CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

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MEMORANDUM

TO: Mayor; City Council

FROM: Joel P. Landeen, Assistant City Attorney

DATE: 2-28-06

RE: Issues Relating to Second Appeal of Requirement that the Former Lamplighter Hotel Be Sprinkled.

In spring of last year Barker & Little was informed that it was required to provide sprinklers in conjunction with its proposed renovations to the former Lamplighter Inn property. The work Barker & Little is proposing to the property includes adding kitchens with stoves to the individual units. Essentially the Lamplighter is being converted from traditional transitory hotel rooms to non-transitory efficiency apartments. Converting from a transitory hotel/motel to a non-transitory hotel/motel would be a change of occupancy under the IBC. If an occupancy is changed the structure must be brought into compliance with the building code. There was also an issue of what code provisions actually apply in this situation.

This appeal was heard by the DARB Board on April 22, 2005. The DARB voted at the meeting on April 22, that the occupancy of the property was not changing. The chairman of the DARB Board found that the Board's decision on this issue made the issue of what code provisions to apply moot. The vote of the DARB Board on this issue was 4-2. Based on that decision Barker & Little would not have been required to sprinkle the building.

Due to the procedure in place at the time, the decision of the DARB was only a recommendation to the City Council. The Public Works Committee heard the recommendation on April 26th. They forwarded the item to the full Council without recommendation. On May 16th the full Council heard the appeal and voted unanimously to reject the DARB Board recommendation and to uphold the decision by staff that the building needed to be sprinkled.

Since the initial appeal was completed, the Council changed the process for appeals from the IBC. Under the newly adopted process, appeals from the IBC are heard by the DARB sitting as the International Building Code Board of Appeals (IBCBA). When the DARB is sitting as the IBCBA its decision on an appeal is now final. Barker & Little re-appealed the requirement that the Lamplighter be sprinkled shortly after this change became effective. The second appeal is identical to the previous appeal the City Council unanimously voted to reject on May 16th. Even Barker & Little recognizes that this is the same appeal. John Brewer, the President of Barker & Little, stated on February 6, 2006, in a letter regarding the second appeal, that "The DARB previously heard this issue on April 22, 2005 and concluded that there was no change in use on a vote of 4 to 2."

On the morning of February 28, 2006, the DARB sitting as the IBCBA heard the second appeal. A motion was made by board member Bob Brandt to dismiss the appeal on the basis that the board did not have jurisdiction to hear a matter that has already been finally decided. This motion failed on a 3-2 vote. Rich Huffman, the only attorney on the board, agreed with Mr. Brandt that the board did not have jurisdiction to hear the appeal on its merits. The board then proceeded to take testimony on the merits of the appeal. The Board voted 2-1 with 2 abstentions to grant Barker & Little's appeal, thus reversing the City Council's previous decision. Board members Steve McCarthy and Doug Andrews voted to grant the appeal and Bob Brandt voted against it. Rich Huffman abstained based on his opinion that the Board did not even have the authority to hear the appeal on its merits. Warren Fisk also abstained. He stated that he was abstaining because he could not decide which side was correct and did not feel he had the expertise necessary to make the decision.

It is the opinion of staff that the second appeal is not allowed based on the issue having already been appealed and finally decided by the City Council. The basis for this opinion is contained in a memo that was provided to the IBCBA and the City Council on February 15, 2006.

The decision of the IBCBA has put staff in a difficult position. If staff issues the permit they are disregarding the unanimous decision of the City Council and if they refuse to issue the permit they are disregarding the decision of the IBCBA. Staff needs further direction on how to proceed from the City Council. Essentially the Council has two choices:

1) Find that the IBCBA lacked jurisdiction to hear the second appeal based on the principle of res judicata and direct staff to not issue the permit; or

2) Find that the IBCBA had jurisdiction to hear the second appeal, despite the issue having being previously decided, and direct staff to issue the permit.

