

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, SECURING THE PAYMENT OF FUTURE OFF-SITE  
 IMPROVEMENTS TO SERVE RUSHMORE CROSSING.**

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 is building a large upscale retail complex known as Rushmore Crossing (the "Development") which is located south of Interstate 90, east of Lacrosse St. and west of East North St. within the City of Rapid City; and

WHEREAS, the City has been provided the Rushmore Crossing Traffic Impact Study 3<sup>rd</sup> Edition (the "Study") conducted by Felsburg, Holt & Ullevig the Landowner's traffic consultant (the "Consultant"); and

WHEREAS, the Study identifies several off-site improvements to the City's road network that will be required in future years to adequately support the Landowner's Development; and

WHEREAS, the City has requested as a stipulation for approving the Final Plat of the Development, that the Landowner enter into an Agreement for payment of the cost of the off-site improvements to the City's road network identified by its Consultant; and

WHEREAS, without this Agreement the City would deny the Final Plat for the Landowner's Development; and

WHEREAS, the Landowner has agreed to pay for the cost of the off-site improvements to the City's road network needed to serve its development in accordance with the terms of this Agreement.

NOW THEREFORE, the parties hereby covenant and agree as follows:

1. This Agreement pertains to the Development known as Rushmore Crossing, generally located south of Interstate 90, east of Lacrosse St. and west of East North St. within the City of Rapid City and legally described as follows:

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

2. The Landowner agrees to construct the street identified as Luna Ave. in the Study from Elgin St. to the southern boundary of its property as part of Phase I of its Development. In the future, when this street is further extended to Anamosa Street the Landowner will pay Forty-Five Percent (45%) of the cost of that extension. The amount that the Landowner owes for this extension will be calculated by the City. The City will calculate the amount that the Landowner owes as follows:

- a. The City will multiply the length of the street extension in linear feet by the estimated cost of constructing a street. The City will determine the estimated linear cost of constructing the street by using the estimated value amounts contained in the most recently updated "Project Cost Data Engineer's Estimate Guide" as prepared by the City's Public Works Dept or, if mutually agreed to by the parties at the time the street is extended, a suitable equivalent document; and
- b. The City will multiply the final total cost of the street extension, as determined from invoices submitted by the contractor, by Forty-Five Percent (45%).

The Landowner's obligation will be whichever amount is less.

3. The City will submit an invoice to the Landowner requiring that it pay the amount in subsection (a) prior to requesting bids to complete the street extension or at the time that a Final Plat is approved that includes the extension of Luna Street as a required subdivision improvement. The Landowner will have Thirty (30) days to remit payment to the City. The City Finance Office will account for the money separately from other

City funds. Once the project is completed, the City will calculate the amount owed by the Landowner pursuant to the formula contained in Paragraph Two of this Agreement. After the City has determined the amount owed by the Landowner, it will remit that amount to the person or entity that paid for construction of the roadway extension. If the actual amount owed is less than what the Landowner paid, the City will refund the excess amount to the Landowner, its successor or designee. If the Landowner pays the City for the street extension but the City does not request bids for the project within One Hundred Eighty (180) days or the Final Plat is vacated prior to construction of the street, the City will refund the money collected to the Landowner, its successor or designee.

4. The Landowner agrees at the time an additional west bound left turn lane is added at the intersection of Anamosa St. and Lacrosse St. the Landowner will be responsible for paying Twenty-Four Percent (24%) of the total cost of the additional turn lane. The method of calculating the amount owed by the Landowner and for collecting payment will be identical to the methods used for the extension of Luna St. in Paragraphs Two and Three of this Agreement.

5. The Landowner agrees that per its development plan, it will install traffic signals at the intersections of Lacrosse St./Eglin St. and Eglin St./East North St. as part of Phase I of its Development. It will provide the City with an engineer's estimate for the cost of these improvements which City staff will review and approve if appropriate. City approval will not be unreasonably withheld or delayed once the estimate has been submitted. The Landowner will further provide sufficient surety, in a form acceptable to the City Attorney's Office, to secure the completion of the above described traffic signals.

6. The Landowner agrees in the future to install traffic signals at the intersections of Elgin St./Luna St. and at access point 11 or 12 to its Development, as identified by its Consultant in the Study. The Landowner will install the signals at its own expense as soon as the traffic counts warrant installation at these intersections. The City will be responsible for determining when traffic counts warrant installation of signals. The City will base its determination on the guidelines contained in the most current version of the Manual for Uniform Traffic Control Devices (MUTCD the "Manual"). At the time that the traffic counts at these intersections meet the warrants for installation of signals per the guidelines contained in the Manual, the City will submit an invoice to the Landowner for the cost of purchasing and installing the required traffic signals. The Landowner will remit payment to the City within Forty-Five (45) days.

7. Once the Landowner has complied with all other legal requirements for approval of a Final Plat and has entered into any other agreements the City has required as a condition for approval of the Final Plat, the City will approve the Final Plat for the Landowner's Development in exchange for the promises made herein.

8. The parties acknowledge that in the absence of the promises made by the Landowner in this Agreement to fund the off-site improvements to the City's road network which are required to adequately serve its Development, the City would not

approve the Final Plat of the above described property. The parties further acknowledge that the City's approval of the Final Plat is good and sufficient consideration for the Landowner's promises made herein.

9. 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.

10. 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.

11. The "Rushmore Crossing, Traffic Impact Study 3<sup>rd</sup> Edition" prepared by Felsburg, Holt & Ullevig and all amendments, memos and additions thereto are specifically incorporated into this Agreement. No other writings are a part of this Agreement. All other prior representations, writings, oral statements or negotiations related to off-site improvements to the City's road network have been merged into this Agreement and are either included herein or intentionally excluded.

12. 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.

13. 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.

14. 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

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Mayor

ATTEST:

Finance Officer

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.

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires:

SEAL