BEFORE THE SOUTH DAKOTA ONE CALL NOTIFICATION BOARD

IN THE MATTER OF THE COMPLAINT FILED BY THE CITY OF BRANDON, BRANDON, SOUTH DAKOTA, AGAINST JEREMY SCADDEN CONSTRUCTION, VALLEY SPRINGS, SOUTH DAKOTA	)))))	**FINDINGS OF FACT AND CONCLUSIONS OF LAW; NOTICE OF ENTRY OF ORDER OC06-010**

On November 13, 2006, pursuant to SDCL 49-7A-17, the South Dakota One Call Board (Board) received a complaint filed by the City of Brandon, Brandon, South Dakota (Brandon), against Jeremy Scadden Construction, Valley Springs, South Dakota (Scadden). According to the complaint, Scadden failed to call South Dakota One Call for a locate ticket prior to excavating at 205 Fairview Avenue, Brandon, SD. The complaint alleges such action was a violation of SDCL 49-7A-5.

Pursuant to SDCL 49-7A-23 and 49-7A-24, a copy of the complaint was forwarded to Scadden by U.S. mail on November 16, 2006, advising him that he must file an answer in writing by December 13, 2006. Scadden did not file an answer to this complaint. Pursuant to SDCL 49-7A-22, a five member panel (Panel) was appointed by Jerry Schroeder, Chairman of the Board, for the purpose of determining whether there was probable cause to believe there had been a violation of any statute or rule of the Board. The Panel met on January 18, 2007. Pursuant to SDCL 49-7A-25, based on the complaint filed by Brandon, the Panel determined by unanimous vote that there was sufficient evidence to believe Scadden was guilty of the violations of the statute as alleged in the complaint.

Pursuant to SDCL 49-7A-27, a copy of the Panel's recommendations was sent to the parties. The Board did not receive an acceptance or rejection of the Panel's recommendations from either Brandon or Scadden.

A hearing was held as scheduled on May 4, 2007, at 9:00 a.m., in the International East Conference Room, Holiday Inn City Centre, 100 West 8th Street, Sioux Falls, SD. This hearing was conducted along with OC06-007, 008 and 009. The City of Brandon was present and represented by counsel. Scadden was present and also represented by counsel. Brandon presented evidence through the testimony of Wayne Fletcher, Jimmie Fjerstad, and Rollie Hoeke. Scadden presented evidence through his own testimony. The issues at the hearing were whether Scadden failed to notify the one-call center before excavating in violation of SDCL 49-7A-5.

At the conclusion of the hearing, a motion was made by Doug Larson, a Board member present at the hearing. Mr. Larson moved that based on the testimony and the evidence submitted there was insufficient evidence to hold Scadden in violation of SDCL 49-7A-5 by commencing excavation at 205 Fairview Avenue without providing advance notification to the South Dakota One Call System as required by statute. Eugene Solseth, Board Member, provided a second to the motion. Chairman Jerry Schroeder called for discussion on the motion. There was no discussion and a vote was taken of all the members present. There was a unanimous vote by all the members of the Board present at the hearing in support of the motion. Those members present at the hearing for the vote included: Jerry Schroeder, Todd Chambers, Kevin Kouba, Bleau LaFave, Eugene Solseth, Doug Larson, Rod Cundy and Kurt Pfeifle.

Having considered the evidence of record and applicable law, the Board makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. On November 13, 2006, pursuant to SDCL 49-7A-17, the South Dakota One Call Board received a complaint filed by the City of Brandon, Brandon, South Dakota, against Scadden, Valley Springs, South Dakota. According to the complaint, Scadden performed excavation without first notifying the South Dakota One Call System. The complaint alleged Scadden failed to notify the one-call center before excavating in violation of SDCL 49-7A-5.

2. Brandon presented evidence and exhibits to the Board through the testimony of Wayne Fletcher, the Director of Public Works for Brandon, Jimmie Fjerstad, the One Call locator for the City of Brandon, and Rollie Hoeke, the Public Works Supervisor for the City of Brandon. Scadden presented evidence and exhibits to the Board through his own testimony.

3. Scadden denies any excavation took place at 205 Fairview Avenue Rather, he argues 205 Fairview Avenue was simply being used to pile dirt and debris from other lots. The piled dirt, he argues, was later removed and excavation did not occur. Transcript pages 101 through 104.

4. Brandon did not present any evidence to prove excavation did in fact occur.

CONCLUSIONS OF LAW

1. The Board finds that it has jurisdiction over this matter pursuant to SDCL Chapter 49-7A, including 49-7A-2, 49-7A-4, 49-7A-5, 49-7A-8, 49-7A-10, 49-7A-12, 49-7A-17 through 49-7A-27, inclusive, and SDCL Chapter 1-26.

2. SDCL 49-7A-5 provides in part that, "No excavator may begin any excavation without first notifying the one-call notification center of the proposed excavation..."

3. The Board finds that there is insufficient evidence to find that Scadden violated SDCL 49-7A-5 by failing to provide notice to the one-call notification center prior to excavating at 205 Fairview Avenue, Brandon, SD and the Complaint is dismissed.

It is therefore

ORDERED, that this complaint is dismissed and the docket closed.

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 13th day of June, 2007. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Sioux Falls, South Dakota, this 13th day of June, 2007.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.

By: _____

Date: 6/13/07

(OFFICIAL SEAL)

BY ORDER OF THE SOUTH DAKOTA ONE-CALL BOARD:

_____

JERRY SCHROEDER, Chairman

_____

Under the Authority and on behalf of the Chairman

LARRY ENGLERTH, Executive Director