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February 28, 2006

Mr. John Brewer
Barker and Little Property Management
816 St. Joseph St.
Rapid City, SD 57701

Re: International Building Code Board of Appeals decision regarding Lamplighter Inn

Dear John:

As you are aware the International Building Code Board of Appeals approved Barker and Little's appeal on the Lamplighter Inn at today's meeting. As you are also aware this decision conflicts directly with prior decision of the Rapid City Common Council. This puts the staff in a very difficult position. As a result and as I mentioned at the meeting this morning, I have asked that this item be included on the next City Council meeting agenda. That meeting will be Monday, March 6th at 7:00 p.m. in the City Council chambers at 300 6th Street. I believe the item will appear under Growth Management items, so it will be closer to the beginning of the agenda than the end. I would encourage you or a representative of Barker and Little to be at the meeting so that your position can be considered by the Council. Until the Council makes a decision, I have directed that no permits be issued as a result of today's action by the International Building Code Board of Appeals. Please give me a call if you have any questions. With Best Regards, I am,

Sincerely,

Jason E. Green
City Attorney

JEG/adg

DRAFT

MINUTES
BOARD OF DEVELOPMENT APPEALS AND REVIEW

02/28/06

Attendance: Steve McCarthy, Warren Fisk, Bob Brandt, Deb Hadcock, Rich Huffman, and Doug Andrews. Absent: George Dunham.

City staff present was as follows: City Attorney Jason Green, Assistant City Attorney Joel Landeen, Brad Solon, Marcia Elkins, Bob Dominicak, Bill Knight, and Tim Behlings. Also present were Dave St. Pierre, John Brewer, Doug Hamilton, and Dave LaFrance.

1. **APPROVE MINUTES OF PREVIOUS MEETING.** Motion was made by Brandt, seconded by Andrews, and unanimously carried to approve the minutes of November 1, 2005.

Chairman Steve McCarthy told the Board that they are hearing an appeal today in the capacity as the International Building Code of Appeals Board and not as the Development Appeals and Review Board.

2. **SET MEETING AGENDA.** Motion was made by Fisk, seconded by Huffman, and carried to set the meeting agenda.

3. **HEAR APPEAL OF BARKER & LITTLE, INC. REGARDING THE REQUIREMENT TO SPRINKLE AND PROVIDE AUDIO PURSUANT TO SECTION 902.3.7 FOR ISSUANCE OF A BUILDING PERMIT, RE-SUBMITTED, FOR THE LAMPLIGHTER INN LOCATED AT 27 ST. JOSEPH STREET, RAPID CITY, SD.** Brandt said that given the fact that the City Council has voted to deny Barker & Little's request to waive the requirement to sprinkle the Lamplighter Inn located at 27 St. Joseph Street, he is going to move to immediately dismiss this appeal with no further discussion. Second by Huffman. Brandt said that the City Council voted unanimously and in the best interests of the citizens of Rapid City and for the safety of the citizens, that this building needs to be sprinkled. He said he is not going to second guess 10 elected members of the City. Andrews said he would challenge the City Council. He thinks this issue of sprinkling a motel lacks some common sense. He thinks it is not appropriate to require this particular situation to have sprinkling. He does not think anything that is a four plex or below should be required to be sprinkled. Huffman said he personally feels it should not have to be sprinkled but unfortunately, it was decided by the DARB Board by a vote of 6 to 4 in favor of the applicant and at that time, because the DARB Board was not the final decision maker, it went to the City Council. They were the final decision makers and they made a final decision. He does not think we have authority to hear this. Landeen said even if you don't agree with the decision of the City Council, it is a question of jurisdiction. It is not appropriate for this Board to hear the exact same appeal on the exact same issue. Dave St. Pierre, the ICC Certified Plans Examiner for Barker & Little, said at the prior meeting of this Board the issue of what code applies was not talked about. The issue is what code applies. Bill Knight said the Fire Code is very specific in reference to what has to be sprinkled and what does not have to be sprinkled. The Fire Code was approved by the City

