

PREPARED BY: City Attorney's Office  
300 Sixth Street  
Rapid City, SD 57702  
(605) 394-4140

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

**AGREEMENT BETWEEN THE CITY OF RAPID CITY AND MIDLAND RUSHMORE,  
LLC, REGARDING PAYMENT OF THE PROPORTIONATE SHARE OF LIFT  
STATION UPGRADE COSTS**

This Covenant Agreement (this "Agreement") is made and entered into by and between the CITY OF RAPID CITY, a municipal corporation located at 300 Sixth Street, Rapid City, SD 57701 (herein after referred to as the "City") and MIDLAND RUSHMORE, LLC, located at 8044 Montgomery Rd., Suite 710, Cincinnati, OH, 45236 (herein after referred to as the "Landowner").

WHEREAS, the Landowner has proposed a final plat for property on the south side of Interstate 90 between Lacrosse and East North St. on which it proposes to construct a retail development known as Rushmore Crossing; and

WHEREAS, the City has informed the Landowner that the construction of this development in conjunction with other developments that are currently proposed in the area will require that the City upgrade the capacity of the existing North Elk Vale Lift Station (the "Lift Station"); and

WHEREAS, the City has further informed the Landowner that without this development the capacity of the Lift Station would be sufficient for many more years; and

WHEREAS, the City has requested, and the Landowner has agreed to proportionately share in the cost of upgrading the Lift Station in accordance with the terms of this Agreement so that the expense is not passed on to the City rate payers; and

WHEREAS, without this Agreement the Lift Station would not be improved and the Final Plat of the Landowner's property would be denied by the City; and

WHEREAS, this Agreement will allow the City to approve the Final Plat that has been requested and upgrade the Lift Station so that it will be able to adequately service the

Landowner's proposed development along with other anticipated developments in the Lift Station's service area.

NOW THEREFORE, the parties agree as follows:

1. Once all other legal requirements for approval of a Final Plat have been met, the City will immediately approve the Final Plat of the following lots:

Proposed Legal

Lot 1 and Drainage Lot of Block 1, Tracts A, B, C, D, and E of Block 2, Lots 1 through 9 of Block 3, Tracts G and J, Eglin Street (formerly part Farnwood Avenue), Luna Avenue Extension, areas dedicated for public right-of-way purposes, easements, vacation of easements, vacation of a portion of Century Road right-of-way, vacation of a portion of the eastern 33' section line highway of Section 30, vacation of a portion of the western 33' section line highway of Section 29, vacation of a portion of the northern 33' section line highway of Section 32; vacation of a portion of the southern 33' section line highway of Section 29 and vacation of a 66' public access easement recorded in Highway Plat Book 1, Page 31;

Existing Legal

Formerly Lot BR of Lot 2 of the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29; Lot C of Lot 2 of the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29; Tract C of the SW $\frac{1}{4}$  of Section 29; Lot 1 of the SW $\frac{1}{4}$ SE $\frac{1}{4}$  Section 29; Lot A of Lots 1 and 2 on the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29; Lot 1R of Lots 1 and 2 of the SE $\frac{1}{4}$ SW $\frac{1}{4}$  of Section 29; unplatted portions of the SW $\frac{1}{4}$  of Section 29; Lot H-1, located in the S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$  of Section 30; Lot H-10, a portion of Lots H-1 and H-4, located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  Section 29; Lot H-11, a portion of Lot H-2, located in the NW $\frac{1}{4}$ SW $\frac{1}{4}$  Section 29; Lots 1 and 2 of Bedco Subdivision, located in the SE $\frac{1}{4}$  of Section 30; part of Lot M of the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 30; part of Lot K-4 of Marshall Heights Tract, located in the SW $\frac{1}{4}$  of Section 30; part of Lots 1 and 2 of Rapps Addition and the South Half of the vacated alley adjacent to Rapp's Addition, located in the NW $\frac{1}{4}$ SE $\frac{1}{4}$  of Section 30; and the unplatted portions of the SE $\frac{1}{4}$  of Section 30; and Tract C in the NE $\frac{1}{4}$ NW $\frac{1}{4}$  and the NW $\frac{1}{4}$ NE $\frac{1}{4}$  of Section 32; all located in Township 2 North, Range 8 East, of the Black Hills Meridian, the City of Rapid City, Pennington County, South Dakota.

2. The City will also immediately begin the process of hiring a consultant at no cost or expense to the Landowner to evaluate the sewer service needs of the area served by the Lift Station. Once the evaluation has been completed and it has been determined what work will be required solely to upgrade the Lift Station so that it has sufficient capacity to handle the estimated future waste from the area originally intended to be served by the Lift Station, the City will solicit bids to construct the necessary improvements and award the contract to the lowest

responsible bidder per South Dakota law. The City will fund this work from the .16 Utility Fund.

3. In exchange for the City approving the Final Plat on the previously described lots and upgrading the Lift Station so that there is sufficient capacity to serve the proposed developments as provided above, the Landowner agrees to pay its proportionate share of the total upgrade costs for the required Lift Station improvements as herein provided.

