

PREPARED BY: City Attorney's Office
300 Sixth Street
Rapid City, SD 57702
(605) 394-4140
7-20-10

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

AGREEMENT BETWEEN THE CITY OF RAPID CITY AND MCCARTHY PROPERTIES, LLC TO ALLOW THE CONTINUED USE OF A SUB-GRADE ENCROACHMENT INTO THE ADJACENT PUBLIC RIGHT OF WAY.

This Covenant Agreement (the "Agreement") is made and entered into by and between the CITY OF RAPID CITY, a municipal corporation of the State of South Dakota, located at 300 Sixth Street, Rapid City, SD 57701 (herein after referred to as the "City") and the MCCARTHY PROPERTIES, LLC, located at 2834 Jackson Blvd., Rapid City, SD 57702 (herein after referred to as the "Landowner").

WHEREAS, the City is doing an improvement project on 6th Street adjacent to the Landowner's property; and

WHEREAS, as part of this project the City will be reconstructing the sidewalks adjacent to the Landowner's property; and

WHEREAS, in preparation for the project the City identified the properties which had sub-grade spaces which encroached into the public right of way below the sidewalks; and

WHEREAS, The Landowner's property was identified as one of the properties which had such an encroachment; and

WHEREAS, as a general rule, private encroachments into the public right of way are not legal; and

WHEREAS, some private encroachments into the public right of way can be legal so long as they do not interfere with the use of the public right of way; and

WHEREAS, sub-grade encroachments which extend into the public right of way were common features on older buildings in central business districts; and

WHEREAS, such encroachments do not interfere with the use of the public right of way, but do pose a potential liability issue for both the City and Landowner; and

WHEREAS, the City would like to balance its desire to remove all sub-grade encroachments from the public right of way with the needs of Landowners who still have sub-grade encroachments which were legal when constructed and are still in use; and

WHEREAS, the City is willing to allow the Landowner's current sub-grade encroachment to remain if the Landowner is willing to agree to certain terms and conditions.

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

1. The land which is subject to this agreement is generally located at 508 6th Street, Rapid City, South Dakota and is legally described as:

West Ten feet of Lot 13, all of Lots 14 through 16, except the South Fifty-nine and One-half feet of Lots 13 through 16, of Block 85, Original Town of Rapid City, Pennington County, State of South Dakota.

2. In conjunction with its street improvement project, the City will design and reconstruct a portion of the sub-grade encroachment belonging to the Landowner (the "Project"). The space reconstructed for the Landowner will be of similar size and returned to similar functionality for the purpose it is currently being used. The City will keep the Landowner informed on the design of the space and the work to be performed, but the City's decisions as to the project design and costs are final. The ceiling for the sub-grade encroachment will be designed and constructed for HS-20 loads as part of the Sixth Street Reconstruction Project.

3. In exchange for being allowed to continue to maintain the sub-grade encroachment, the Landowner agrees to provide the City, its engineer, contractor, subcontractors and other agents, reasonable access to the property to complete the design and construction of the Project. The Landowner further agrees to be responsible for any maintenance and upkeep on the structure once the Project has been completed and the work accepted by the City. The Landowner specifically acknowledges that once the Project is completed, the Landowner is in the best position to provide necessary maintenance and upkeep. Upon noticing any structural deficiencies or other maintenance and safety concerns which, in the opinion of the Landowner, are issues related to design and construction of the Project, the Landowner shall immediately inform the City Engineer.

4. From the date of this Agreement being approved, the sub-grade encroachment will be considered in the nature of a revocable license to occupy the sub-grade portion of the right of way where the structure is located. If the City engages in another street project, or otherwise needs to remove the encroachment the Landowner agrees to do so at its sole expense. The Landowner further agrees to remove the encroachment if requested by the City due to maintenance or safety concerns.

5. If the City becomes aware of safety or maintenance issues related to the sub-grade encroachment and the Landowner refuses to repair or remove the encroachment, the City may enter onto the property and conduct repairs, or if repairs are not feasible or deemed too expensive, remove the structure at the Landowner's sole expense. If the Landowner refuses to pay the City for the cost of such work and forces the City to obtain a judgment for the cost, the Landowner agrees to pay the City's reasonable attorney's fees.

6. The Landowner's agree to allow City agents and/or employees reasonable access to the sub-grade encroachment for the purpose of conducting inspections to determine the structural integrity and overall safety of the sub-grade encroachment. If the Landowner refuses reasonable inspection requests, the City may revoke the Landowner's license to occupy the right of way and require the sub-grade encroachment be removed at the Landowner's expense.

7. The City will defend, indemnify and otherwise hold harmless the Landowner, its heirs, assigns and successors in interest from any and all claims arising out of the negligent design or construction of the portion of the sub-grade encroachment reconstructed by the City.

8. The Landowner agrees to maintain sufficient liability insurance coverage for the property subject to this Agreement. The Landowner will defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the sub-grade encroachment except those claims referenced in paragraph 7 of this Agreement.

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 Landowner acknowledges that the City could force it to immediately remove the sub-grade encroachment and the City's promise to design and reconstruct portions of the sub-grade structure is good and sufficient consideration for the promises it has made herein.

11. 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.

12. Failure of a party to insist upon adherence to any term of this Agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon adherence to that term, or any other term of this Agreement.