Council and it specifically refers to all buildings, not just new buildings. Once an existing building does a significant remodel, then it is required to bring that building up to code. In both codes, the Building Code and the Fire Code, it states that specific will take precedence over general. Landeen said that the issue of which code applies was raised at the previous hearing but the Board did not get to that issue for discussion because of the decision that there was not a change in occupancy so therefore, the question of which code applied did not need to be addressed. He said res judicata not only blocks the same claim, but it prevents the same issue being raised based on different arguments. Brandt said he thinks there should be a vote taken on the motion and if the motion fails, then discussion on the merits of the appeal can be opened up. McCarthy said he would allow more discussion. John Brewer with Barker & Little said this appeal is being brought forward based on the fact that the Building Code applies in this instance. This project has been put back in their lap. They have gone through it again and have resubmitted for a building permit. It now comes back to this Board that now apparently has the authority to rule on whether 102.4 is appropriate or whether the Fire Code shall be appropriate. If under the Fire Code R-1 applies, it shall not be necessary to sprinkle. If, however, R-2 applies, the International Building Code is still specific and carves out an exception for this building. They are here today with a resubmitted new plan that was presented to the Building Official. Brandt said there is a huge increased chance of fire when you add kitchens to a structure. There is a much increased fire load. He thinks the Fire Department or the building authority should have the final decision on what code to follow, not the owners or designers. Landeen reiterated that this has previously been heard and the applicant had a chance to make its argument to the Council. They chose not to do that. Now they are back before this Board which he feels is not appropriate because the appeal has already been heard. McCarthy said Landeen told the DARB Board when they heard the case the first time that they did not have the authority to hear the case and make a final decision. Subsequently, the DARB Board has been appointed as the Board of Appeals and there is a valid application before the Board and the process presently in place should be followed. Landeen said even though the process has been changed, that does not give the applicant the right to go back and re-appeal something that has already been appealed to the City Council. It is the same issue. Huffman called the question. Motion failed with Brandt and Huffman voting "yes" and Fisk, McCarthy, and Andrews voting "no." Andrews asked if the decision of this Board will go back to City Council. Jason Green said if this Board decides to approve this appeal, contrary to the prior decision of the City Council, this puts the staff in a horrible position. He will direct the staff to take no action until the City Council directs us on how to proceed. Therefore, if this Board decides to approve the appeal, this matter will go back to the City Council for advice from the Council as to whether the staff follows their prior decision or this Board's decision. Landeen said there was a concerted effort on the part of City staff to remove many of the exceptions that are contained in the International Existing Building Code and by the action of the Council in adopting the Code. Brandt said this is not a non-combustible building. There are very old floor trusses that are dry and ceiling trusses that are very dry. In his opinion, a fire would spread incredibly fast. After further discussion, Huffman moved to approve the appeal. Second by Andrews. Fisk asked if the appeal is based on what code applies. John Brewer said that is correct. Tim Behlings said the Fire Code does still apply. It refers to the Building Code and the International Existing Building Code for the purposes of renovations and repairs, but the basis for fire sprinkler protection still stands within the Fire Code itself. Landeen said when you are doing code interpretation, in a situation where there are conflicting provisions, the most specific requirement applies. Dave St. Pierre explained why

they believe the Building Code applies in this situation. Landeen said the Fire Code as adopted by the City of Rapid City removed all reference to the International Existing Building Code. When Rapid City adopted the Fire Code it deleted the word "new" and it now says all structures must be sprinkled. Brandt called the question. A vote was taken on the motion with Andrews and McCarthy voting "yes", Brandt voting "no" and Fisk and Huffman abstaining. Huffman stated that he is abstaining because he does not believe this Board has the authority to hear this appeal, and Fisk stated he is abstaining because both sides have clear arguments and he does not feel qualified to make a judgment.

4. **ADJOURNMENT**. There being no further business to come before the meeting, the meeting adjourned at 7:35 AM.