

**MEMORANDUM OF UNDERSTANDING  
BETWEEN THE CITY OF RAPID CITY AND FISCHER FURNITURE, INC.,  
RELATING TO RIGHT-OF-WAY USE**

This Memorandum of Understanding (“MOU”) is made and entered into by and between the City of Rapid City, a South Dakota municipal corporation, located at 300 Sixth Street, Rapid City, South Dakota 57701 (the “City”), and Fischer Furniture, Inc., a South Dakota corporation, with its principal place of business at 1802 West Main Street, Rapid City, South Dakota 57702 (“Fischer”).

**RECITALS**

WHEREAS, Fischer is the lessee of certain real property located at 1700 West Main Street, Rapid City, Pennington County, South Dakota, legally described as follows:

Lot RU-106 (also in 2N-7E SEC 35), RU Lots Subdivision, Section 2, Township 1N, Range 7E, Black Hills Meridian, Rapid City, Pennington County, South Dakota

(the “Property”); and

WHEREAS, the west end of the Property abuts City right-of-way depicted on Exhibit A, attached hereto and incorporated herein by reference (the “City right-of-way”); and

WHEREAS, Fischer desires to erect, on an annual basis, a temporary tent within the City right-of-way, the tent to be in place for approximately twelve (12) consecutive days during the time-frame of September to October of each year, and the tent to be used to display furniture; and

WHEREAS, the City has determined that an annual twelve (12) day placement and subsequent removal of a temporary tent will not materially affect the City’s rights to and use of the right-of-way; and

WHEREAS, The City is willing to authorize the annual placement and removal of a temporary tent within the City right-of-way in accordance with the terms and conditions of this Memorandum of Understanding.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual covenants, promises and conditions in this Memorandum of Understanding (“MOU”), the parties agree as follows:

1. Location of Right-of-Way. Fischer acknowledges and admits the existence of the City right-of-way as shown on Exhibit A.

2. Authorization for Tent Location. Fischer may erect on an annual basis a temporary tent within the City right-of-way, consistent with the following: the tent will be in place for no more than twelve (12) consecutive days during the time-frame of September to October of each year; and the tent will be used only to display furniture and other wares for sale (the foregoing stipulations for the Authorization for Tent Location are hereinafter collectively referred to as the “Annual Tent Event”). No Annual Tent Event may be enlarged or altered materially without subsequent permission of the City and amendment of this MOU. Fischer acknowledges and admits that each Annual Tent Event is an encroachment in the City right-of-way. The City’s knowledge of the encroachment and execution of this MOU shall not constitute waiver, abandonment or estoppel of its rights in the City right-of-way.

3. Term and Renewal. The initial term of this MOU shall be for five (5) years, commencing on the Effective Date enumerated in ¶ 9. Upon expiration of the initial term, this MOU shall automatically renew for successive additional terms of one (1) year, unless either

party provides written notice of non-renewal no later than sixty (60) days prior to expiration of the initial term or any successive renewal term.

4. Termination for Public Purposes. If the City's Director of Public Works, or his or her designee, determines that the City right-of-way, or any part thereof, is necessary to construct or install street improvements, or if the City right-of-way is needed for public purposes, this MOU shall terminate immediately. Should the City exercise its option to terminate this MOU pursuant to this paragraph, such termination will be effective upon mailing of written notice to Fischer, at which time Fischer shall have no further rights under this MOU.

5. Termination for Default. The City shall have the option of terminating this MOU immediately if any of the following instances of default occur:

- a. Fischer dissolves or is administratively dissolved;
- b. Fischer enters any type of proceedings related to its insolvency, whether bankruptcy, receivership, or otherwise;
- c. Fischer ceases its furniture business operations.

Should the City choose to exercise its option to terminate this MOU pursuant to this paragraph, such termination will be effective upon mailing of written notice to Fischer, at which time Fischer shall have no further rights under this MOU.

6. Insurance. Fischer shall obtain insurance that covers all activities relating to each Annual Tent Event. Such insurance policy(ies) shall name the City of Rapid City as an additional insured with respect to all activities under this MOU. Acceptable Certificates of Insurance and Endorsements confirming the above coverage shall be filed with the City before commencing any work pertaining to each Annual Tent Event and/or operation of the same as a sales venue.

Such Certificates shall afford the City thirty (30) days written notice of cancellation or of a material change in coverage. The City's failure to obtain from Fischer a Certificate of Insurance conforming to the foregoing requirements shall not be deemed a waiver of any of the foregoing requirements. This paragraph shall in no way limit the provisions of the indemnification section.

