CITY OF RAPID CITY

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MEMORANDUM

TO: Mayor Kooiker and the City Council

FROM: Joel P. Landeen, City Attorney

DATE: 2-26-15

RE: Application of the ADA to the Barnett Arena

At the Legal & Finance Committee meeting on February 25th there were concerns raised regarding the settlement agreement the City entered into with the Dept. of Justice last November and the applicability of the Americans with Disabilities Act (ADA) to the Barnett Arena. The committee took the discussion to the City Council meeting on March 2nd without recommendation. Based on the continued confusion over the issue, I felt it was necessary to provide a more detailed analysis of the settlement agreement and the application of the ADA to an existing structure like the Barnett Arena. I was also directed to respond to Bill Freytag's statement that the building codes do not apply to the City so the additional cost to bring the Barnett Arena into compliance with the building code is not a required cost.

A. Response to assertion that the requirements of the building code are not applicable to the City/Civic Center project.

Before addressing the ADA issues, I would like to respond to Mr. Freytag's comments regarding the application of the building code requirements to a City project. Mr. Freytag's assertion that the City does not have to comply with the building code was not accurate. The City is not exempt from the building code requirements. The following sections of the City Code are applicable:

15.04.150 Building permit required.

Except as otherwise specified this code, no building or structure or part thereof regulated by this code shall be erected, constructed, enlarged, altered, repairs as defined by code, moved, improved, removed, converted or

demolished unless a separate permit for each building or structure has first been obtained from the Building Official.

15.04.160 Building permit–Exceptions.

A. A building permit shall not be required for the following:

1. Building:

a. One-story detached accessory structures used as tool and storage sheds, playhouses and similar uses, provided the floor area does not exceed 120 square feet;

b. Fences not over 6 feet (1,829 mm) high;

c. Retaining walls that are not over 4 feet (1,219 mm) in height measured from the top of the footing to the top of the wall, unless supporting a surcharge;

d. Water tanks supported directly upon grade if the capacity does not exceed 5,000 gallons (18,927 L) and the ratio of height to diameter or width does not exceed 2 to 1;

e. Deck, platforms, walks, and driveways not more than 30 inches above grade and not over any basement or story below;

f. Painting, papering, tiling, carpeting, cabinets, counter tops and similar finish work;

g. Prefabricated swimming pools that are less than 40 inches deep, do not exceed 12,000 gallons and are installed entirely above ground;

h. Swings and other playground equipment;

i. Window awnings supported by an exterior wall which do not project more than 54 inches (1,372 mm) from the exterior wall and do not require additional support;

j. Replacement of siding and windows and brick or stone for 1- and 2-family dwellings except for dwellings and accessory structures located in a designated historic district or if individually listed in National Register of Historic Places per SDCL 1-19-11.1;

k. Dumpsters;

l. Gutters, downspouts, and storm windows;

m. Window replacement - where the structural component and egress as required by code is not altered; in 1- and 2-family dwellings or as exempted by Building Official. (“m” does not apply to Historical Districts); or

n. Structures or work performed on properties of the government of the United States of America, State of South Dakota, and County of Pennington;

2. Mechanical:

a. Portable heating appliances;

b. Portable ventilation appliances and equipment;

c. Portable cooling units;

d. Steam, hot water or chilled water piping within any heating or cooling equipment or appliances regulated by this title;

e. The replacement of any minor part that does not alter the approval of equipment or an appliance or make such equipment or appliance unsafe;

f. Portable evaporative coolers;

g. Self-contained refrigeration systems that contain 10 pounds (4.5 kg) or less of refrigerant, or that are actuated by motors of 1 horsepower (0.75 kW) or less;

h. Portable fuel cell appliances that are not connected to a fixed piping system and are not interconnected to a power grid; or

i. Water heaters installed in one- and two-family dwellings.

3. Electrical:

a. Placement of lamps in fixtures already installed by qualified persons in an approved manner, provided only qualified electricians may install or replace lamps in explosion-proof fixtures;

b. Connecting or disconnecting equipment to an approved receptacle by a suitable attachment plug;

c. Maintenance in labeled equipment or appliances, where the original installation was affected by a qualified electrician, when any such repair or maintenance work is not detrimental to the original wiring or connection;

d. Installation, alteration or repair of wiring, devices, appliances, or equipment for operation of signals or for transmission of intelligence, where such wiring, devices, appliances, or equipment operate at a voltage not exceeding 50 volts between conductors and which do not include generating or transforming equipment capable of supplying more than 50 watts of energy;

e. Installation of electric wiring, devices, or equipment to be installed by a public utility in the generation, transmission or sale of electric energy, or for the use of such a utility in the transmission of intelligence;

f. Work performed under any contract led by the state and supervised and inspected by the state;

g. Buildings, structures, or premises owned by the state or federal government, including, but not limited to, state owned schools;

h. Existing electrical systems in any building, although a change in use or occupancy has occurred. Such existing electrical system may remain in service only if adequate and suitable for the intended purpose, and in compliance with NFPA 73; or

i. When the electrical permit fee for the work is less than $10, or as provided by resolution of the Common Council.

