

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

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

This declaration of covenant and agreement is made on this ____ day of _____, 2007, by and between Elk Vale Business Park, LLC, a South Dakota limited liability company ("Elk Vale"), located at P.O. Box 330, Rapid City, SD 57709 and the City of Rapid City, a municipal corporation of the State of South Dakota ("Rapid City"), located at 300 Sixth Street, Rapid City, SD 57701.

RECITALS:

A. Elk Vale is in the process of developing The Northern Lights Development (referred to herein as the "Subject Property") located at the eastern terminus of Cheyenne Blvd South of Interstate I-90, in the City of Box Elder, Pennington County, South Dakota, as more particularly described on Exhibit "A" attached hereto and made part hereof. All of the approximately two hundred and forty acres of the Subject Property belonging to the developer are located within the municipal limits of the City of Box Elder. In order to facilitate the Northern Lights Development on the subject property, it is necessary that Developer has water service available, as development occurs;

B. The Subject Property is located in an area in which Rapid City is readily capable of providing water service and Box Elder is not;

C. Rapid City is under no obligation to furnish water services to the Subject Property;

D. Elk Vale wishes to obtain water services without the necessity of waiting until Box Elder expands its utility services to make such available to the Subject Property;

E. Elk Vale requests the Rapid City furnish such water services to the Subject Property;

F. Elk Vale will use its best efforts during the next three years to secure water services from the City of Box Elder to the Subject Property; and

G. The parties seek to facilitate the immediate development of the Subject Property even though Box Elder cannot currently accommodate the water service needs of the Northern Lights Development.

NOW, THEREFORE, in consideration of the foregoing and the promises, undertakings, and mutual agreements contained herein the parties covenant and agree as follows:

1. **Recitals Incorporated.** The above recitals are hereby incorporated in and made a part of this agreement as fully as if set forth verbatim herein. By signing this agreement the parties acknowledge reading, understanding and agreeing to all of these recitals.
2. **Use of the Subject Property.** Although subject to the sole discretion of Elk Vale, Elk Vale presently intends to develop residential and commercial lots on the Subject Property.
3. **Covenants by Rapid City.** Rapid City makes the following covenants, warranties, agreements and representations, each of which shall be deemed material to this agreement:
 - a. Rapid City will furnish water services to the Subject Property for a period of three years upon the terms, conditions and covenants set forth herein.
 - b. Rapid City will furnish water services to the Subject Property beyond three years at its sole discretion. Rapid City has the unilateral right to terminate water service to the Subject Property after three years. The City shall have no responsibility or liability if it chooses not to continue serving the Subject Property after three years. Elk Vale agrees to defend, indemnify and hold the City harmless for any claims that arise based on the City's decision to terminate water services after the end of the three year period.
4. **Covenants by Elk Vale.** Elk Vale makes the following covenants, warranties, agreements, and representations, each of which shall be deemed material to this agreement:
 - a. Elk Vale agrees to pay all costs for extending Rapid City water services to the Subject Property.
 - b. Elk Vale agrees to get the formal consent of the City of Box Elder for Rapid City to provide water services to the Subject Property. Such consent shall be in the form of a resolution approved by the Box Elder City Council and shall be obtained prior to Rapid City providing water services to the Subject Property. If Box Elder terminates its consent to Rapid City providing water services to the Subject Property, Elk Vale agrees to defend, indemnify and hold the City harmless from any claims that arise related to Rapid City providing water services to the Subject Property. If Elk Vale refuses to fulfill its obligation to defend or indemnify the City per this section, the City may immediately terminate

- water services to the subject property even though it has been less than three years.
- c. Elk Vale agrees that there will one connection point with one shut off valve and one meter connecting the water services of the Subject Property to Rapid City's municipal water system.
 - d. Elk Vale agrees to pay Rapid City all charges, deposits, and rates for service and equipment in connection with water service outside the municipal limits of Rapid City applicable under Rapid City's ordinances and rate schedules, which are now applicable or as may be changed from time to time. The City will bill Elk Vale directly. It will be between Elk Vale, Box Elder and the successors and assigns of Elk Vale to work out how Elk Vale will collect the fees to pay for the water from the owners of the individual parcels within the subject property. Should Elk Vale fail to make payment within thirty (30) days of receiving a bill from Rapid City, the City shall have the right to terminate water services to the Subject Property until such time as Elk Vale pays all monies due and owing for such services. Elk Vale will pay Rapid City 150% of the normal utility fees for the first three years of this agreement, 300% of the normal utility fees for years four and five, 400% during year six, and 500% of the normal utility fees for each year thereafter.
 - e. Elk Vale shall ensure that a copy of this agreement is provided to any purchaser of individual lots within this development.
 - f. Elk Vale, at its sole cost and expense, will disconnect the water services provided by Rapid City to the Subject Property pursuant to this agreement and will connect to Box Elder's water utility services if Box Elder has in fact provided water and sewer utility services to the Subject Property within the time frame set forth in this agreement.
5. **Recording.** The parties agree that all of the terms and conditions herein set forth shall extend to, and be binding upon, the heirs, assigns, or successors in interest of Elk Vale, 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 pursuant to the provisions of South Dakota statutes.
6. **Default; Remedies.** Any party shall be deemed to be in default of its obligations under this agreement upon any breach, failure or nonoccurrence of any material covenant, promise, or obligation contained in this agreement. In the event of any default by any party hereto, the non-breaching party may pursue, in addition to the remedies set forth herein, any and all available remedies in law or equity.
7. **Entire Agreement.** The parties acknowledge that no representations or inducements have been made other than those expressed herein; that this agreement supersedes any and all prior memoranda, correspondence,

