

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 THE CONSTRUCTION OF OFF-SITE
 IMPROVEMENTS AT THE INTERSECTION OF LACROSSE AND RAPP
 STREETS.**

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 3rd Edition (the "Study") conducted by Felsburg, Holt & Ullevig the Landowner's traffic consultant (the "Consultant"); and

WHEREAS, the Study identifies improvements to the intersection of Lacrosse and Rapp Streets (the "Intersection") that will be necessary to serve the Landowner's Development; and

WHEREAS, the work identified by the Landowner and its Consultant includes straightening out Elgin Street so that it intersects with Lacrosse Street and constructing a new intersection between Rapp and Elgin Streets (the "Project"); and

WHEREAS, the Landowner intends to construct the above Project as part of Phase I of its Development; and

WHEREAS, this Project will be located off-site of the Landowner's Development and will have an adverse impact a Major Arterial Street for the duration of the time it takes to construct the Project; and

WHEREAS, the City will not allow the Landowner to do work in the right-of-way that will be necessary to construct the Project unless the City first has assurances that the adverse impact of the Project is minimized and that there is sufficient surety to guarantee that the Project is completed in a timely manner; and

WHEREAS, the Landowner is willing to provide the assurances the City requires so that it may be authorized to do the necessary work in the right-of-way to serve its Development.

NOW THEREFORE, the parties agree as follows:

1. This Agreement pertains to the Landowner's Development which is 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 improvements to the Intersection identified by its Consultant in the Study and referred to as the Project as part of Phase I of its Development.

3. Prior to beginning any work on this Project within the City's right-of-way, the Landowner will obtain a Right-of-Way Permit (the "Permit") from the City. In addition to any other requirements of the Permit, the Permit will establish a reasonable amount of time in which the improvements to the Intersection will be completed. The amount of time to complete the work will be determined by the Landowner and City staff at the time the Permit is requested. The Landowner will also be required to provide the City with surety, in a form acceptable to the City Attorney's Office, sufficient to insure that if the improvements are not completed in the time established by the Permit, the City will be able to complete the Project. The City may at its sole discretion grant extensions of time to the Landowner for completion of the Project based on unforeseen circumstances such as, but not limited to, weather.

4. The Landowner also agrees that it will facilitate reasonable access during the duration of the Project to the property owners that currently depend on Rapp Street as their sole means to access their property. The City and Landowner have obtained access easements across the property of the adjoining property owners that corresponds with the present location of Rapp Street being vacated by the City to facilitate this Project. The Landowner agrees to maintain the current Rapp Street pavement section within this easement so that it may be used as access by these property owners during the duration of the Project. Once the Project reaches the point where the Intersection/Elgin Street is able to provide reasonable access, the Landowner will be relieved of its obligation to maintain the access easement and can remove the pavement section that was part of the vacated portion of Rapp Street.

5. In exchange for the promises made by the Landowner in this Agreement the City will approve the Permit to allow the Landowner to construct the improvements to the Intersection that will be necessary to serve its Development.

6. The parties acknowledge that in the absence of the promises made by the Landowner in this Agreement the City would not grant the Landowner permission to do work in the City's right-of-way. The parties further acknowledge that the City's approval of the Permit to allow the Landowner to do work within the City's right-of-way is good and sufficient consideration for the Landowner's promises made herein.

7. 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.

8. 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.

9. The "Rushmore Crossing, Traffic Impact Study 3rd Edition" prepared by Felsburg, Holt & Ullevig and all amendments, memos and additions thereto as well as The "Covenant Agreement Related to Off-Site Roadway Improvements" are specifically incorporated into this Agreement. No other writings are a part of this Agreement. All other prior representations, writings, oral statements or negotiations other than those previously mentioned have been merged into this Agreement and are either included herein or intentionally excluded.

10. 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.

11. 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.

12. 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

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]