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February 11, 2009

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Re: Appeal of Denial of Petition for Major Amendment to a Planned Residential Development: File No. 08PD052 -- Council Meeting of February 17, 2009

Honorable Council Members:

I represent Mandalay Homes, LLC ("Mandalay"), on general business matters and have been asked to communicate its position to the Council with regard to the appeal of the above-referenced matter. In short, due to events beyond Mandalay's direct control, a portion of a garage built in the Red Rock

Meadows subdivision, encroaches into the 18' set back. A copy of a map showing the location of the lot as well as a survey are attached as Exhibits A and B. The unintentional encroachment was not discovered until an improvement and location exhibit was received during the closing process. The home and garage at issue are owned by Anuiadha Shende, who is absolutely free from fault or blame in this unfortunate situation. Rather, direct fault lies with one of Mandalay's former subcontractors who erred in placement of the foundation.¹

As an aside, Mandalay has implemented a two-step approach to ensure this situation does not reoccur. First, it immediately terminated the negligent subcontractor and hired a reputable and established local firm. Second, the new/current subcontractor verifies all set back requirements with a string line and tape. The requirements are then confirmed by Mandalay's field superintendent after the forms are set but prior to pouring the foundation.

Mandalay took responsibility and attempted to address the situation as soon as the problem was discovered. I attach a brief chronology for your convenience.

DATE	EVENT	DESCRIPTION
11/05/05	PRD Approved	The Planning Commission approves the Planned Residential Development allowing an 18' front yard setback.
9/24/08	Major Amendment to a PRD (1 st)	Mandalay's first application submitted.
10/23/08	Planning Commission Meeting and Appeal	Commission denies Mandalay's Petition without Prejudice, citing potential safety hazards. Mandalay files notice of appeal the same day.
11/13/08	Letter to City Attorney's Office	Advising Attorney Schad that in order to provide Planning with the most accurate information possible, Mandalay obtained an actual survey. <u>See Exhibit B.</u> It was discovered that a variance was only needed for a portion of the garage, not the entire garage as indicated on the improvement and location exhibit. Specifically, due to the unique shape of the lot, only the northern portion of the garage encroaches into the setback as it measures 17.3' (as opposed to the 17.6' as stated in the original application).
11/21/08	Letter to City dismissing appeal	Mandalay requests appeal (to be heard by the Council on December 1, 2008) be dismissed so that it may re-file the Petition to include the more accurate survey information.
12/3/08	Major Amendment to PRD (2 nd)	Major Amendment to Planned Residential Development filed again to include more accurate information based upon survey received. Exhibit B.

¹ Mandalay is taking responsibility for the negligence, albeit unknown at the time, of its former subcontractor.

1/22/09	Staff Report and Rapid City Planning Commission Meeting	Staff recommends the Major Amendment be denied without prejudice. The single reason stated for the recommendation for denial is a belief that an 18' setback in the front of the garage is the "minimum necessary to insure that a vehicle may be parked in the driveway without overhanging" into the sidewalk and the proposed 17' 3" is not adequate. Commission denies application and Mandalay Appeals.
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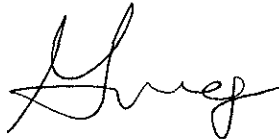
One concern that was raised at the initial Planning meeting was whether the City of Rapid City could be held liable to any person injured as a result of a vehicle parked within, and therefore obstructing, the sidewalk. I was not present at this meeting. However, it is my opinion that the City could not be held liable. Rather, the person(s) who parked on the sidewalk would be liable pursuant to SDCL §32-30-6.1 ("no person may stop, stand or park a vehicle...[o]n a sidewalk"). See also 63 C.J.S. Municipal Corporations § 767, p. 2 (owner of vehicle parked on sidewalk has duty to ensure he has not created an unsafe condition for the passing of pedestrians).

For ease of reference, please find enclosed photographs depicting the subject lot with a full size pickup truck in the driveway. Exhibit C. It is clear that the current encroachment is minimal at best. Mandalay respectfully submits that the potential cost of curing the encroachment (\$15,000 or more) outweighs the minimal benefit to be gained (approximately six inches of sidewalk space). Based upon the totality of the circumstances, Mandalay respectfully requests the Council reverse the decision of the Planning Commission and approve its Major Amendment to a Planned Residential Development.

Please feel free to contact me at your convenience should you have any questions or simply wish to discuss further. Thank you in advance for your consideration.

