

PREPARED BY: City Attorney's Office  
300 Sixth Street  
Rapid City, SD 57701  
(605) 394-4140

STATE OF SOUTH DAKOTA     )  
  ) SS.        **COVENANT AGREEMENT**  
COUNTY OF PENNINGTON    )

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND BIES  
HIGHWAY 79 LLP, REGARDING THE CONSTRUCTION OF DRAINAGE  
IMPROVEMENTS FOR THE SOUTH ROBBINSDALE DRAINAGE BASIN.**

This Covenant Agreement is made and entered into between the City of Rapid City, herein after referred to as the "City," and Bies Highway 79 LLP, herein after referred to as the "Developer."

WHEREAS, the Developer is the owner of property that is generally located northwest of the intersection of Minnesota Street and Cambell Street (aka S.D. Highway 79) legally described as follows:

Lot 1 and Lot 2 of Hamilton Subdivision, located in the SE ¼  
of Section 18 of T1N, R8E of the Black Hills Meridian, Rapid  
City, Pennington County, State of South Dakota; and

WHEREAS, the City has developed a Design Plan for the South Robbinsdale Drainage Basin, which is a tributary to Rapid Creek; and

WHEREAS, the Design Plan will improve South Robbinsdale water runoff drainage and upon its completion will facilitate the removal of five (5) acres of Developer's property from the Rapid Creek flood plain, as committed to by FEMA, which is beneficial to both parties, allowing the property to be developed and increasing the real property assessed valuation of the City; and

WHEREAS, Element 2 and Element 4 of the Design Plan are drainage conveyance elements which are located on or in the immediate vicinity of the above identified property of the Developer; and

WHEREAS, the City desires to have Element 2 and Element 4 of the Design Plan constructed to manage drainage runoff in accordance with the Design Plan and the City's Capital Improvement Project identified as South Robbinsdale Drainage Improvements, Elements 2 and 4, Project #DR05-1485/CIP #50556 ; and

WHEREAS, Element 2 and Element 4 of the Design Plan will function as regional conveyance facilities to manage runoff from areas upstream of the identified property of the Developer, and

WHEREAS, construction of Element 2 and Element 4 of the Design Plan will also aid in the management of storm water from the Developer's property, reduce the area that could be impacted by major flooding, and facilitate future development of said property; and

WHEREAS, the parties wish to memorialize what actions are expected by the parties to facilitate the construction of the drainage improvements prior to further development of the property.

NOW THEREFORE, the parties agree as follows:

1. The Developer will provide services to design and manage the construction of Element 2 and Element 4 of the Design Plan. The project will be identified as: South Robbinsdale Drainage Improvements, Elements 2 and 4, Project #DR05-1485/CIP #50556.

The Developer shall retain engineering services from a competent licensed engineering consultant to provide project design, prepare plans and contract documents, and to administer and observe construction phase activities. Construction phase services shall include: conducting pre-bid, preconstruction, and construction progress meetings as necessary; observation and acceptance of construction work; response to contractor requests for information; review and certification of contractor payment requests; final inspection and determination of substantial and final completion; submittal of revised plans as needed to show as-constructed conditions; preparation and submission to the Federal Emergency Management Agency (FEMA) a Letter of Map Revision (LOMR) to amend the mapped flood plain for this tributary; and certification, upon completion, that the improvements have been constructed to the best of its knowledge in substantial conformance with the plans and specifications, except for any variations or deficiencies noted in accordance with SDCL § 36-18A-46. Nothing in this agreement is intended to create a contractual relationship between the City and the Developer's engineering consultant.

2. The City will review the plans and, after the design and contract documents are complete, place public advertisements for bids per SDCL § 5-18-3.

3. Printing and distribution of plans and specification to potential bidders, maintenance of plan holders lists, and distribution of addenda shall be the responsibility of the Developer's engineer.

4. The City will receive and award the bids for construction in accordance with state law. After review and consultation with the Developer, the bids shall be presented to the City Council for authorization to award contracts. Following City Council authorization, the

Developer's Engineer shall prepare and issue the construction contract in the City's standard format.

