

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

LF061307-05

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

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND GOOD GUYS, LLC, TO ALLOW CONSTRUCTION OF A RETAIL PAD WITHIN THREE FEET OF A PREVIOUSLY INSTALLED SEWER MAIN.**

This declaration of covenant and agreement is entered into this 5<sup>th</sup> day of June, 2007, by and between the CITY OF RAPID CITY, a South Dakota municipal corporation, located at 300 Sixth St., Rapid City, South Dakota, 57701, herein after referred to as the "City," and GOOD GUYS, LLC, located at 4940 5<sup>th</sup> St., Suite 2A, Rapid City, South Dakota, 57701, herein after referred to as the "Landowner."

WHEREAS, Landowner is developing a retail shopping complex at property generally located at 333 3<sup>rd</sup> Street, Rapid City, South Dakota and legally described as:

Dan's Supermarket Tract Revised, Less Lot 1 and Less Lot H1 of Blocks 66 and 67 of the Original Town of Rapid City, Rapid City, Pennington County, State of South Dakota; and

WHEREAS, the Landowner requested a variance to reduce the required building setback from twenty-five (25) feet to three (3) feet along Rapid Street; and

WHEREAS, the requested variance will allow the Landowner to place a structure on a proposed retail pad within three feet of a City storm water sewer; and

WHEREAS, the City is willing to grant the variance to the required setback if the Landowner agrees to compensate the City for any damages to the storm sewer adjacent to the property caused by its building and further agrees to hold the City harmless for any future damage to its property caused by the proximity of its proposed structure to the storm sewer.

NOW THEREFORE, the parties agree as follows:

1. The City agrees to grant the Landowner's request to reduce the required building setback from twenty-five (25) feet to three (3) feet for a distance of two hundred sixty-six (266) feet along the southern property line for the proposed retail structure located in the southeast corner

of the above described lot. The six foot high garbage enclosure at the east end of the proposed structure is specifically included in this agreement.

2. In exchange for the City granting the Landowner's request to reduce the setback, the Landowner agrees that it will indemnify the City for any damages that its structure may cause to the City's storm water sewer located in the north side of the Rapid Street right-of-way adjacent to the above property. The Landowner further agrees for itself and its tenants that it will hold the City harmless for any damage to the above described property that is caused by the City's previously identified storm sewer or any work carried out by the City or anyone doing work on behalf of the City. The City agrees to perform all maintenance work or other necessary work on the storm sewer in a workman like manner and further agrees, to the extent possible, to conduct such work in a manner that minimizes any potential damage to the Landowner or its tenant's property. However, any damage caused to the foundation of the structures or any other damage to the above described property as a result of the City operating and/or maintaining the storm sewer will be the responsibility of the Landowner and/or its tenants and not the City.

3. The Landowner further agrees that all entrances on the south side of the proposed structure are limited to service entrances only with no overhead doors. The portion of the southwest corner of the building located in the sight triangle will be removed. No further expansion of the proposed structure will be allowed unless a Major Amendment to the Planned Commercial Development is approved.

4. By granting the Landowner's request to reduce the required setback the City has allowed it to maximize the buildable area on its property. If the required setback were not reduced the Landowner would not be able to build the proposed retail structure. The ability to build the proposed retail structure will increase the profitability of the Landowner's development. The Landowner acknowledges that the City's granting of the reduced setback is sufficient consideration for the promises that the Landowner has made herein. The Landowner further acknowledges that the City's primary consideration for granting the request for a reduced setback is the Landowner's promises contained herein and that without these promises the Landowner's request for the reduced setback would not have been granted.

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. In addition to any other remedies the City may have, should the Landowner violate the promises made in this agreement any improvements constructed within the reduced setback will be deemed illegal and will be required to be removed at the Landowner's expense within one hundred eighty (180) days of receiving notice to do so from the City.

7. The City may undertake any legal or equitable action available to enforce the provisions of this agreement in addition to any other remedies 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.

8. Should one of the Landowner's tenants undertake legal action against the City relating to the storm sewer the Landowner agrees to defend the City and further agrees to indemnify it for any judgments entered as a result of said legal actions.

9. 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.

10. 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.

11. 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

\_\_\_\_\_  
Mayor

ATTEST:

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

(SEAL)

GOOD GUYS, LLC

*Scott Mueller*  
\_\_\_\_\_  
By: *Scott Mueller*  
Its: *Manager*

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.

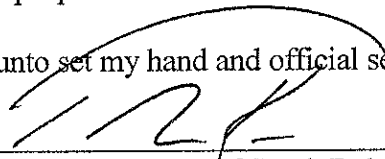
\_\_\_\_\_  
Notary Public, South Dakota

My Commission Expires:

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

On this 5<sup>th</sup> day of June, 2007, before me, the undersigned officer, personally appeared Scott Mueller, who acknowledged himself to be the Manager of Good Guys, 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.

  
\_\_\_\_\_  
Notary Public, State of South Dakota  
My Commission Expires: 11/2/10

[SEAL]