

The Law Offices of

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February 12, 2018

VIA U.S. MAIL AND EMAIL

Joel Landeen
Office of the City Attorney
300 Sixth Street
Rapid City, SD 57701

Re: Epic Outdoor Advertising

FOR SETTLEMENT PURPOSES ONLY

Dear Joel,

I write again to try to settle the matter of Epic v. ZBOA and some related billboard issues.

Obviously, the City of Rapid City lost Epic v. ZBOA. The Trial Court relied on the very case (*Lamar*) that I cited and read to the ZBOA at the hearing. The ZBOA ignored it or refused to consider it due to their stated animosity of Epic's business. Ms. Modrick's spirited speech as president of scenic Rapid City asking the ZBOA to ignore my client's vested (grandfathered) legal rights also contributed to the violation of my client's clear legal rights.

The City of Rapid City will never be able to prohibit full motion video on Epic's four public purpose boards at this point absent a settlement being reached.

While the Epic v. ZBOA matter was pending, we had a global settlement in place for both Epic v. Rapid City and the Epic v. ZBOA matters. That settlement would have been incredibly beneficial to the City and its taxpayers. The City was to pay no settlement money, my client would have agreed to stop running motion, the public purpose boards would have become standard billboards to be regulated as all other billboards, and an interstate district would have been introduced that would have allowed for an industry standard (and Sioux Falls, Brookings etc.) 1448 board with lower than industry standard pole height. The City would have been released from any money damages on the Epic v. RC lawsuit for its denial of other Epic permits based on the ban it created and the City would have bought itself a lengthy, if not indefinite, moratorium on the sign credit challenge. That settlement agreement was breached.

The City of Rapid City subsequently lost the Epic v. ZBOA case and is subject to an appeal to the South Dakota Supreme Court for Epic to obtain its legal fees which I am confident will occur on appeal when the City of Rapid City is unable to explain the comments of the ZBOA members or the fact it ignored the South Dakota Supreme Court's decision in *Lamar*. The City of Rapid

City also cannot prohibit full motion video on the public purpose signs, the City of Rapid still has to try to regulate public purpose boards without definition or sufficient protocols in place for doing so, and is now facing a sign credit challenge for certain now that Lamar Outdoor Advertising is intervening in Epic v. RC. That in and of itself could get very expensive.

My client still wants to settle this and related matter other than sign credits which is now out of our control. Epic's settlement proposal remains simple and straight forward:

1. Epic will cease running full motion video on the public purpose boards. Settlement is now the only way the City will ever obtain this remedy (this was previously paragraph 4 of the prior settlement agreement reached);
2. The City will amend its ordinances to implement the interstate district to allow for off premise signs to be six hundred and seventy two square feet (672) with a maximum pole height of forty feet (paragraph one of the settlement agreement previously reached);
3. The City will amend its ordinance to remove the requirement to obtain a conditional use permit for any work to any existing or new off premise signs. If a sign is legal by right, it shall be a legal sign (this is a modified version of paragraph 2 of the prior settlement agreement reached). Quite honestly, and based on recent events, I do not believe that the City's conditional use permit requirement is enforceable anyway;
4. The four public purpose boards will be considered standard billboards under the applicable code removing the City of Rapid City's issues with enforcement and bringing them within the standard regulations applicable to all billboards in the municipality (paragraph 3 of the prior settlement agreement reached);
5. My client will waive one half of his attorney's fees and costs associated with having to pay my law firm to have the Trial Court simply reinforce the settled legal precedent (*Lamar*) both the ZBOA and the City ignored leading up to the Trial Court's decision. Again, the Court cited one case in ruling in Epic's favor, the Lamar case the ZBOA and City were certainly aware of because they were cited at both the ZBOA hearing and the City was a party to that litigation.