Developer and the City both reserve the right to reject all bids if the lowest responsible bid exceeds the engineer's cost estimate of One Hundred Fifty-one Thousand Four Hundred Eight Dollars (151,408.00). If any bid received is not acceptable to both parties, then this Agreement shall be null and void and the City shall reimburse the Developer for seventy percent (70%) of the actual engineering costs, including costs and expenses incurred by the Developer in the bid letting process. In this event Developer shall provide to the City original reproducible sets of any plans, engineering reports, and similar documentation prepared for the project. The City may use these documents or information for future work by the City, however, it is agreed that the Developer or its engineer will not be responsible for any such future use of the documents or information for purposes other than this Capital Improvement Project unless there is additional written agreement between the parties specifying otherwise.

5. The contract, signed by the construction contractor, performance bond, and insurance certificate shall be submitted for review and approval by the City. Following approval and complete execution of the contract, the Developer's engineer shall issue a Notice to Proceed.

6. The parties agree that the costs for the improvements will include the following:

<u>Item</u>	<u>Estimated Cost</u>
Construction	\$132,408.60
Engineering Services	\$ 15,000.00
<u>FEMA Fee for LOMR</u>	<u>\$ 4,000.00</u>
Total Costs	\$151,408.00

The City will pay seventy percent (70%) and the Developer will pay thirty percent (30%) of the project costs in the construction of the facility, including any cost increases resulting from change orders increasing the cost of the project, in excess of the initial contract price. No change orders shall be authorized or approved which increase the project cost above the initial contract price unless approved in writing, in advance, by both the City and Developer, and prior to commencing the work for which increased compensation is claimed.

Construction Costs will be paid by the City, and the Developer will be billed by the City for payment of its share. Developer shall pay all cost so billed within 30 days of billing in cash or by demonstrating payment has been made for other eligible project costs, such as Engineering Services.

7. After completion of construction of the project and acceptance of the project by the City, and payment in full by the Developer for his thirty percent (30%) of the cost thereof, Developer shall have no further obligation arising out of the construction of the facility. Maintenance of the facility, after completion and acceptance by the City, shall be the sole obligation of the City without contribution from the Developer.


8. All of the terms and conditions herein set forth shall extend to and be binding upon the heirs, assigns, or successors in interest of the Developer, and be considered as a covenant running with the above-described property. Furthermore, it is agreed that, in accepting title to the above-described property any grantee, heir, assign, or successor in interest to the undersigned expressly agrees to be bound by the terms of this agreement recorded with the Pennington County Register of Deeds' Office pursuant to the provisions of South Dakota statutes.

9. This document represents the entire agreement of the parties. No other writing is a part of this agreement. All other prior representations, writings, oral statements or negotiations have been merged into this document and are either included herein or intentionally excluded.


10. The parties' rights and obligations under this Agreement shall be governed by, and construed in accordance with, the laws of the State of South Dakota. Any dispute concerning this Agreement shall be venued and litigated in the Circuit Court for the Seventh Judicial Circuit, located in Rapid City, Pennington County, South Dakota.

DATED this 18 day of DECEMBER, 2006.

CITY OF RAPID CITY

  
Jim Shaw, Mayor

ATTEST:

  
Finance Officer

(SEAL)

BIES HIGHWAY 79, LLP

By: Harold J. Bies  
Its: Gen Partner

STATE OF SOUTH DAKOTA     )  
  )ss.

COUNTY OF PENNINGTON )

On this 27 day of December, 2006, before me, the undersigned officer, personally appeared Jim Shaw and James F. Preston, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City and that they, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing as such Mayor and Finance Officer of the City of Rapid City.

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

Angeline M. Gerry  
Notary Public, State of South Dakota  
My Commission Expires: 7-15-2012

[SEAL]

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

On this 13th day of December, 2006, before me, the undersigned officer, personally appeared Harold Bies, who acknowledged himself to be the General Partner of BIES HIGHWAY 79 LLP, and that as such, being duly authorized so to do, executed the foregoing instrument for the purposes herein contained.

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

Karen Jones  
Notary Public, State of South Dakota  
My Commission Expires: July 11, 2008

[SEAL]