Sincerely,

BANGS, McCULLEN, BUTLER,
FOYE & SIMMONS, L.L.P.



Gregory J. Erlandson

GJE:srl

cc: Client
Michael Schad, Esq.
Planning and Zoning

08PD064

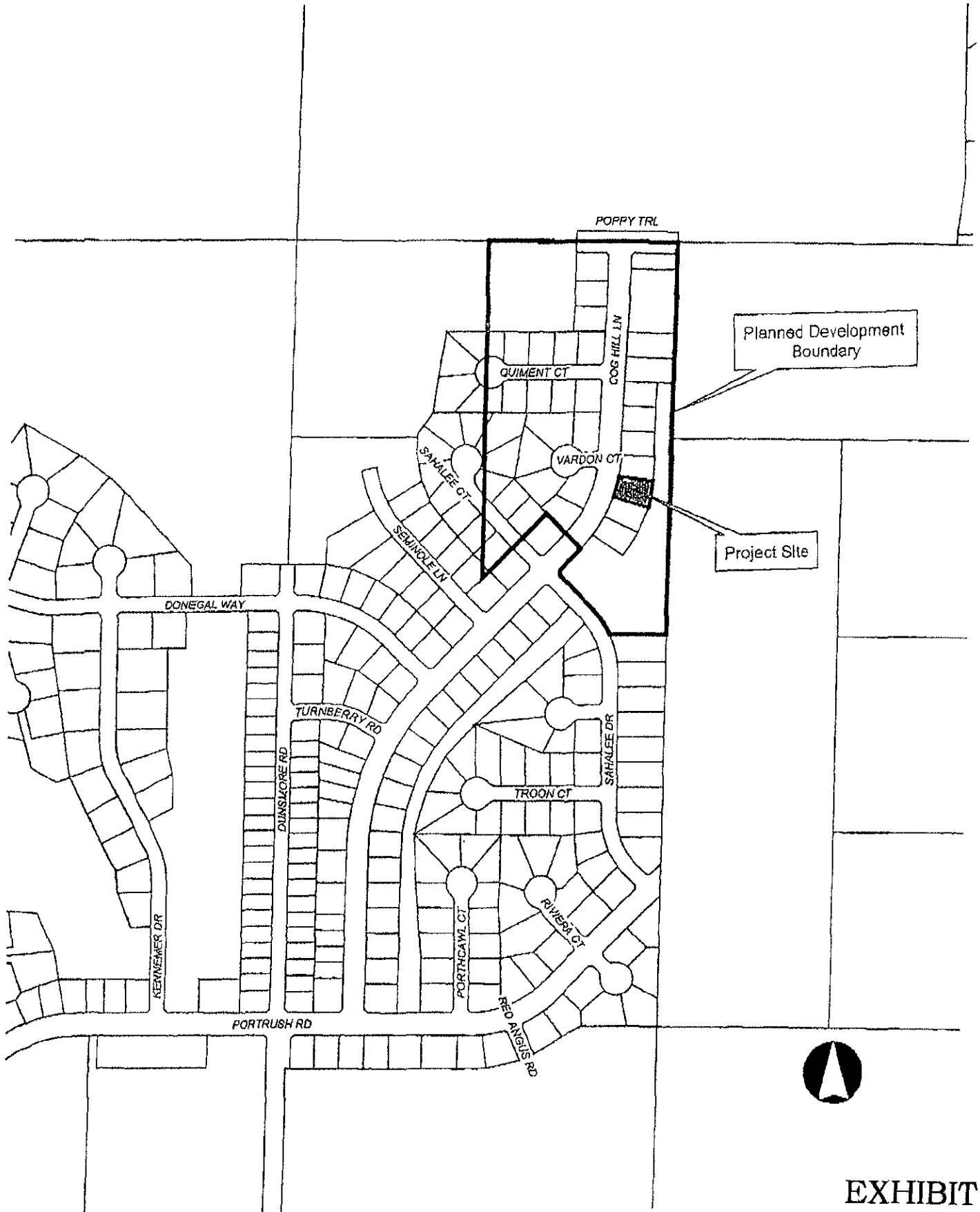
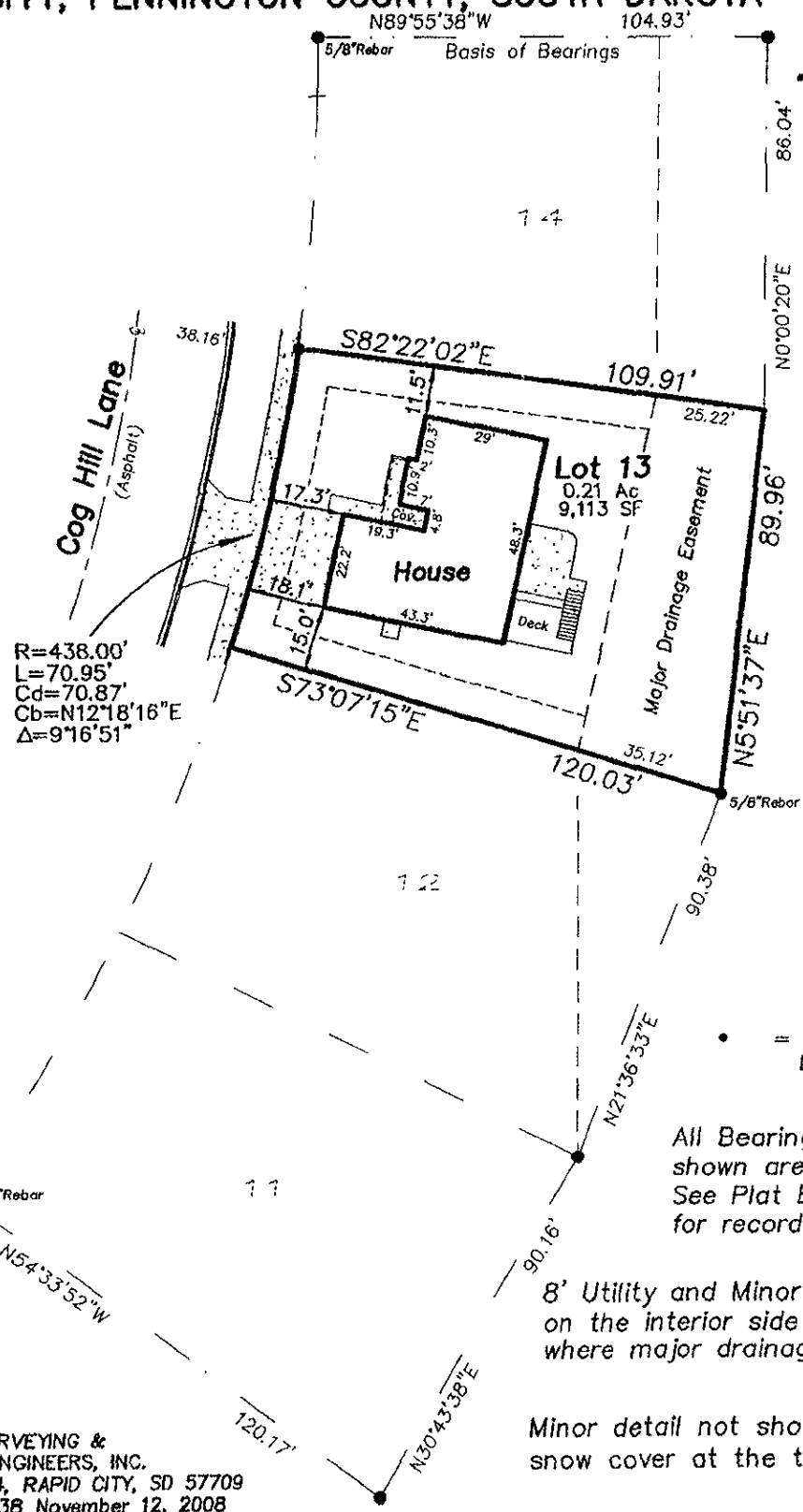


EXHIBIT A

EXHIBIT A

RECORD OF SURVEY
 LOT 13, BLOCK 2, RED ROCK MEADOWS SUBDIVISION
 RAPID CITY, PENNINGTON COUNTY, SOUTH DAKOTA



LEGEND

- = Found Survey Monument
 LS 3977 unless noted

All Bearings and Distances
 shown are measured this survey
 See Plat Book 34 Page 149
 for record information

8' Utility and Minor Drainage Easements
 on the interior side of all lot lines except
 where major drainage easements are located

Minor detail not shown due to
 snow cover at the time of survey

PREPARED BY:
 FISK LAND SURVEYING &
 CONSULTING ENGINEERS, INC.
 P.O. BOX 8154, RAPID CITY, SD 57709
 (605) 348-1538 November 12, 2008

NO. 08-10-04



10/22/2008



10/22/2008

EXHIBIT C