conversations, negotiations and agreements pertaining to the matters herein expressed; and that this agreement constitutes the entire agreement between them.

8. **Modification.** The terms of this agreement may be modified in whole or in part only by a written instrument signed by all of the parties. Any oral agreement to modify this agreement shall be void and of no force and effect.
9. **Captions.** The captions and headings of the Paragraphs of this agreement are for convenience only and may not be used to interpret or define the provisions of this agreement.
10. **No Waiver.** No waiver of a breach of any of the covenants or promises of this agreement shall be construed as a waiver of any succeeding breach of the same or other covenant or promise.
11. **Severability.** In the event that any provision or clause of this agreement conflicts with any applicable law, the other provisions of this agreement shall be given effect as fully as possible without the conflicting provision, and to this end the provisions of this agreement are declared to be severable.
12. **Further Assurances.** The parties agree to take all steps and do everything reasonably required to give effect to any of the transactions contemplated by this agreement.
13. **Successors and Assigns.** The covenants and agreements contained in this agreement and the obligations created hereunder shall inure to the benefit of and be binding upon the respective heirs, successors and assigns of the parties and will run with the land.
14. **Governing Law and Forum.** The validity, construction and effect of this Agreement shall be governed by the laws of the State of South Dakota, and the parties hereby consent to the exclusive jurisdiction of the courts of the state of South Dakota for resolution.
15. This agreement shall be effective upon the date of the last party affixing its signature.

Dated this ____ day of _____, 2007.

CITY OF RAPID CITY

Alan Hanks, Mayor

ATTEST:

Finance Officer

(SEAL)

ELK VALE BUSINESS PARK, LLC

By: _____

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2007, before me, the undersigned officer, personally appeared Alan Hanks 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:

(SEAL)

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2007, before me, the undersigned officer personally appeared _____, who acknowledged himself to be the _____ of ELK VALE BUSINESS PARK, LLC, and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, South Dakota

My Commission Expires:

(SEAL)

EXHIBIT A

The real estate which is the subject of said Agreement and this Assignment is described as follows:

DESCRIPTION NO. 1: Tract B in the North Half of the Southeast Quarter ($N \frac{1}{2} SE \frac{1}{4}$) and in the South Half of the Northeast Quarter ($S \frac{1}{2} NE \frac{1}{4}$) of Section 27 in Township 2 North of Range 8 East of the Black Hills Meridian in the City of Box Elder, Pennington County, South Dakota, as shown on the plat filed in Plat Book 3, Page 216; EXCEPTING therefrom Lot H1 of said Tract B, as shown on the plat filed in Highway Plat Book 4, Page 89, and as conveyed to Chicago and Northwestern Railway Company by Warranty Deed recorded October 3, 1964, in Deed Book 145, Page 190; ALSO EXCEPTING therefrom Lot 1 of Tract B in the $N \frac{1}{2} SE \frac{1}{4}$ of said Section 27, as shown on the plat filed in Plat Book 12, Page 197; ALSO EXCEPTING therefrom the West 606.12 feet of Lot H-2 of Tract B in the $N \frac{1}{2} SE \frac{1}{4}$ of said Section 27, as described in Warranty Deed recorded May 11, 1972, in Deed Book 176, Page 107; AND ALSO EXCEPTING therefrom Lot H-2 Revised of said Tract B, as shown on the plat filed in Plat Book 29, Page 40, and

DESCRIPTION NO. 2: The $E \frac{1}{2} NE \frac{1}{4} NE \frac{1}{4}$ and the $E \frac{1}{2} W \frac{1}{2} NE \frac{1}{4} NE \frac{1}{4}$ of Section 34 and the $E \frac{1}{2} SE \frac{1}{4} SE \frac{1}{4}$ and $E \frac{1}{2} W \frac{1}{2} SE \frac{1}{4} SE \frac{1}{4}$ of Section 27, all in Township 2 North of Range 8 East of the Black Hills Meridian in the City of Box Elder, Pennington County, South Dakota.