

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)

COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND MALL DRIVE, L.L.C., REGARDING FUTURE OFF-SITE STREET IMPROVEMENTS IN THE VICINITY OF ITS PROPERTY LOCATED ON EAST MALL DRIVE.

This 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, South Dakota 57701, herein after referred to as the "City," and Mall Drive, L.L.C., a South Dakota corporation, located at 601 West Boulevard, Rapid City, South Dakota 57701, herein after referred to as the "Landowner."

RECITALS

WHEREAS, the Landowner is the owner of property generally located along East Mall Drive between Dyess Ave and N. Elk Vale Rd.; and

WHEREAS, Landowner has applied for a Planned Commercial Development on its property; and

WHEREAS, in conjunction with the Planned Commercial Development application, the City has obtained a traffic study from the Landowner; and

WHEREAS, the traffic study identifies future improvements which may be needed when the traffic counts in the study area reach certain milestones; and

WHEREAS, these improvements will benefit and be necessitated by, all the landowners in the area, not just the Landowner; and

WHEREAS, the Landowner acknowledges it, or its heirs, assigns and/or successors in interest will contribute to the increased traffic and should bear some financial responsibility for these future improvements; and

WHEREAS, the funding mechanism for the future improvements contemplated by this Covenant Agreement will provide a reasonable means for all landowners and the City to complete improvements without delay of future development or sale of land by landowners; and

WHEREAS, it is the intent of the parties to enter into an agreement whereby the Landowner agrees to cooperate with a future assessed project at such time as roadway and traffic control improvements are needed as a condition of approval for its Planned Commercial Development.

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

1. This agreement pertains to property generally located along East Mall Drive and legally described as:

The NW1/4 of the SE1/4 north of I-90 and a portion of Lot E of the S1/2 of the SE1/4, Less Lot H-13, Less Mall Drive Subdivision, located in Section 28, T2N, R8E, BHM, Rapid City, Pennington County, South Dakota; and

Lot 1 of I-90 Heartland Business Park, Rapid City, Pennington County, State of South Dakota.

2. The Landowner acknowledges that development of its property will contribute to the necessity for future roadway improvements to East Mall Drive, including, but not limited to, the potential signalization of the intersections of East Mall Drive with Dyess Ave and Elk Vale Rd. The Landowner further acknowledges the City has the power to make assessments for local improvements on property adjoining or benefited thereby, to collect same in the manner provided by law, and to fix, determine and collect penalties for nonpayment of any special assessments. The Landowner on behalf of itself and its heirs, assigns and successors in interest agree that if at any time in the future the City determines it is necessary or desirous to construct street improvements to East Mall Drive or install signalization which is adjacent to, or benefits the above described property through an assessed project, the Landowner its heirs, assigns, or successors in interest, waive any right to object to such an assessed project as allowed under state law and further agree not to take any action, or participate in any action which seeks to prevent such assessed project. This waiver does not prevent the Landowner, its heirs, assigns or successors in interest from commenting on, or providing input to the City regarding any such assessed project, or from disputing the validity of any amounts actually assessed.

3. 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 Landowner, 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.

4. The Landowner acknowledges that in the absence of the covenants it has made herein the City would not approve its Planned Commercial Development. The Landowner further

acknowledges that the City's approval of its Planned Commercial Development is good and sufficient consideration for the promises it has made herein. This agreement pertains to future improvements related to East Mall Drive and certain traffic control improvements. In no event will the future development or sale of land be delayed or denied due to the lack of the improvements to East Mall Drive contemplated herein. However, this agreement does not relate to required subdivision or other improvements, not involving East Mall Drive, which may be required for future sale or development of lots within the property covered by this agreement.

5. The City may undertake any legal or equitable action available to enforce the provisions of this agreement in addition to any remedy provided herein. In the event the City is required to undertake any action to enforce the terms of this agreement, the undersigned, its 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.

6. 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.

7. This agreement shall be construed according to the laws of the State of South Dakota. No modification or amendment to this agreement shall be valid, unless evidenced by a writing signed by the parties hereto. The venue of any action concerning this agreement shall be the Circuit Court for the Seventh Judicial Circuit in Pennington County, South Dakota.

8. 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 _____, 2011.

CITY OF RAPID CITY

Alan Hanks, Mayor

ATTEST:

Finance Officer
(SEAL)

MALL DRIVE, L.L.C.

BY: _____
ITS: _____

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2011, before me, the undersigned officer, personally appeared Alan 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 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)

State of _____)
 ss.
County of _____)

On this the _____ day of _____, 2011, before me, the undersigned officer personally appeared _____, who acknowledged himself to be the _____ of Mall Drive, L.L.C., 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, _____

My Commission Expires:
(SEAL)