13. This Agreement constitutes the entire agreement of the parties. No other writings or negotiations are part of this document. This agreement may only be modified by mutual agreement of both parties. Any modifications or addendums to this agreement must be in writing.

14. This Agreement is intended solely for the benefit of the parties hereto along with their heirs, assigns and successors in interest and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as allowed under paragraphs 9 and 12 of this Agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

15. If any section(s), or provisions of this Agreement are 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.

16. 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 the Circuit Court for the Seventh Judicial Circuit.

17. 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 _____, 2010.

CITY OF RAPID CITY

Mayor

ATTEST:

Finance Officer

MCCARTHY PROPERTIES, LLC

By: Stephen McCarthy
Its: Operating Manager

State of South Dakota)
 ss.
County of Pennington)

On this the ____ day of _____, 2010, before me, the undersigned officer, personally appeared Allan Hanks and Pauline Sumption, 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 instrument 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 South Dakota)
)ss.
County of Pennington)

On this 18th day of November, 2010, before me, the undersigned officer, personally appeared Stephen McCarthy, who acknowledged himself to be the Operating Mgr of McCarthy Properties, 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.

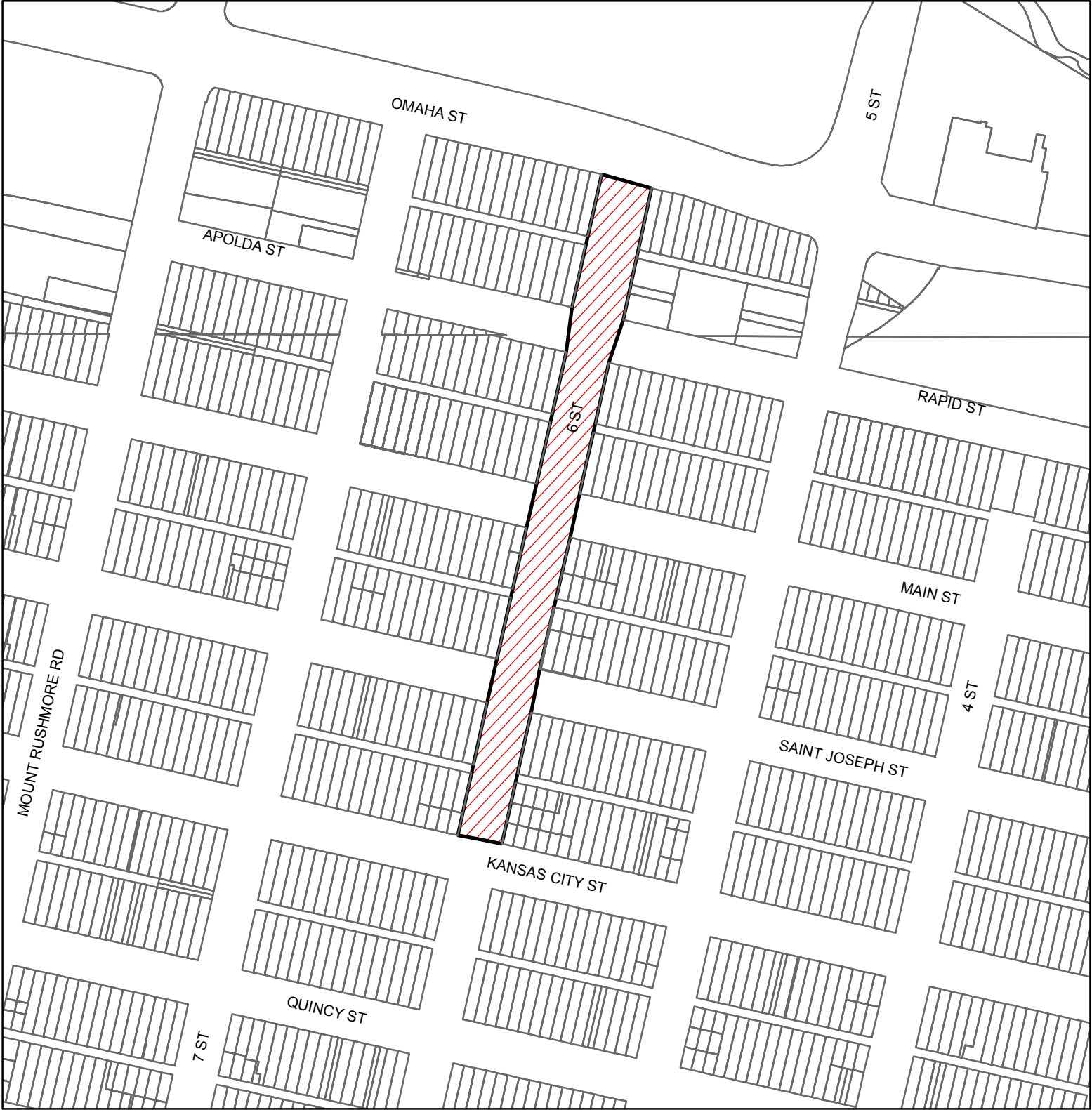
Teresa Harris
Notary Public, South Dakota
My Commission Expires: 12-10-15



EXHIBIT "A"

PW113010-23

SCALE 1" = 300'



**DOWNTOWN STREET IMPROVEMENTS-PHASE 2
OMAHA STREET TO KANSAS CITY STREET
PROJECT NO. ST10-1817 CIP NO. 50138**