4. The Landowner's proportionate share of the upgrade costs for the development (FEE) will be calculated using the following formula:

$$\text{FEE} = \frac{\text{User's estimated peak capacity in g.p.m.}}{\text{Total Capacity of Lift Station in g.p.m.}} \times \text{Total Upgrade Cost of Lift Station Improvements}$$

5. The Landowner agrees to pay the proportionate share of the costs to upgrade the Lift Station as building permits are issued on each of the individual lots previously described. The User's estimated aggregate peak capacity in g.p.m. will be calculated by the Landowner, subject to the City's approval, not to be unreasonably withheld, conditioned or delayed, prior to issuance of a building permit on each individual parcel. The amount of the FEE will then be calculated by the City based on one of the formulas contained in this Agreement for the lot on which the building permit is being obtained.

6. The estimated capacity of the Lift Station after the upgrade is between 750 g.p.m. and 1000 g.p.m. The highest estimate of the cost to upgrade the capacity of the Lift Station is \$2.5 million. This would increase the capacity of the Lift Station to 1,000 g.p.m. If the City does not increase the capacity to 1000 g.p.m., based on the evaluation that is conducted, the cost of the improvements will almost certainly be less than \$2.5 million. If the final cost for the upgrade or the total capacity of the Lift Station has yet to be determined at the time Landowner requests a building permit, the Landowner agrees to pay an estimated FEE. The Landowner's estimated FEE will be calculated using the following formula:

$$\text{FEE} = \frac{\text{User's estimated peak flow in g.p.m.}}{750 \text{ g.p.m.}} \times 2.5 \text{ Million}$$

7. The amount of the FEE in Paragraph 6 represents the maximum amount of the cost to upgrade the Lift Station that the Landowner will be responsible for paying. Once the final cost of the upgrade and the maximum capacity have been determined, the Landowner's proportionate FEE will be determined based on the formula in Paragraph 4. If the amount the Landowner has paid the City pursuant to Paragraph 6 exceeds the calculation of its final proportionate share per Paragraph 4, the City will refund the excess money collected to the Landowner or its designee. This will be done within 90 days of the determination of the FEE pursuant to Paragraph 4. Any funds collected pursuant to this Agreement will be used solely to reimburse the City's .16 Utility Fund. The City's Finance Office will account for the funds in such a way that the City will be able to meet its obligation to remit any excess FEE that was collected back to the Landowner or its designee.

8. If the City approves a Tax Increment Financing District and associated Project Plan which includes the cost of the Lift Station upgrade as a reimbursable expense prior to the Landowner requesting a building permit on the above described lots, the Landowner will be fully relieved of its obligation to pay for its proportionate share of the Lift Station upgrade costs. If a Tax Increment Financing District and associated Project Plan which includes the cost of the Lift Station upgrade as a reimbursable expense is approved after a building permit has been issued and the Landowner has already paid the estimated FEE, any funds collected by the City will promptly be returned to the Landowner or its designee.
9. The parties acknowledge that in the absence of the promises made by Landowner in this Agreement the City would not approve the Final Plat of the above described property or increase the current capacity of the Lift Station. The parties further acknowledge that the City's approval of the Final Plat and initiation of a project to increase the capacity of the Lift Station are good and sufficient consideration for the Landowner's promises made herein.
10. All of the terms and conditions herein set forth shall extend to and be binding upon the heirs, assigns, and successors in interest of the Landowner, and shall 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.
11. The parties may undertake any legal or equitable action available to enforce the provisions of this Agreement in addition to any other remedies provided herein.
12. No other writings are a part of this Agreement. All other prior representations, writings, oral statements or negotiations have been merged into this Agreement and are either included herein or intentionally excluded.
13. If any section(s), or provision of this application is declared invalid for any reason whatsoever by any competent court, such invalidity shall not affect any other section(s) or provision of this application if they can be given effect without the invalid section(s) or provisions.
14. This Agreement shall be construed according to the laws of the State of South Dakota. Any action concerning this agreement shall be venued in Rapid City, South Dakota in State Circuit Court. No modification or amendment to this agreement shall be valid, unless evidenced by a writing signed by the parties hereto.
15. If the Landowner is a corporation, it has the power to enter into this agreement and its officers signing for it have full power and authority to do so.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2007.

CITY OF RAPID CITY

\_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer

(SEAL)

MIDLAND RUSHMORE, LLC.

\_\_\_\_\_  
By: \_\_\_\_\_

Its: \_\_\_\_\_

State of South Dakota        )  
  ss.  
County of Pennington        )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2007, 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, a municipal corporation, and that they, as such Mayor and Finance Officer, being authorized so to do, executed the foregoing Covenant Agreement for the purposes therein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

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

\_\_\_\_\_  
Notary Public, South Dakota

My Commission Expires:

[SEAL]

State of \_\_\_\_\_ )  
 )ss.  
 County of \_\_\_\_\_ )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2007, before me, the undersigned officer, personally appeared \_\_\_\_\_, who acknowledged themselves to be the \_\_\_\_\_ of Midland Rushmore, LLC., and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

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

[SEAL]

\_\_\_\_\_  
 Notary Public, State of \_\_\_\_\_  
 My Commission Expires: \_\_\_\_\_