Last, and I have raised this in writing several times before, but Ms. Modrick has an absolute conflict of interest in this matter. I attach my prior letters (exhibits 1 and 2) to your office identifying this clear conflict. Ms. Modrick previously acknowledged my client's grandfathered legal rights in writing and then took a position wholly contrary to such grandfathered legal rights when she argued before ZBOA against Epic and its use of motion. Ms. Modrick now sits on council, and she still has an interest and maintains an officer position with Scenic Rapid City. I have no idea why Ms. Modrick continues to be allowed to be advocate, judge, and "decider" on this matter (including the City's right to appeal) but it is violative of settled conflict of law as well as the City of Rapid City's own resolutions. The fact that Ms. Modrick was allowed to participate in the vote to approve the appeal of the Trial Court's decision in Epic v. ZBOA was unbelievable in light of the conflict of interest that exists.

I attach a Complaint for Declaratory Relief against the City of Rapid City and Ms. Modrick both individually, in her role as former president and now director of Scenic Rapid City, and as a Council person (attached as exhibit 3). If the City of Rapid City does not confirm in writing that Ms. Modrick is conflicted in considering the settlement offer above, or participating in any such discussions as to Epic's billboard business in the future, I will have it served promptly to assure that same result through the Courts. Obviously, if it is served, my client will also be seeking money damages. Please also understand that I am continuing to research the history of the conflict of interest, and Ms. Modrick's participation in the City's conduct, both before and after her election. In sum, I believe there may well be causes of action which would make this a Federal District Court lawsuit against the City of Rapid City as well.

I look forward to the City of Rapid City's written response to the issue of conflict, as well as the settlement offer above. My client has indicated that this offer is open and subject to a final resolution as can be agreed up until the date in which the Appellant's Brief on the Issue of Attorney's Fees and Costs is submitted to the South Dakota Supreme Court.

Respectfully,

CLAYBORNE, LOOS & SABERS, LLP

A handwritten signature in black ink, appearing to read "Michael K. Sabers", written in a cursive style.

Michael K. Sabers

MKS/ekh
cc: client
Encl.

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August 30, 2017

SENT VIA EMAIL AND U.S. MAIL

Mr. Joel Landeen
Office of the City Attorney
300 Sixth Street
Rapid City, SD 57701

Re: Rapid Center, LLC, Appeal and Conflict Issue

Dear Joel,

As you know, I represent Epic Outdoor Advertising (“Epic”). Epic recently was issued a permit by right for a billboard which we have referred to as the Dyess Avenue sign (File No. 17UR015). The City of Rapid City still required a conditional use permit (“CUP”) despite the billboard being permitted by right but that CUP was ultimately also granted for this billboard. After the conditional use permit was granted, an entity named Rapid Center LLC appealed the grant of the conditional use permit on August 15, 2017. My understanding is that appeal is scheduled to be heard at the September 5, 2017 City Council Meeting.

1. Rapid Center LLC lacks standing to appeal

Rapid Center LLC lacks standing to appeal the decision to approve the conditional use permit. As you know, and within the document titled: “Community Planning & Development Services, Application for Conditional Use Permit” the following language is pertinent:

Appeal Procedure:

2. Appeals must be made in writing and submitted to Community Planning & Development Services by close of business on the seventh full calendar day following action by the Planning Commission.

The South Dakota Supreme Court has stated a local zoning board's decision to grant or deny a conditional use permit is quasi-judicial and subject to due process constraints. *Armstrong v.*



3. Lisa Modrick has a conflict of interest.

I previously wrote you in regards to a settlement proposal on the Epic v. ZBOA matter and indicated that my client was insisting that the City Council vote on the conflict of interest that existed with Ms. Modrick under SDCL § 6-1-17 prior to considering the same. Although you subsequently indicated that there was no interest in the settlement offer, you did not indicate whether such vote had taken place prior to City's discussions of that offer. I write again in regards to this matter and the conflict generally.

