

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 RAPID CENTER LLC,  
REGARDING THE CONSTRUCTION OF FUTURE OFF-SITE IMPROVEMENTS TO  
SERVE ITS RETAIL DEVELOPMENT.**

This Covenant Agreement (the "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 (the "City") and RAPID CENTER, LLC, a Delaware limited liability company, located at 5850 Avenida Encinas, Suite A, Carlsbad, CA 92008 (the "Landowner").

WHEREAS, the Landowner is the owner of certain real property within the City generally located south of East Mall Drive, north of Interstate 90 and immediately east of Dyess Ave. and legally described on Exhibit "A" attached hereto and by this reference made a part hereof and depicted on the Site Plan attached hereto as Exhibit "B" and by this reference made a part hereof (the "Property"); and

WHEREAS, the Landowner is in the process of constructing a retail development on the Property (the "Development"); and

WHEREAS, the Landowner has provided the City with Foursquare Property Traffic Impact Analysis 2<sup>nd</sup> Edition and additions thereto (the "Traffic Study"), which was prepared by Felsberg, Holt & Ullevig, the Landowner's traffic engineering consultant (the "Consultant"); and

WHEREAS, the Traffic Study identifies several improvements to the City's road network which will be required in future years to adequately support the Landowner's development on the Property (the "Future Improvements"); and

WHEREAS, an application for a Planned Commercial Development was previously submitted and approved for Lots 1, 2 and 3 of Forefather Flats Subdivision; and

WHEREAS, a stipulation of approval for the Final Development Plan on Lot 3 is that the Landowner enter into an agreement for the construction of the Future Improvements; and

WHEREAS, until the Landowner enters into an agreement with respect to the completion of the Future Improvements, no further building permits will be issued on the Property; and

WHEREAS, the approval of any future plats and/or planned developments on the Property will also be conditioned on the Landowner entering into an agreement with respect to the completion of the Future Improvements; and

WHEREAS, it is the intent of the parties to enter into an agreement which requires the commencement and completion of construction of the Future Improvements and allows the Landowner to continue to develop the entire Property.

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

1. This Agreement pertains to the development of the Property.
2. The Landowner agrees to construct the following improvements, as identified in the Traffic Study, which will become necessary upon further development of its property as provided in the Traffic Study:
  - a. The Landowner will be responsible for funding 58% of the design and construction costs of all work necessary to widen East Mall Drive from three to five lanes between Dyess Ave. and East North Street as shown on Exhibit "B" (the "East Mall Drive Project"). The East Mall Drive Project shall be engineered and designed to be consistent with the existing roadway. The City agrees to identify a funding source for, and to fund, the remaining 42% of the design and construction costs necessary to widen this portion of East Mall Drive. At the time the design and construction is required by this Agreement, the City and Landowner will determine if the East Mall Drive Project will be designed and built jointly, or if the parties will undertake their portion of the East Mall Drive Project separately. If undertaken separately, the parties will determine, based on their percentage of responsibility, the length of street they will each be responsible for and will then design and construct that length of street. In such event, the parties will each reasonably cooperate with each other and coordinate the design and construction of the East Mall Drive Project.
  - b. The Landowner is to pay for, and cause to be completed, all design and construction costs necessary to widen East Mall Drive from three to five lanes from Dyess Ave. eastward to the point in its development designated on Exhibit "B" as Access 2.
  - c. The Landowner will be responsible for commencing construction of the Future Improvements described in sub-paragraphs 2(a) and (b) whenever either of the following events occurs: 1) prior to, or in conjunction with, the issuance of building permits for any structures to be located on the Property which will bring the total square footage for all structures in the development of the Property, including Lot 3 on which Cabela's is located, in excess of three hundred seventy thousand (370,000) square feet; or 2) by July

