Minnesota Counties Intergovernmental Trust

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July 5, 2012

Mr. Ken Olson
Pennington County
1st and Main
Box 616
Thief River Falls, MN 56701

Dear Ken:

This letter addresses ongoing questions and concerns raised by Pennington County pertaining to its building called the "Old Auditorium".

It is our understanding Pennington County owns the facility and rents space out to permanent tenants. It is also our understanding that groups, such as the neighboring school and volleyball leagues, that were granted permission to use the building by the former owner, continue to use the facility. The County has received additional requests to use the facility which has raised additional questions regarding use.

Deb Sletten and Kevin Balfanz toured the facility on Tuesday, June 26th. Deb will be sending their physical plant recommendations in a separate letter.

Based upon the information provided by the county, the following are MCIT's risk management recommendations. MCIT suggests that the county consult with the County Attorney prior to taking any action on the issues.

The County inquired into possible liability under the Americans with Disabilities Act (ADA) for the old auditorium. As a public entity, Pennington County is governed by Title II of the ADA. (While not directly discussed herein, the Minnesota Human Rights Act contains similar provisions as the ADA.) Title II of the ADA requires public entities to ensure that individuals with disabilities are not excluded from services, programs, and activities because existing buildings are inaccessible. Public entities do not necessarily have to make each of their existing facilities accessible, but they do need to provide program accessibility. This could include altering existing facilities, relocating a service or program to an accessible facility, or providing services at alternate accessible sites. Thus, if Pennington County is offering services at the building and they are not accessible to individuals with disabilities, the County may have some liability under the ADA.

Pennington County could also have exposure under the ADA if any of the building's uses by private entities could be considered government services, programs and activities. Private entities are covered by Title III of the ADA with respect to accessibility to "public accommodations." The Title II ADA Compliance guide (http://www.ada.gov/taman2.html) lays out the requirements and interactions between Title II and Title III. Although public entities

are covered by Title II and private by Title III, there are situations in which the "public entities stand in very close relation to private entities that are covered by title III, with the result that certain activities may be affected, at least indirectly, by both titles."

The 1994 supplement to the Title II ADA Compliance guide (http://www.ada.gov/taman2up.html) provides additional guidance:

> *Does the program accessibility requirement prevent a public entity from renting existing inaccessible space to a private entity?* Not necessarily. For example, if a State leases space to a public accommodation in a downtown office building in a purely commercial transaction, i.e., the private entity does not provide any services as part of a State program, the State may rent out inaccessible space without violating its program access requirement. The private entity, though, would be responsible for compliance with title III. On the other hand, if a State highway authority leases a facility in one of its highway rest areas to a privately owned restaurant, the public entity would be responsible for making the space accessible, because the restaurant is part of the State's program of providing services to the motoring public. The private entity operating the restaurant would have an independent obligation to meet the requirements of title III.

As such, if any of the services offered by private entities could be attributed to the County, the County may have liability under the ADA.

It should also be noted that a building tenant, if providing a public accommodation, may have responsibility and exposure under the ADA for an inaccessible space. Depending on the wording of any lease or facility use agreement, the County could find itself brought into a dispute if a private entity covered by Title III is sued under the ADA.

The specific requirements of each ADA title chapter are outside of MCIT's risk management advice. An analysis of Pennington County's services, if any, relative to the building should be considered when analyzing ADA liability. We recommend that Pennington County consult with its County Attorney, if it has not already done so, for a legal opinion regarding its obligations under the ADA. The County may want to address ADA compliance and liability in any facility use agreements or leases, if it does not already do so.

A related question raised was whether listing the building on the State Historical Register would impact ADA compliance. The ADA does contain provisions relative to historical buildings. However, prior to going down this path, the County may wish to give consideration to any limitations that historical registration may have on future remodeling or building use.

If it has not already done so, MCIT recommends that Pennington County have lease agreements in place with the permanent tenants that occupy the building. Lease agreements generally set forth the rights and responsibilities of the landlord and tenant and can be crucial in the event of a dispute. As part of a lease, the County should consider making tenants responsible for their owned contents. Tenants should be required to verify insurance coverage for the contents and their liability with a certificate of insurance.

The County may also wish to have facility use agreements in place with the groups using the auditorium for activities. Facility use agreements can set forth the terms under with the facilities are being used. MCIT also recommends that the County obtain certificates of insurance from these groups prior to their facility use. In event a certificate of insurance is not feasible, the County should consider requiring that groups obtain a waiver of liability specifically naming Pennington County for each participant. The County Attorney should review any wording for a facility use agreement and waiver.

With respect to requests for use, the County should keep in mind that by opening the building to public use, it may have created a limited public forum under the First Amendment, and accordingly may have a somewhat limited ability to restrict its use by private groups. In general, only viewpoint neutral and reasonable time, place and manner restrictions may be permissible. The County should consult with the County Attorney with any specific questions regarding use by outside groups. For consistency, the County should consider developing and implementing a facility use policy.

Finally, a question was raised as to liability coverage. The liability coverage provided by MCIT to its members is a broad coverage that protects a variety of exposures. MCIT's coverage determinations are made based on the facts, causes of action and relief and requests pleaded in any legal complaint. Coverage is subject to MCIT's Coverage Document terms, conditions and limitations.

MCIT hopes this information will be helpful with your decisions concerning the "Old Auditorium" facility. Please let us know if you have any additional questions.

Sincerely,

Robert Goede

Robert Goede
Risk Management Consultant
Minnesota Counties Intergovernmental Trust

CC: Commissioner Darryl Tveitbakk

CC: Commissioner Oliver Swanson, Board Chair

CC: Al Rogalla, County Attorney