As noted above, the City Council is sitting in a quasi-judicial capacity on the Rapid Center LLC appeal. I am attaching copies of the Scenic Rapid City Articles of Incorporation that illustrate that Ms. Modrick was the sole incorporator and registered agent of such entity. She was also a major shareholder, and the South Dakota Secretary of State's office lists the entity as having 5,000 shares of stock outstanding a \$1.00 per share (attached as Exhibit 2). The last filing with the South Dakota Secretary of State's office (2015) indicates that Ms. Modrick remains a director of Scenic Rapid City (changed from President for years 2012-2014) (attached as Exhibit 3). There is nothing in the corporate filings indicating that Ms. Modrick's shares in stock in Scenic Rapid City have been terminated, reduced, or otherwise eliminated.

Furthermore, and considering that Ms. Modrick continues to be a director of Scenic Rapid City, it is clear that she cannot under any circumstances sit in a quasi-judicial capacity on any dispute or appeal pertaining to billboards or my client Epic Outdoor Advertising's legal interests. A review of Ms. Modrick's campaign finance disclosures reflect that the current president and vice president of Scenic Rapid City donated money to Ms. Modrick's campaign (Attached as Exhibit 4). Scenic Rapid City continues to actively lobby the City Council on all issue of billboards, including the Epic v. ZBOA matter (in which Ms. Modrick apparently participated throughout), and now in the appeal coming before the City Council in this quasi judicial proceeding (Rapid Center LLC appeal of grant of CUP).

I write, again, to request that the City Council conduct the vote under SDCL § 6-1-17 and based on the above determine that Ms. Modrick has a conflict of interest and under South Dakota law should not be a decision maker in this quasi-judicial CUP appeal proceeding. Ms. Modrick, and the entity in which she maintains a financial interest, and director position are lobbying against Epic's legal rights in this and other matters.

I do not believe there is any sitting Judge in the State of South Dakota that would believe it appropriate to participate in, consider, or rule on such issues under facts such as those presented here. If the City Council will not agree to conduct such vote, as was previously requested in writing in another scenario where Ms. Modrick was undeniably conflicted (having argued as president at the ZBOA hearing for Scenic Rapid City) and determine that a conflict exists, my client will have no other choice then to seek judicial intervention through a Writ and determination of conflict. Just as there are other Circuit Court Judges who are available to hear cases fairly and impartially, when conflicts arise, there are other Council Members who can address the issues identified in this letter, and who could have considered, impartially, the prior settlement offer without hearing from a conflicted Council member.

SUMMARY

A delinquent out of state entity, that has not paid its fees, and which is not represented by a South Dakota lawyer, cannot maintain an appeal of the grant of the CUP to my client for the Dyess Avenue billboard. Furthermore, the involvement of a City Council person in the prior, and current proceeding, who has a clear and undeniable conflict of interest is not permitted to participate or vote on these matters by South Dakota law. As such, my client, again, requests the Council conduct the statutory vote and find that Ms. Modrick is clearly conflicted from voting on this or other billboard matters. In sum, Ms. Modrick's continued insistence on participation in all of these matters is further evidence of her conflict of interest. I need to hear from you prior to the September 5, 2017 meeting on the issues above.

Sincerely yours,

CLAYBORNE, LOOS & SABERS, LLP



Michael K. Sabers
Attorney for Epic Outdoor Advertising

MKS/pjh

Enclosures

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July 19th, 2017

SENT VIA EMAIL

Mr. Joel Landeen
Office of the City Attorney
300 Sixth Street
Rapid City, SD 57701

Re: Epic Outdoor Advertising v. The Zoning Board of Adjustment of the City of
Rapid City
Civ. No. 15-1593

Dear Joel,

I am writing to reduce to writing the settlement offer we discussed.

This settlement offer would result in the dismissal of the Epic Outdoor Advertising v. ZBOA case. My client Epic Outdoor Advertising will agree to cease running motion on all public purpose boards, and waive the claim for attorney's fees and costs presented in the Petition (attached as Exhibit 1 with exhibits), in exchange for a variance on the otherwise legal location and board permitted off of Dyess Avenue. The variance would allow for a pole no larger than 40' tall, and a board 14x48 in size. In sum, a standard size and height for interstate billboards throughout the entire State of South Dakota. This billboard, as we have discussed, would largely serve the Rushmore Crossings area and many new stores which have built and located their businesses in that area.