1, 2010. This square footage is based on the estimated daily traffic volume the three lane street can accommodate and estimated number of trips per square foot contained in the Traffic Study. If the City issues a building permit for a structure which will bring the total square footage of all structures within the Property over three hundred seventy thousand (370,000) square feet, no certificate of occupancy will be issued for that structure until the improvements described in sub-paragraphs 2(a) and (b) are certified by the Landowner's engineer and City Staff to be substantially complete. If the Landowner fails to commence construction of the improvements required under sub-paragraphs 2(a) and (b), the City may refuse to issue any further building permits, and if the Landowner fails to substantially complete construction of the improvements required under sub-paragraphs 2(a) and (b), the City may refuse to issue any further certificates of occupancy on the Property until the Landowner's obligations have been met. Notwithstanding the foregoing, the Developer may submit a written request for an extension of time to complete the Future Improvements described in sub-paragraphs 2(a) and (b) by July 1, 2010. The request for extension must be filed with the City June 1, 2010. An extension will be considered by the City in good faith and may be granted by the City if the Developer has submitted the design and the engineer's estimate for the costs of the Future Improvements described in sub-paragraphs 2(a) and (b) to the City.

d. The Landowner agrees to pay for 50% of the cost to install a future traffic signal at the intersection of Dyess Ave. and East Mall Dr. The Landowner agrees to pay 100% of the cost to install future traffic signals at the intersections of East Mall Drive and the points which are designated on Exhibit "B" as "Access 2" and "Access 4." The traffic signals will be installed at these intersections when traffic counts warrant their installation. The City will be responsible for determining when traffic counts warrant installation of the traffic 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"). The Landowner will be responsible for the actual installation of said traffic signals. At the time that the traffic counts at these intersections meet the conditions precedent for the installation of said traffic signals, the City will notify the Landowner. The Landowner will have One Hundred Eighty (180) days from the date it is notified by the City to complete installation of the traffic signals.

e. The Landowner also agrees to construct, on the Property, an eastbound right turn lane at a point designated as "Access 3" on Exhibit "B." This will need to be constructed prior to issuance of a certificate of occupancy for the structure identified on Exhibit "B" as "Building B."

3. Within Sixty (60) days of this Agreement being approved, the Landowner will provide the City with an engineer's estimate for the cost of completing any portion of the required work contemplated in sub-paragraphs 2(a) and (b), which City staff will review and approve if appropriate. City approval of the cost estimate will not be unreasonably withheld, conditioned or delayed once the estimate has been submitted. Upon the City's approval of the engineer's estimate, the Landowner will provide the City with a surety, in a form reasonably acceptable to the City Attorney's Office, which shall ensure the completion of the improvements the Landowner is responsible for under this Agreement. Such surety may be in the form of a bond, a

letter of credit, cash in escrow or a set aside letter substantially in the form of Exhibit "C" If the Landowner fails to provide such surety, the City may withhold issuance of building permits and/or certificates of occupancy for any structures located on the Property until such time as the surety has been provided. If such surety expires prior to any of the Future Improvements in this Agreement being substantially completed and the Landowner fails to provide additional surety to cover its obligations under this Agreement Thirty (30) days prior to the surety's expiration, the City may draw on the surety and cause the improvements to be constructed even if the conditions for construction contained in paragraph 2 have not yet occurred. Except as expressly provided in the preceding sentence, the City agrees not to draw on the surety and cause the improvements to be constructed until such time as one of the conditions triggering construction of the Future Improvements has occurred and the Landowner has failed to fulfill its obligations under the Agreement. The Landowner shall have Ninety (90) days from the triggering date to fulfill its obligation to commence construction of the Future Improvements and shall only be considered to have failed to fulfill its obligations under this Agreement after the Ninety (90) days has passed. The Landowner shall have One (1) year from the date it is required to commence construction to substantially complete the Future Improvements. If it fails to do so, the City may draw on the surety and complete any remaining improvements, provided that the Landowner shall not be deemed to be in default under this Agreement except upon the expiration of thirty (30) days after receipt of written notice from the City specifying the particulars in which the Landowner has failed to perform its obligations under this Agreement, and which notice shall state, in bold and conspicuous type, that if the Landowner does not cure the default within thirty (30) days after receipt of the notice, that the City shall then be entitled to draw on the surety and complete the work in question. unless the Landowner, prior to expiration of said thirty (30) day period, has rectified the particulars specified in said notice of default. If the cure is not one that is capable of being completed within such thirty (30) day period, but has been commenced and is being diligently prosecuted, there shall be no default as long as the cure is commenced within said thirty (30) day period and diligently prosecuted to completion. In the event that the City draws on the surety as provided above, the prohibition contained in paragraph 2 against the issuance of building permits and certificates of occupancy shall be null and void, and the Landowner shall be entitled to such building permits and certificates of occupancy if it otherwise complies with all other City requirements then in place.

