sign are irrelevant. It is the purpose behind the sign itself that matters. If the Civic Center sign is analyzed without regard for the messages that it contains it is clear that it would still serve a public purpose. The same could not be said of the signs that Epic is proposing. The signs proposed by Epic are analogous to the billboards which contain public service messages. Epic is an outdoor advertising company that is in business to generate revenue for its owners. The signs Epic is proposing serve no purpose other than allowing Epic to place off-premises advertising, be it public service advertising or advertising for the "sponsors" that they refer to, without having to get a permit as required by the municipal code. Any other assertion by the appellant that they are simply constructing these signs in order to benefit the public and not themselves is frankly disingenuous.

cc: Michael Reynolds  
Brad Solon  
Jason Green