I also ask that prior to your client discussing this offer that your client take up the issue of conflict of interest of Ms. Modrick under SDCL 6-1-17. Ms. Modrick appeared at the underlying ZBOA hearing and spoke out as President of Scenic Rapid City. Her comments reflect, at a minimum, a conflict of interest. My client requests that your client conduct the vote identified in SDCL 6-1-17 (2) to determine whether two thirds of the Council believes that such conflict of interest exists prohibiting Ms. Modrick's involvement in either the discussion or vote on such settlement offer as identified in the cited statute.

EXHIBIT

2

Blumberg No. 5208

My client is continuing to seek remedies to the issues in dispute. The above referenced settlement proposal is simple, straightforward, ends a pending lawsuit, removes the City's risk of paying attorney's fees and costs as requested in the Petition, and will provide needed advertising to the Rushmore Crossings area. It seems to be a win / win / win on all sides.

I look forward to hearing from you on the City's response to the settlement offer.

Sincerely,

A handwritten signature in black ink, appearing to read "MS", written in a cursive style.

Mike Sabers
Attorney for Epic Outdoor Advertising

STATE OF SOUTH DAKOTA)
)SS
 COUNTY OF PENNINGTON)

IN CIRCUIT COURT
 SEVENTH JUDICIAL CIRCUIT

Civil File No. _____

EPIC OUTDOOR ADVERTISING, a)
 South Dakota corporation,)
)
 Plaintiff,)

**COMPLAINT FOR DECLARATORY
 JUDGMENT AND OTHER RELATED
 RELIEF**

v.)
)
)

LISA MODRICK,)
 Individually, and as a Council Member of)
 the City of Rapid City Common Council)
 (City Council), and as Member and)
 Officer of Scenic Rapid City,)

AND;)
)

THE CITY OF RAPID CITY, a South)
 Dakota Municipal Corporation,)

Defendants.)

Plaintiff, by and through its attorney, Michael K. Sabers, hereby files this Complaint for Declaratory Judgment and other Related Relief.

PARTIES

1. Plaintiff, Epic Outdoor Advertising (hereinafter “Epic”) is a South Dakota corporation in good standing conducting business in the State of South Dakota.
2. Plaintiff maintains its office at 720 Saint Anne Street, Rapid City, South Dakota, 57701.
3. Defendant, Lisa Modrick (hereinafter “Modrick”) is a Council Member of the City of Rapid City’s Common Council (City Council) for the First Ward. Modrick is also the incorporator, registered agent, shareholder, and former President of Scenic Rapid City



("Scenic"). Modrick is a current director of Scenic. During her campaign, Modrick's campaign finance disclosures reflect the current president and vice president of Scenic contributed to her successful campaign to become elected to City Council.

4. Defendant, City of Rapid City (hereinafter "City") is a South Dakota municipal corporation existing under the laws of the State of South Dakota and located at 300 Sixth Street, Rapid City, South Dakota 57701.

JURISDICTION

5. Jurisdiction is proper as to all defendants in that the acts complained of took place in Pennington County, South Dakota.

GENERAL ALLEGATIONS

6. Plaintiff incorporates the preceding paragraphs by reference as through set forth in full,
7. Scenic was recognized by the state of South Dakota as an Organization on March 9, 2011.
8. Scenic's Articles of Incorporation provide in ARTICLE II: CAPITAL STOCK, "The number shares of that the corporation is authorized to issue is Five Thousand (5,000) shares of common stock having a par value of One Dollar (\$1.00) per share.
9. Under ARTICLE III: PRINCIPAL EXECUTIVE ADDRESS the address listed is 803 Saint Patrick Street, Rapid City, South Dakota; the same address listed under ARTICLE IV of the Registered Agent, Modrick.
10. Modrick's address is also listed under ARTICLE V: INCORPORATOR.
11. Scenic's website states: "Scenic Rapid City Committee, Inc. is a coalition of residents who value the quality of life in Rapid City. Our supporters include citizens and businesses who are concerned about the preservation to keep Rapid City Scenic. Our

primary mission is to work with our legislators and other elected officials and to enlist their support in reducing visual clutter in the community.”