4. In addition to identifying the 42% of the cost to widen East Mall Drive from East North Street to Dyess Ave., the City shall not require the Landowner pay for any of the costs associated with widening East Mall Drive from the eastern boundary of the Property to Elk Vale Road.

5. Nothing in this Agreement shall be construed as waiving any of the legal requirements for approval of future plats, planned developments or any other permits or authorizations normally required by the City.

6. The Landowner acknowledges that, as provided in the Traffic Study, its proposed Development will make the improvements contemplated in this Agreement necessary. The Landowner further acknowledges that in the absence of its covenants as contained in this Agreement to assist in the cost of constructing the Improvements required to adequately serve its Development, the City would not have approved the Final Development Plan on Lot 3 of Forefather Flats Subdivision, would not approve further plats or planned developments or issue

any further building permits or certificates of occupancy for the Property. The Landowner further acknowledges that the City's approval of the Final Development Plan for Lot 3, the ability to get approval of future platting and planned developments, as well as its ability to obtain building permits and certificates of occupancy are good and sufficient consideration for the covenants contained 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 Property. Furthermore, it is agreed that, in accepting title to the 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. Upon the completion of the Future Improvements covered in this Agreement the City shall issue a written instrument confirming that the obligations contained in this Agreement have been fulfilled and the Landowners and their heirs, assigns, and successors in interest are released from any further obligations related to this Agreement. Notwithstanding the foregoing, so long as the Landowner retains fee title to the Property, except for an area described as:

A tract of land being part of the North half of the Southwest 1/4 of Section 28 Township 2 North, Range 8 East of the Black Hills Meridian in the City of Rapid City, Pennington Co., SD, commencing at the Northwest corner of Lot 1 of Fore Father Flats Subdivision, said point also being a point on the South Right-of-Way line of East Mall Drive, thence along said South Right-of-Way line S89°-53'-22"W 634.76 feet to the point of beginning; thence leaving said South Right-of-Way line S00°-00'-05"W 186.71 feet to a point; thence S15°-10'-08" E 48.64 feet to a point; thence S74°-49'-52" W 34.00 to a point; thence N15°-10'-08"W 14.00 feet to a point; thence S74°-49'-52"W 70.55 feet to a point; thence N89°-59'-55"W 91.82 feet to a point; thence on a curve deflecting to the right having a radius of 30.00 feet, an arc length of 47.12 feet, a chord bearing of N44°-59'-55"W and a chord distance of 42.43 feet to a point, thence N00°-00'-05"E 180.54 feet to a point; thence on a curve deflecting to the right having a radius of 50.00 feet, an arc length of 41.04 feet, a chord bearing of N23°-31'-04"E and a chord distance of 39.90 feet to a point on the South Right-of-Way line of East Mall Drive, thence along said Right-of-Way line N89°-53'-22"E 197.74 feet to the point of beginning, containing 1.19 acres; and

A tract of land being part of the North half of the Southwest 1/4 of Section 28 Township 2 North, Range 8 East of the Black Hills Meridian in the City of Rapid City, Pennington County, SD, beginning at the Northwest corner of Lot 3 of Fore Father Flats Subdivision (Cabela's Tract), said point also being in the South line of Lot 1 of said subdivision. Thence along the West line of said Lot 3 S00°-00'-05"W 282.04 feet to a point; continuing along said West line of said Lot 3 S90°-00'-00" E 10.01 feet to a point; thence S00°-00'-00"E 457.63 feet to a point on the North right-of-way line of South Dakota Interstate 90; thence leaving said west line along said North Right-of-Way line N89°-50'-04"W 778.03 feet to a point; thence leaving said North Right of Way line N00°-00'-05"E 397.00 feet to a point; thence N89°-59'-55"W 8.00 feet to a point; thence N00°-00'-05"E 263.76 feet to a point;

thence N15°-10'-08"W 15.41 feet to a point; thence N74°-49'-52"E 174.18 feet to a point; thence on a curve deflecting to the right having a radius of 465.50 feet, an arch length of 123.25 feet, a chord bearing of N82°-24'-59"E and a chord distance of 122.89 feet to a point; thence S89°-59'-55"E 364.93 feet to a point at the Southwest corner of Lot 1 of said subdivision; thence along the South line of said Lot 1 N90°-00'-00"E 125.18 feet to the point of beginning containing 13.03 acres; and

the provisions of this Agreement requiring the construction of the Future Improvements will not be covenants running with the Land and will not be binding on said Lots.

