LF040208-33

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

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

AGREEMENT BETWEEN THE CITY OF RAPID CITY AND AZ DEVELOPMENT OF RAPID CITY, LLC ALLOWING A NON-CONFROMING CURB CUT OFF EAST NORTH STREET.

THIS AGREEMENT IS MADE and entered into this ___ day of _____, 2008, by and for AZ Development of Rapid City, LLC, 501 Chestnut Bypass, Centre, AL 35960, Rapid City, South Dakota 57709 (the "Developer"), and the City of Rapid City, a municipal corporation of the State of South Dakota, located at 300 Sixth Street, Rapid City, South Dakota 57701 (the "City").

WHEREAS, the Developer is the owner of the property located at 414 E North Street, Rapid City, South Dakota; and

WHEREAS, the Developer will be obtaining a building permit prior to the ownership of the property being transferred; and

WHEREAS, the Developer has requested approval of a site plan; and

WHEREAS, the site plan submitted by the Developer shows that access to the property from East North Street will be from a curb cut that does not conform to the requirements contained in the City's Street Design Criteria Manual; and

WHEREAS, the City's Street Design Criteria Manual regulates the alignment of curb cuts; and

WHEREAS, the curb cut proposed by the Developer does not properly align with a curb cut across East North Street; and

WHEREAS, the Developer has requested that the City grant an exception to the Street Design Criteria Manual which will allow the curb cut location as shown in its proposed site plan; and

WHEREAS, it is the intended purpose of the Developer and City to enter into an agreement protecting the City from future claims related to the non-conforming curb cut and thereby allow the City to grant the Developer's requested exception to the City's Street Design Criteria Manual.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein, it is hereby agreed by the parties as follows:

1. This agreement pertains to property generally located at 414 E. North Street (the "Property"), and includes those properties which are designated and identified as follows:

The East 33' of Lot 16 and all of Lots 17-20, of Block 9, Schnasse Addition, Section 31, T2N, R8E, BHM, Rapid City, Pennington County, South Dakota

2. The Developer has requested an exception to allow a curb cut on East North Street to the above described property which is inconsistent with the City's Street Design Criteria Manual. The request is made solely for the Developer's convenience and does not serve any public good. The City Council has approved the requested exception upon the condition the Developer agree to the terms contained within this covenant agreement. The City further agrees that at the time East North Street is reconstructed it will engage in discussions with the property owner across the street about altering the location of the curb cut on its property so that the curb cut alignment between the properties is brought into compliance with the City's regulations. However, the parties acknowledge that the City has no authority to force a new curb cut alignment on the owner of that property.

3. The parties agree that upon issuance of the building permit associated with the proposed site plan for this property, the City may cause this covenant agreement to be filed at the Pennington County Register of Deeds Office.

4. The Developer acknowledges the City has the authority to regulate curb cuts on to public road when the public necessity or traffic reconfiguration so requires. The Developer agrees that if at any time in the future, the City determines it is necessary or desirous to alter or realign the non-conforming curb cut which provides access onto East North Street, the Developer or their heirs, assigns, or successors in interest, waive any right to object to the alteration or realignment of the curb cut to bring it into conformity with the City's Street Design Criteria Manual. The Developer is specifically waiving any and all right to compensation for any loss of access or inconvenience arising under local, state, or federal constitutions, statutory law and/or common law for the alteration and/or realignment of the curb cut to bring it into compliance with the City's regulations. It is understood by the Developer that the City of Rapid City's primary consideration for granting the exception, and approving the site plan with the non-conforming curb cut, is the Developer's covenant and promise to waive any right to object to the alteration and/or realignment of the curb cut and its waiver of its right to seek compensation as set out above.

Notwithstanding the foregoing or anything to the contrary herein, if the City requires the Developer to alter or realign the non-conforming curb cut, the City shall provide Sixty (60) days prior written notice to the Developer of the City's intention to alter or realign the non-conforming curb cut. Further the City agrees that the Developer shall have an additional Sixty (60) days to secure permitting for a new curb cut and/or other on and offsite improvements necessary to restore its necessary circulatory functional access to the Property.

5. The Developer agrees to defend, indemnify and hold the City harmless from all claims relating to or arising from the grant of the exception to the Street Design Criteria Manual and the installation of the non-conforming curb cut allowed by this agreement.

6. The Developer further acknowledges that the granting of the exception which will allow approval of the site plan with the otherwise non-conforming curb cut is sufficient good and valuable consideration for the promises it has made herein.

7. 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.

8. The City may undertake any legal or equitable action available to enforce the provisions of this agreement in addition to any remedy provided herein or provided at law. In the event the City is required to undertake any action to enforce the terms of this agreement or its subdivision regulations in connection with this agreement, the undersigned, heirs, assigns or successors in interest agree the City may recover from the owner of said property its reasonable expenses, including attorney's fees incurred with respect to such action.

9. 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.

10. This agreement shall be construed according to the laws of the State of South Dakota. Any dispute concerning this agreement shall be venued in the State Circuit Court for the Seventh Judicial Circuit which is located in Rapid City, South Dakota. No modification or amendment to this agreement shall be valid, unless evidenced by a writing signed by the parties hereto.

11. If the Developer 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 _____, 2008.

CITY OF RAPID CITY

_____
Mayor

ATTEST:

_____
Finance Officer

(SEAL)

State of South Dakota)
ss.
County of Pennington)

On this the _____ day of _____, 2008, before me, the undersigned officer, personally appeared Alan Hanks 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 Agreement Consenting to Assessed Project 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)

AZ DEVELOPMENT OF RAPID CITY, LLC.

_____

By:_____

Its:_____

STATE OF ALABAMA)
)ss.
COUNTY OF _____)

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared _____, who acknowledged himself to be the _____ of AZ Development of Rapid City 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 Alabama
My Commission Expires:_____

[SEAL]