12. Scenic is an organization that has continuously, and repeatedly, opposed all business activities related to billboards including Epic’s billboards. Scenic has repeatedly, and publicly, opposed any type or kind of digital billboard and any billboard containing motion.
13. The goal of Scenic is to systemically eliminate any and all digital billboards from Rapid City.
14. The City Council on July 18, 2005 approved Rapid City Ordinance 4030 which allowed “public purpose” billboards to run full motion video in the municipality of Rapid City.
15. Since 2005 Epic has been continuously running full motion video in accordance with Rapid City Ordinance 4030.
16. On April 8, 2011 Modrick authored a Rapid City Journal Opinion which read in pertinent part:

Billboard measures protect city's beauty

Anything existing today has "grandfathered" protection. This means that outdoor advertising companies still have opportunities to continue business as usual. This protects the city from lawsuits.

LISA MODRICK
Scenic Rapid City

17. In July 2012, the sign code was amended to specifically prohibit animation and full-motion, including on public purpose signs.
18. On June 2, 2015, the City Attorney’s Office sent Epic written notification of the violations and demanded an immediate cessation of the use of full motion video on all of Epic’s signs.

19. On June 22, 2015, the City sent Epic a second notice of violation, stating that criminal citations would be issued beginning on June 29, 2015.
20. On October 8, 2015 the Zoning Board / Planning Commission (hereinafter "ZBOA") met to discuss the appeal by Epic of the City staff's decision that Epic's use of full-motion video on their public purpose signs violated the sign code.
21. At the October 8, 2015 meeting, Modrick spoke as President of Scenic Rapid City and despite her full understanding that Epic's full motion video was grandfathered in Modrick took a position wholly contrary to the same and requested ZBOA violate and eliminate Epic's grandfathered in rights to run full motion video on it public purpose billboards:

"I'm Lisa Modrick. I'm president of Scenic Rapid City.
Because we've got to make sure, as Councilwoman Scott has stated, that we stay on track and don't pull something and put it into a process of appeal and move forward. Because the action of today is going to carry with you tomorrow. It's going to carry with you in a decade, as we're finding, and it's going – it's going to be the future.

So, we hope you hold strong because you're our zoning and you're our planning, and we're counting on you to go forward with that the citizens of Rapid City want, and that's reasonable regulation and enforcement of the law.
22. Modrick knew when she presented to ZBOA that Epic's signs were grandfathered in and she intentionally took a position contrary to what Modrick knew the law to be which was in direct contradiction to Epic's settled legal rights.
23. ZBOA voted to uphold support staff's recommendation that Epic's use of full-motion video is a violation of the sign code and needed to cease immediately.
24. On November 9, 2015 Epic filed a Verified Petition for Writ of Certiorari seeking to overturn the ZBOA decision.

25. In June of 2016 Modrick was elected to a three (3) year term as an aldermen of Rapid City for the First Ward.
26. On July 19, 2017, Counsel for Epic sent the City Attorney's office a letter requesting the Council vote in accordance with SDCL § 6-1-17(2) to determine whether two thirds of the Council believes that a conflict of interest exists prohibiting Modrick from involvement in the discussion or vote on a settlement offer with Epic to include, but not be limited to, those same issues that were present at the ZBOA hearing referenced above.
27. The Council never held a vote to determine if a conflict existed for Modrick. In fact, the City failed to respond at all in writing to Epic's written request on conflict.
28. The Trial Court reversed the decision of the ZBOA on January 9, 2018. The Trial Court noted, as Modrick and the City of Rapid City previously understood, that Epic's use of full motion video had been grandfathered in.
29. On December 18, 2017 the City Council met to discuss, debate, and determine whether to appeal the Trial Court's decision in the ZBOA matter.
30. The Council directed the City Attorney to appeal the Circuits decisions 7-2. As the record and minutes reflect, Modrick participated in both the discussion, and the vote that took place.
31. The City continues to refuse to address the conflict of interest that was raised and presented by Epic and which clearly exists under the facts presented above.
32. Modrick has acted with malice and intentionally and repeatedly interfered with Epic's settled legal and vested rights.