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 Traffic Study and all amendments, memos and additions thereto, except for the last amendment dated January 18, 2007, (actual date January 18, 2008) are specifically incorporated into this Agreement as if fully repeated herein. No other writings are a part of this Agreement. All other prior representations, writings, oral statements or negotiations related to construction of off-site roadway improvements have been merged into this Agreement and are either included herein or intentionally excluded. This Agreement is based on the development shown in the previously approved Initial Development Plan. If the Landowner applies for a Final Development Plan which is substantially different from the approved Initial Development Plan or which proposes a use that would substantially increase or decrease the amount of traffic from the uses considered in the Traffic Study, the City may require an additional traffic study and take into consideration the findings of that study when imposing stipulations of approval for future phases of the Development.

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.

13. Neither party shall be deemed to be in default where failure or delay in performance of any of its obligations under this Agreement is caused by floods, earthquakes, other Acts of God, fires, wars, riots, acts of terrorism, or similar hostilities, strikes, picketing and other labor difficulties beyond such party's control, government regulations, court actions (such as restraining orders or injunctions), enactment of laws which prevent or preclude compliance by a party with any material provision of this Agreement; litigation brought by persons or entities other than a party, or an affiliate of a party; acts (or failure to act when action is required) or







EXHIBIT "A"

LEGAL DESCRIPTION OF THE PROPERTY

Lots 1 and 2, Less Lot H-13 of Forefather Flats Subdivision, located in T2N, R8E, of Section 28, BHM, Rapid City, Pennington County, State of South Dakota; and

That portion of the SW1/4 north of I-90, Less Lot 3 of Starlite Subdivision, Less GLM Subdivision No. 2, all located in Section 28, T2N, R8E, BHM, Rapid City, Pennington County, South Dakota; and

Lot 3 of Starlite Subdivision, located in T2N, R8E, of Section 28, BHM, Rapid City, Pennington County, State of South Dakota.

