CITY OF RAPID CITY

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MEMORANDUM

TO: Members of the Zoning Board of Adjustment

FROM: Carla Cushman, Assistant City Attorney

DATE: November 25, 2015

RE: City enforcement of encroachments into setbacks / right-of-way

Summary

The ZBOA asked me to look into enforcement options, including fines, for properties that encroach into the setbacks and/or right of way and then seek a variance after the construction is complete. As I examine below, the City does not have the legal authority to issue a civil penalty/fine to individuals who improperly encroach into the setback/right of way. The City does have the abilities to issue criminal citations for encroachments and to seek court orders to remove encroachments.

Background

At its October 8, 2015 meeting, the ZBOA considered a variance application for a property at 404 St. Onge Street to reduce the front yard setback from 25 feet to 0 feet. More than a year before, the applicant had sought a variance to reduce the setback from 25 feet to 5 feet in anticipation of constructing an addition to the commercial property; the ZBOA granted the variance request. However, once construction was complete this summer, the property owners learned that the building actually extended through the property line and 1.9 feet into the West Rapid Street right-of-way. Consequently, the owners filed a second variance request to reduce the setback to 0, along with a vacation of right of way application to vacate 1.9 feet of the right of way along West Rapid Street.

During discussion on this item, ZBOA members asked several questions about how the City could address errors in development and construction when a property is constructed within

the setback/right-of-way and what options the ZBOA has when a property owner "asks for forgiveness" through a variance after the building is already constructed. Both staff and ZBOA members agreed that such a situation is not uncommon and puts the City in a difficult position when the property owner has already incurred the expense of the construction. At the same time, the error is not the City's, but belongs to the property owner or his/her contractor, and the City should not be bound to grant forgiveness when the encroachment could and should have been avoided.

Fines

The City does not have the authority to charge civil penalties, except in very limited circumstances. Therefore, the City cannot generally use fines to enforce its ordinances, including its zoning ordinances. Instead, R.C.M.C. 1.12.010 provides that violations of city ordinance are criminally enforced, and a person who is convicted of such a violation may be fined $500 or given 30 days in jail, or both. "Each day any violation of this code or other ordinance continues shall constitute a separate offense," meaning that theoretically every day an encroachment continues could be an additional criminal citation. *RCMC 1.12.010.* The City Attorney's office does not generally prosecute encroachments into setbacks as a criminal matter and would need direction from Council to do so.

However, individuals who build structures in the setback must pay $250 to apply for a variance, plus $20 for the mailing list for neighbor notification. Since the variance applications which arise out of existing encroachments (as opposed to potential future encroachments) may require more staff time and effort to generate a staff opinion and report, it may be possible to increase the application fee for those variance requests which come about after the encroachment already exists. Any application fee must be an amount that be commensurate to the additional staff time needed to review these applications, and it could not be an arbitrary amount. An increased application fee would not be a fine or civil penalty, per se, but an additional cost nonetheless to the people who carelessly build in the setback.

Demolition / removal of encroachment

If no variance is sought, or if a variance is requested and not granted, then the encroachment is illegal. SDCL 11-4-7 gives the City authority to seek injunctive relief in court to abate or demolish the encroachment, to prevent occupancy of the building, or to otherwise address the illegality. Whether or not the City seeks to require demolition of the encroachment is a case-by-case decision; as the Board discussed at the October meeting, many issues arise in the decision to pursue the demolition of the encroachment.

The South Dakota courts have looked at the issues around ordering an encroaching property to be demolished. Generally, the courts have been reluctant to demolish structures that are wholly constructed even when they are clearly in violation of the zoning code and/or applicable restrictive covenants. Because the courts' concerns and considerations mirror those

before the City bodies who are reviewing similar encroachments, I've summarized their analyses below:

- In Hentz, the Court noted that when evaluating whether an illegal building should be removed, one "factor to guide a court in issuing an injunction is the balancing of the equities," or the "relative hardship test." *Hentz v. City of Spearfish, 2002 S.D. 74, ¶10, 648 N.W.2d 338, 340.* In other words, the harm to the complaining neighbor (or City, if it's right of way) from the encroachment is balanced with the harm to the offending neighbor if the encroachment was demolished. When the burdens of the wrongdoer are balanced with the burdens on the neighbor, the court may decide that removal of the building is too inequitable. Id. *at ¶11 (concluding that the hardship of requiring removal of the addition outweighs the detriment to Hentz); see also Harksen v. Peska, 1998 S.D. 70, ¶33, 581 N.W.2d 170, 176 (stating that "[i]t would be inequitable to require the destruction of a $100,000 summer residence when there really is no burden on Harksen" because the cabin is "barely visible from the edge of Harksen's land" and not visible at all from his building site").*

- The *Hentz* court said that a critical factor of the balancing of the equities is "knowledge." Hentz *at ¶10.* "[S]ome courts will not apply this [relative hardship] test if one deliberately builds a structure in violation of restrictions. This, in turn, allows injunctions that require destruction of the property." Id. *But see Harksen, 1998 S.D. 70, ¶32 (finding that removal of the building was too harsh even though "Peska knew he was violating the covenants" in building the home).*

- The state of the construction (fully completed, partially completed, etc.) was persuasive to the Court as a matter of the cost to the encroaching party in removing the encroachment. Hentz, *at ¶4; see also Harksen, 1998 S.D. 70 at ¶28 (noting that Peska ignored communications from Harksen's attorney that the structure violated the covenants and ignored the summons and complaint for the lawsuit and continued to build the structure for 3 more months).*

- In cases where the City was in error for wrongfully issuing a building permit, the Court was disinclined to require the removal since the encroachment was constructed pursuant to an issued building permit. *See* Hentz *at ¶2 (building permit issued because City had misapplied its own zoning ordinance);* Id. *at ¶11, (finding that the neighbor had "proceeded under the good faith assumption that they were building in compliance with the zoning laws, and received a building permit.").*

Please feel free to give me a call at 394.4140 to discuss further or if you have any questions.