7. Indemnification. Fischer agrees to indemnify and hold the City harmless from and against any loss, liabilities, claims, demands or causes of action (including any costs and attorneys' fees incidental to the defense thereof by the City), for deaths or injuries to persons or loss of or damage to property sustained by Fischer, its representatives, agents or consultants, guests or invitees, or any other person or entity, arising out of or in connection with the putting up and/or taking down, maintenance and/or use pertaining to each Annual Tent Event, except for loss, liabilities, claims, demands or causes of action caused solely by the negligence or willful misconduct of the City, its officers, employees, representatives, agents or consultants. In the event of any such loss, liability, claim, demand or cause of action caused by the joint negligence of Fischer, its representatives, agents or consultants, guests or invitees, and the City, Fischer's indemnification of the City shall be enforceable to the extent of Fischer's negligence. If any action or proceeding is brought against the City by reason of such claim, Fischer upon notice from the City, shall defend the same at Fischer's expense through legal counsel reasonably satisfactory to the City. Fischer shall give the City prompt notice in the event of casualty or accidents involving any Annual Tent Event. Fischer's indemnity of the City shall survive termination of this MOU.

8. Assignment. Fischer shall not delegate or assign either in whole or in part any of its rights and obligations under this MOU without written authority from the City.

9. Effective Date. This MOU shall be effective upon execution by both parties.

10. Notices. All notices given hereunder shall be in writing, and made by hand delivery or certified mail, return receipt requested, to the parties at the following addresses:

City of Rapid City  
Attn: Finance Officer  
300 Sixth Street  
Rapid City, SD 57701

Fischer Furniture, Inc.  
Attn: Sam Fischer  
1802 West Main Street  
Rapid City, SD 57702

Each party shall have the right, by written notice given to the other pursuant to the provisions of this paragraph, to change from time to time the respective addresses at which notice shall be given. The parties agree that respective notification of any changes in contact information or the address of business correspondence shall be provided within thirty (30) days after said change.

11. Recitals. The recitals set forth above constitute an integral part of this MOU and are incorporated herein by this reference as if fully set forth herein as agreements of the parties.

12. Amendment. This MOU may only be amended by a written document duly executed by all parties.

13. Waiver. The failure by one party to require performance of any provision herein shall not affect that party's right to require performance at any time thereafter, nor shall a waiver of any breach or default of this MOU constitute a waiver of any subsequent breach or default or a waiver of the provision itself.

14. Entire Agreement. This MOU constitutes the entire agreement between the parties, and supersedes all prior negotiations, agreements and understandings, whether oral or written.

15. Counterparts. This MOU may be executed in counterparts; each such counterpart shall be deemed an original and when taken together with other signed counterparts, shall constitute one MOU.

16. Severability. If any provision of this Agreement is held unenforceable by a court of competent jurisdiction such holding shall not affect the remaining provisions of this Agreement, which shall remain in full force and effect.

17. Controlling Law/Venue. All disputes regarding the construction, interpretation and the parties' rights and obligations under this MOU will be governed by the laws of the State of South Dakota, without regard to any conflicts of law provisions. The parties agree to submit to the exclusive venue and jurisdiction of the State of South Dakota, in Circuit Court, Pennington County.

18. Headings. The headings and numbering of the different paragraphs of this MOU are inserted for convenience only and are not to control or affect the meaning, construction or effect of each provision.

**[THIS SPACE INTENTIONALLY LEFT BLANK]**

Dated this \_\_\_\_ day of \_\_\_\_\_, 2013.

CITY OF RAPID CITY:

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer

(SEAL)

STATE OF SOUTH DAKOTA        )  
  )ss.  
COUNTY OF PENNINGTON        )

On this the \_\_\_\_ day of \_\_\_\_\_, 2013, before me, the undersigned officers, personally appeared Sam Kooiker and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing document for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

(SEAL)

\_\_\_\_\_  
Notary Public, South Dakota  
My Commission Expires: \_\_\_\_\_

FISCHER FURNITURE, INC.:

\_\_\_\_\_  
By: Sam Fischer  
Its: Vice President

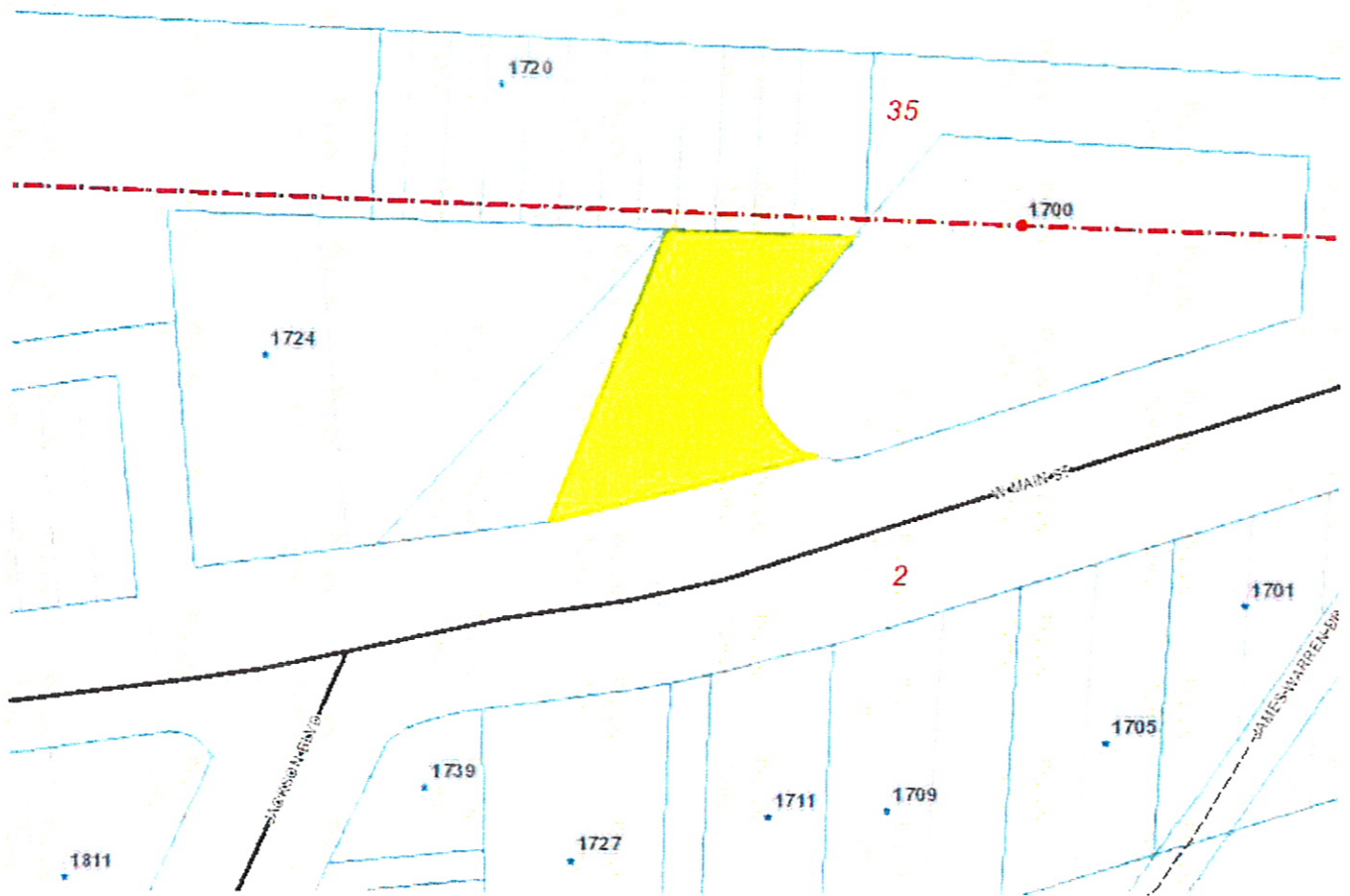
STATE OF SOUTH DAKOTA        )  
  )ss.  
COUNTY OF PENNINGTON        )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2013, before me the undersigned officer, personally appeared Sam Fischer, who acknowledged himself to be the Vice President of Fischer Furniture, Inc., a corporation of Rapid City, South Dakota, and that as such Vice President, being authorized so to do, executed the foregoing document for the purposes therein contained by signing the name of Fischer Furniture, Inc., of Rapid City as Vice President.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

(SEAL)

\_\_\_\_\_  
Notary Public, South Dakota  
My Commission Expires: \_\_\_\_\_



**“City Right of Way” Designated in Yellow**

EXHIBIT "A"