COUNT ONE:
DECLARATORY JUDGMENT VIOLATION OF SDCL § 6-1-17

33. Plaintiff incorporates the preceding paragraphs by reference as through set forth in full,
34. This cause of action is brought pursuant to SDCL § 21-24-1, *et seq.*, for a judicial declaration by this Court.
35. Modrick is now and was an elected person in the municipal government of Rapid City, SD.
36. No municipal official may participate in discussing or vote on any issue in which the official has a conflict of interest.
37. Modrick as a municipal official and in her role as President, shareholder, member, and incorporator of Scenic had and has a conflict of interest and such interest requires her to be disqualified from participating in discussion or voting on issues related to Epic's business.
38. That the City Council failed to conduct a vote to determine if Modrick has a conflict of interest despite requests of Epic that such be conducted.
39. That the City Council failed to conduct a vote to determine if a conflict existed regarding Councilwoman Modrick and that any actions taken by Modrick are to be invalidated and that she is to be prohibited from all current and future discussions or involvement with Epic's billboard business in Rapid City as a Councilwoman. Plaintiff requests that this Court enter a declaratory judgment requiring the City of Rapid City to conduct the vote as identified in SDCL 6-1-17.
40. If the City of Rapid City fails to identify the conflict of interest which clearly exists as to Modrick, Epic requests that this Court enter an Order enjoining the City of Rapid City

from allowing Modrick to continue to participate in and vote on any issue as to Epic's advertising business.

COUNT TWO:
INTENTIONAL INTERFERENCE WITH A BUSINESS RELATIONSHIP

41. Plaintiff incorporates the preceding paragraphs by reference as through set forth in full,
42. Epic had a valid business expectancy in its continued use of its public purpose billboards and in running full motion video.
43. Epic has a valid business expectancy in its continued operation of its business.
44. Modrick was aware of Epic's business relationships, expectancies, and was well aware that Epic's use of full motion video on its public purpose billboards was grandfathered in based upon the original ordinance which prohibited the same.
45. Modrick committed an intentional and unjustified act of interference in her actions dealing with Epic's business interests.
46. Epic has sustained harm from the interference to include, but not be limited to, damage to its reputation, business interests, and vested legal rights.
47. Epic has damages as its relationship or expectancy was disrupted by the conduct of Modrick in all of her capacities as identified herein.

WHEREFORE, Plaintiff requests Judgment against the Defendant as Follows:

- (1) Declaring and adjudging the Council hold a vote to determine that Modrick has a conflict of interest in discussing or participating in any Council business pertaining to Epic's business interests;
- (2) Declaring and adjudging that Modrick's conflict of interest requires her to be disqualified from participating in discussion or voting on Epic's business interests in the future;

- (3) An award of damages, including punitive damages, for Modrick's intentional interference with Epic's business relationship and business generally.
- (4) An award of attorney's fees, costs, disbursements associated with the need to file this action and compel such action on behalf of the City of Rapid City;
- (5) Granting such other and further relief as the Court deems just and equitable.

Respectfully submitted this ___ day of February, 2018.

CLAYBORNE, LOOS & SABERS

Michael K. Sabers
P.O. Box 9129
Rapid City, SD 57709
(605) 721-1517
Attorney for Plaintiff
Epic Outdoor Advertising