

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

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

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND  
COTESFORD & CHAMBERLAIN, LP1, REGARDING 818 ST. JOSEPH  
STREET IN RAPID CITY.**

This declaration of covenant and agreement ("Agreement") is entered into this day of \_\_\_\_\_, 2007, by and between COTESFORD & CHAMBERLAIN, LP1, located at 816 St. Joseph St., Rapid City, South Dakota 57701, herein after referred to as the "Landowner" and the CITY OF RAPID CITY, a South Dakota municipal corporation, located at 300 Sixth Street, Rapid City, South Dakota, 57701, herein after referred to as the "City."

WHEREAS, Landowner owns a building located generally at 818 St. Joseph Street in Rapid City which is legally described as:

Lots 24 and 25 of Block 82 of the Original Town of Rapid City, located in T1N, R7E, of Section 1, BHM, Rapid City, Pennington County, State of South Dakota; and

WHEREAS, this building has a set back of zero feet from the western lot line; and

WHEREAS, the lot adjacent to the Landowner's property at 818 ½ St. Joseph St. and legally described as:

Lot 23 of Block 82 of the Original Town of Rapid City, located in T1N, R7E, of Section 1, BHM, Rapid City, Pennington County, State of South Dakota

is currently owned by Maguire Services, LLC, and also has a setback of zero feet from the common lot line; and

WHEREAS, the lot owned by Maguire Services is currently an open paved area used for parking; and

WHEREAS, the Landowner wishes to construct windows in the western wall of the building at 818 St. Joseph Street; and

WHEREAS, the City Building Official denied the Landowner's request for a building permit to construct the windows based on the requirement that buildings with window openings of the kind proposed by the Landowner must have a certain amount of separation under the International Building Code and based on the zero foot setback from the common property line this requirement could not be met; and

WHEREAS, the Landowner appealed the Building Officials denial to the International Building Code Board of Appeals requesting that the Board find that by acquiring a 3 foot 1 inch "no build" easement on the adjoining property they had met the code requirements for a building with a 3 to 5 foot setback; and

WHEREAS, the City's International Building Code Board of Appeals heard the appeal on January 3, 2007, and listened to the arguments of both the Landowner and City staff; and

WHEREAS, after hearing the appeal the City's International Building Code Board of Appeals did conditionally allow the Landowner to obtain a building permit for the windows that it proposed; and

WHEREAS, the Board conditioned its approval of the alternative method of obtaining the required separation distance by requiring that the Landowner acquire a "no build" easement from the adjacent property owner and that in addition, the Landowner enter into an agreement with the City requiring that the Landowner close the window openings at its own expense if in the future a building is ever erected which encroaches into the required separation distance.

NOW THEREFORE, the parties hereby agree as follows:

1. The Landowner agrees to obtain from the owner of Lot 23 and file at the Register of Deeds a "no build" easement adjacent to the common property line it shares with the property located at 818 ½ St. Joseph St., Rapid City, South Dakota.

2. If at any time in the future the "no build" easement is allowed to lapse or is revoked by the owner of 818 ½ St. Joseph St. and a building is constructed on that lot which encroaches into the required 3 foot setback distance, the Landowner further agrees to close up the windows at its own expense in a manner approved by the City's Building Official which will result in the former window openings providing an amount of fire protection equivalent to the amount of fire protection provided by the remainder of the western wall. The Landowner will have 45 days to complete the closing of the window. If the Landowner does not close the window openings within 45 days, without good cause for failing to do so, the City may proceed with any civil action available to it and the Building Official may order that the building not be occupied until it is brought into compliance with this agreement. The Common Council of Rapid City will make the determination of whether or not there has been good cause for failure to comply with the terms of the agreement within 45 days and may grant the Landowner such extensions of time for closing the window openings as they deem appropriate.

3. In order for the required setback/separation distance to be 3 feet, the windows installed by the Landowner must amount to less than 15% of the total area of the western wall and the building must be sprinkled with an approved sprinkler system. If either of these conditions are not met the required separation between buildings in this agreement will be 10 feet. Any reference in this agreement to a three foot setback will automatically become a 10 foot setback and any structures will be required to have an actual separation of at least 10 feet.

4. In exchange for the Landowner's obligations incurred in this agreement the Landowner will be able to obtain a building permit to construct windows in the western wall of the building located 818 St. Joseph St. The Landowner acknowledges that the City's primary consideration in granting the building permit to construct the proposed windows is that the actual separation distance between the buildings required by the International Building Code will be maintained and the Landowner's further promise that should an adjacent building encroach into the required separation distance the Landowner will close the window openings at its own expense. The Landowner further acknowledges that the granting of the permit that would otherwise be denied is sufficient consideration for this agreement.

5. 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 Landowners, 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.

6. 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 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.

7. 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.

8. 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.

9. 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 \_\_\_\_\_, 2007.

CITY OF RAPID CITY

\_\_\_\_\_  
Jim Shaw, Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer

(SEAL)

COTESFORD & CHAMBERLAIN, LP1

\_\_\_\_\_  
*John B. Brown*  
By: *President*

Its: \_\_\_\_\_

State of South Dakota     )  
                                          ss.  
County of Pennington     )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2007, before me, the undersigned officer, personally appeared Jim Shaw 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:

State of South Dakota        )  
                                          )ss.  
County of Pennington        )

On this 8<sup>th</sup> day of January, 2007, before me, the undersigned officer, personally appeared John E. Brewer, who acknowledged himself to be the President of Cotesford & Chamberlain, LP1, 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.

Margaret Paul  
Notary Public, State of South Dakota  
My Commission Expires: 6/25/2009

[SEAL]