B. Exemption from the permit requirements of this code shall not be deemed to grant authorization for any work to be done in any manner in violation of the provisions of this title or any other laws or ordinances of the city.

As you can see, in sub-section 15.04.160(A)(n), the federal government, state and county are exempted from the permit requirement, but the City is not. I also spoke with Brad Solon, the City's Building Official, and he confirmed that the City obtains permits and complies with the building codes on City projects.

B. Analysis of the application of the ADA to the Barnett Arena.

Title II of the ADA applies to public entities including the Rushmore Plaza Civic Center. The ADA prohibits discrimination against people with disabilities and prohibits a public entity from excluding people with disabilities from participating in, or being denied the benefits of, any services, programs, or activities because its facilities are inaccessible or unusable by people with disabilities. For existing facilities such as the Barnett Arena the ADA states "A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is *readily accessible* to and usable by individuals with disabilities." This provision does not necessarily require a public entity to retrofit existing structures so that they are in compliance with the ADA so long as the program, service or activity is readily accessible to those with disabilities. However, if the program, service or activity is not readily accessible to those with disabilities the public entity needs to make it readily accessible by either removing barriers to accessibility within the facility where the program or service is currently offered or by moving the program or service to a location that is readily accessible. It is **not true** to say that existing facilities are "grandfathered" in under the ADA and therefore do not need to be made readily accessible to people with disabilities. Even though the Barnett Arena was built prior to adoption of the ADA it must still be readily accessible to those with disabilities as long as programs, services or activities are offered there.

There have been suggestions that because there was no "formal" complaint by a citizen, the City cannot be legally compelled to comply with Title II of the ADA. The Dept. of Justice has the authority to enforce the provisions of the ADA with or without a formal complaint from a citizen. No matter how they got in the front door, once the Civil Rights Division of the Dept. of Justice determined the facility was not in compliance with Title II of the ADA it had the ability to file suit to enforce compliance with federal law and/or seek to withhold federal funds. Instead

of filing suit or withholding funds the Dept. of Justice sought the City's voluntary compliance with Title II through the settlement agreement the City approved in November of 2014. While the settlement was voluntary in the sense the City could have rejected the agreement, the likely result would have been a lawsuit brought by the Dept. of Justice or the withholding of federal funds from the City. Sub-section B(5) of the settlement agreement acknowledges the consideration for the agreement is that the Attorney General of the United States would refrain from filing suit against the City. The City needs to address the ADA issues under the settlement agreement whether or not the current proposal is approved. If the current proposal is rejected and the City takes no action it will be in violation of the settlement agreement (Paragraph 23). If the City is not in compliance with the settlement agreement and the parties are unable to resolve the issue the Dept. of Justice has the right to file suit to enforce the agreement or to seek compliance with Federal law (Paragraph 22). I think it is safe to assume that if the City decided to not comply with the terms of the settlement agreement the Dept. of Justice would file suit in federal court and seek to make an example out of the City.

Once the Dept. of Justice notified the City that the Civic Center was not in compliance with Title II of the ADA, the question the City needed to answer is whether or not the facility was readily accessible to those with disabilities. While many of the areas outside the Barnett Arena had been built in compliance with the ADA design standards or updated over the years so that they complied and likely would meet this standard, the Barnett Arena had not been updated and the City is well aware that there are significant accessibility issues within the arena. Even though the City may have been able to show that areas outside the Barnett Arena were readily accessible, the Dept. of Justice was looking at the whole facility and when the Barnett Arena is included in the analysis it becomes much less likely that the facility as a whole would be found to meet the readily accessible standard for existing buildings.

At the Legal & Finance Committee meeting Mr. Freytag held out a case involving an arena in Orlando as conclusive proof that we did not need to bring the Barnett Arena in compliance with the ADA. *Assoc. for Disabled Americans, et.al. v. City of Orlando*, 153 F.Supp.2d 1310, (Fed.Dist.Ct. 2001). While this case is relevant, it is certainly not the final word on the subject. I did discuss this case with you prior to approval of the settlement agreement as an example of a situation where a public entity successfully litigated the issue of whether a facility is readily accessible, but I also pointed out that the issue of accessibility is largely a factual question and no two facilities are exactly the same so the fact Orlando successfully litigated the issue would not guarantee the same result for Rapid City.