# Rapid Center LLC Description of Off Site Responsibilities

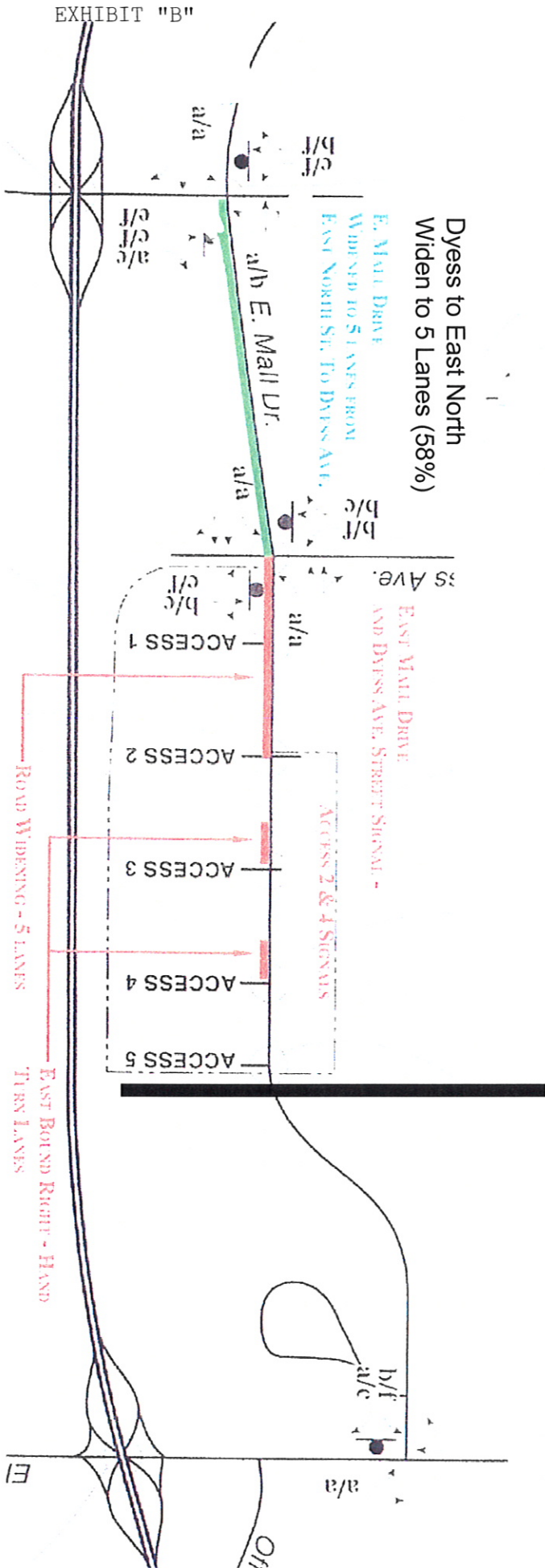


EXHIBIT 'C'

FORM OF SET ASIDE LETTER

The City of Rapid City

Re: Covenant Agreement dated June \_ 2008 between Rapid Center, LLC, (the "Developer")  
and The City of Rapid City. (the "City")

Ladies and Gentlemen:

\_\_\_\_\_ ("Lender") understands that Developer and the City have entered into the above-captioned Covenant Agreement providing for the performance by Developer of certain Future Improvement Work (as that term is defined in the Covenant Agreement). Lender acknowledges that it is familiar with the terms of the Covenant Agreement and hereby agrees with The City as follows:

1. *Lender represents and warrants to The City that Developer has established with Lender and there currently is available to Developer from Lender a \$\_\_\_\_\_ construction loan (the "Construction Loan") upon which Developer may draw to finance, among other things, the costs of the Future improvements.*

2. Lender hereby covenants and agrees that it will hold available under the Construction Loan the sum of at least \$\_\_\_\_\_ (the "Project Costs"). Lender further covenants and agrees that it will disburse to the City, for the account of Developer, the amount, if any, becoming due and payable by Developer to the City (but in no event to exceed the undisbursed portion of the Project Costs) upon receipt from the City of an affidavit in the form of Exhibit 1 attached hereto and made by this reference a part hereof for all purposes (the "Draw Affidavit"). Lender shall not be required to look beyond any such Draw Affidavit, but shall honor such draft upon receipt.

3. Until full disbursement of the Project Costs, Lender's obligations under paragraph 2 of this letter are absolute and unconditional and are not subject to the satisfaction of any condition to Developer's right to require a disbursement under the Construction Loan that may be contained in the documents governing the Construction Loan. Termination of or default by Developer under the Construction Loan will not affect Lender's obligations under paragraph 2 of this letter.

Very truly yours,

LENDER:

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

[Name]

Affidavit for Set Aside Letter

STATE OF South Dakota )

) ss:

COUNTY )

BEFORE ME, the undersigned authority, appeared \_\_\_\_\_, who, after first being duly sworn did depose and say as follows:

My name is \_\_\_\_\_, \_\_\_\_\_ of The City of Rapid City., a municipal corporation, defined as The City under that certain Covenant Agreement dated June \_\_, 2008, wherein Rapid center, LLC, is the Developer. Pursuant to such Covenant Agreement, Developer has caused \_\_\_\_\_ [Name of Bank] \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, to issue to the City. a Set Aside Letter. The City has caused certain work to be performed in accordance with the Covenant Agreement and the certification attached hereto [CERTIFYING COMPLETION OF THE WORK] or has caused such completed work to be paid. \_\_\_\_\_ [Name of Bank] \_\_\_\_\_ is hereby directed to deliver the funds due to The City as set forth in the certification attached hereto without any requirements of approval by Developer or any other party. The City represents to the best of its knowledge that it is not in default under the Covenant Agreement beyond any applicable notice and cure period and that the Covenant Agreement remains in full force and effect.

Executed the \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

THE CITY OF RAPID CITY

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

Name: \_\_\_\_\_

Title: \_\_\_\_\_

STATE OF SOUTH DAKOTA )

) ss.

COUNTY OF \_\_\_\_\_ )

On \_\_\_\_\_, 200\_, before me, \_\_\_\_\_, Notary Public, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

\_\_\_\_\_

Signature

(SEAL)