The Orlando case was decided by a Federal District Court Judge in Florida in 2001. I point this out because in the law there is a hierarchy of legal precedence. In the hierarchy of federal courts the lowest level are the federal district courts, next are federal circuit courts of appeal and at the top is the United States Supreme Court. All reported cases are either binding precedence or persuasive precedence. A decision that is binding precedence must be followed by lower courts. A decision that is persuasive may be used as the basis for a decision by another court, but other courts are not obligated to follow the decision and may reject the holding. A federal district court decision is persuasive authority and is not binding in any other courts. A decision of a federal circuit court of appeals is binding within that circuit, but is only persuasive authority within all other federal circuits. A decision of the United States Supreme Court is

binding authority in all federal courts. Since the Orlando case involved a decision of a federal district court in Florida it is not binding precedent in federal district court in South Dakota or in the Eight Circuit (the federal circuit court of appeals in which South Dakota is located).

Besides the fact it is not a binding decision on any courts in South Dakota, there are other factors that need to be taken into consideration when deciding how the holding in the Orlando case applies to Rapid City's current situation. The term "readily accessible" is a totally subjective non-quantifiable standard for public entities to meet. As such, it is totally dependent on the specific facts related to each facility and the perception of a judge or jury asked to decide if the facts they have heard over the course of a case make a facility readily accessible or not. Just because the federal district judge in the Orlando case held that the arena was readily accessible under the ADA despite the existence of barriers to accessibility within the facility does not mean that a different judge or a jury would come to the same conclusion if Rapid City were sued.

To highlight the fact a different judge could come to a different conclusion than the judge in the Orlando case, I can point to several cases which have been decided since the Orlando case which would cause me concern if the City were sued over compliance with the ADA's program accessibility standard. In *Chaffin v. Kansas State Fair Board*, 348 N.W.2d 850, (10th Cir.Ct.App. 2003), a decision by the Tenth Circuit Court of Appeals, a group of disabled individuals sued the Kansas State Fair alleging that the grandstand was not readily accessible to those with disabilities. People attending events at the grandstand in wheel chairs were seated in a designated wheel chair section. The testimony demonstrated that the view of concerts for people in this section was obstructed by people standing in front of it, that it was difficult to reach the restrooms and concessions from the wheelchair section and there were additional issues with the parking and restroom facilities for those with disabilities. The grandstand was constructed prior to adoption of the ADA and the fair argued that strict compliance with the ADA design standards was not required. While the court acknowledged that strict compliance with the current ADA design standards was not required, it held that the grandstand was not readily accessible to those with disabilities and needed to be modified so it was readily accessible. Another case which caused me concern is *Brown v. County of Nassau*, 736 F.Supp.2d 602 (Fed.Dist.Ct. 2010). Mr. Brown is a disabled individual who occasionally attended New York Islander hockey games at a coliseum owned by Nassau County. He alleged that the arena was not readily accessible to those with disabilities. He hired an expert who identified well over a hundred violations of ADA design standards within the coliseum. The county filed a motion for summary judgment arguing in part that the judge should dismiss the case based on the fact that disabled individuals were able to attend games at the facility was proof that it was readily accessible to those with disabilities. The court completely rejected the County's argument that just because disabled individuals could attend games this necessarily meant the facility complied with the readily accessible standard under the ADA. The County also argued that since the building was built before the ADA was adopted it was not required to meet current ADA design standards. The court acknowledged that the County did not need to strictly comply with the current ADA design standards, but held that the violations of the current design standards identified by the plaintiff's expert could be used as evidence the facility was not readily accessible. Based on the violations identified by the plaintiff's expert, the court denied the county's motion to dismiss the case. I went on to the federal courts website and discovered that prior to going to trial the county and

plaintiff entered into a settlement agreement whereby the county agreed that within 18 months of the agreement it would either begin construction of a new arena built to current ADA standards, or if a new arena was not built, to correct many of the numerous ADA violations identified by the plaintiff's expert.

The City has reports prepared by experts which identify hundreds of ways in which the Barnett Arena does not comply with current ADA standards. While all of the cases I have cited are only persuasive authority, I have no doubt based on the case law I have read that the evidence of the Barnett Arena's lack of compliance with current ADA standards would be admissible to show that the facility was not readily accessible under the program accessibility requirements of Title II of the ADA. While no one can predict with a 100% certainty how a judge or jury would ultimately decide a case against the Civic Center, based on the fact that the Barnett Arena is 40 years old, was not designed with accessibility for disabled people as a consideration, and we have a report identifying hundreds of barriers to accessibility, it is my professional opinion successfully defending an ADA lawsuit brought by the Dept. of Justice would be difficult at best. Based on our discussions regarding this matter, I assumed you all came to the same conclusion which is why you unanimously approved the settlement agreement.