

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

LF103107-25

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

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY, FMLC INC.,  
CHUCK LIEN AND ROBERT AKERS REGARDING THE PLATTING OF CERTAIN  
PROPERTY ADJACENT TO THE FUTURE EAST MALL DRIVE WITHIN THE CITY  
OF RAPID CITY.**

This agreement is made and entered into by and between the City of Rapid City, a municipal corporation located at 300 Sixth Street, Rapid City, SD 57702, herein after referred to as the "City," FMLC, Inc., located at 3213 W. Main St., Rapid City, SD 57702, herein after referred to as "FMLC," Chuck Lien, whose address is P.O. Box 440, Rapid City, SD 57709, herein after referred to as "Lien," and Robert Akers, whose address is P.O. Box 8086, Rapid City, SD 57709, herein after referred to as "Akers."

WHEREAS, the City intends to build East Mall Drive between its current terminus east of Lacrosse Street to East North Street (herein after referred to as the "proposed segment of East Mall Drive"); and

WHEREAS, FMLC and Akers own property adjacent to the proposed segment of East Mall Drive and wish to plat a certain part thereof into two lots; and

WHEREAS, under the City's subdivision regulations, landowners who subdivide their property are required to either construct all necessary public improvements or provide surety sufficient to cover the cost of constructing those improvements at the time a final plat is approved; and

WHEREAS, under the City's subdivision regulations, the platting of the proposed lots would require FMLC and Akers to either construct a certain portion of the proposed segment of East Mall Drive or provide sufficient surety to guarantee the construction thereof; and

WHEREAS, the City intends to pay for the construction of the proposed segment of East Mall Drive as well as the water and sewer utilities installed therein through use of the federal

money that has been earmarked for the project, state road swap money, and the City's .16 Fund; and

WHEREAS, Lien, who is a shareholder in FMLC, has agreed that, in the event the low bid to construct the proposed segment of East Mall Drive, including the water and sewer utilities, exceeds the City's budgeted costs for the project, he will pay to the City an amount up to the sum of \$285,840 for the purpose of alleviating any shortfall between the amount the City has budgeted and the amount of the lowest responsible bid; and

WHEREAS, it is the intention of the parties to enter into an agreement whereby FMLC and Akers shall receive from the City final approval of the proposed plat of Lots 1 and 2 of Block 1 of East Mall Business Center Subdivision without FMLC and Akers being required to construct the proposed segment of East Mall Drive and using this agreement in lieu of traditional surety therefore and whereby FMLC and Akers agree to connect to the City water and sewer utilities in the proposed segment of East Mall Drive and pay a hook up fee therefore and whereby Lien agrees to undertake the obligation to underwrite any shortfall in funds to construct the proposed segment and the water and sewer utilities therein, up to \$285,840.

NOW THEREFORE, the parties agree as follows:

1. This agreement pertains to property generally located at the western end of the proposed segment of East Mall Drive and legally described as:

Lots 1 and 2 of Block 1 of East Mall Drive Business Center Subdivision, Rapid City, Pennington County, State of South Dakota.

2. Within Thirty (30) days of a plat being submitted by FMLC and Akers for Lots 1 and 2 of Block 1 of East Mall Drive Business Center Subdivision, the City shall give final approval to such plat. This agreement shall serve as surety for the completion of the required subdivision improvements related to the proposed segment of East Mall Drive. No other variances or required subdivision improvements are part of this agreement. Nothing in this agreement shall require the City to approve the proposed plat if it is not in compliance with all of the requirements for final plats other than the requirements related to the construction of the proposed segment of East Mall drive and the water, sewer and other utilities such as street lights and conduit located therein. If the City has not approved the proposed plat within Thirty (30) days, FMLC, Lien and/or Akers may terminate this agreement by providing written notice to the City of their intent to do so.

3. In exchange for the City's approval of the proposed plat for Lots 1 and 2 of Block 1 of East Mall Business Center Subdivision without imposing the obligation to construct the proposed segment of East Mall Drive and accepting this agreement in lieu of traditional surety therefore, Lien agrees, that in the event the cost to construct the proposed segment of East Mall Drive, including the water and sewer utilities installed therein, exceeds the City's budgeted costs for the project, he will pay to the City, within ten days (10) days after the opening of the bids, an amount equal to the shortfall between the amount budgeted by the City and the lowest responsible bid received, up to, but not greater than the sum of \$285,840. Should the City not award the bid for

construction of the proposed segment of East Mall Drive within the time allotted for awarding of bids pursuant to SDCL 5-18-7, the City agrees to refund any amounts paid by Lien under the terms of this agreement. Lien acknowledges that the City's approval of the plat of Lots 1 and 2 of Block 1 of East Mall Business Center Subdivision without the construction of the proposed segment of East Mall Drive or any other improvements that may otherwise be required within the proposed segment under the provisions of the Rapid City Municipal Code and the acceptance of this agreement in lieu of traditional surety therefore is sufficient consideration for the obligation he has undertaken herein.

4. In exchange for the City's approval of the proposed plat for Lots 1 and 2 of Block 1 of East Mall Business Center Subdivision without imposing the obligation of constructing the proposed segment of East Mall Drive or providing traditional surety therefore, FMLC and Akers covenant and agree for themselves, their heirs, assigns, and successors in interest that they will pay a hook-up fee at such time as they construct an improvement on the property subject to this agreement which requires them to connect to City's water and/or sewer utilities. It is understood by the parties that the respective obligations of FMLC and Akers to pay such hook-up fee are separate rather than joint obligations which are intended to be independent of each other and shall only arise with respect to them, individually, when such separate party, person or entity owning a parcel that was part of the land that is subject to this agreement requests that an improvement be constructed which requires them to connect to the City's water and/or sewer utilities. The money generated from the collection of this fee will be used to reimburse the City's .16 Fund for the cost of constructing the water and sewer portion of this project. The fee will be determined pursuant to the statutory provisions on the assessment of public improvements contained in SDCL Chapters 9-43, 9-47 and 9-48 and consistent with the manner in which such determinations have been historically made. In order to provide FMLC and Akers with some limitation on their potential liability, the City agrees that the maximum fee charged under this section will be no more than \$4,300 per acre plus 20% contingency (  $4,300 \times \# \text{ of acres} \times 1.2$  ) for the water improvements and \$130 per acre plus \$30 per linear foot of frontage plus 20% contingency (  $\{130 \times \# \text{ of acres}\} + \{30 \times \# \text{ of linear feet in frontage}\} \times 1.2$  ) for the sewer improvements. This amount was arrived at by calculating the hook-up fees based on the total estimated construction cost of the water and sewer improvements and adding 20%. The actual hook-up fees will be calculated under the same formula (minus the addition of 20% contingency) after the final costs for the project have been determined. Once the actual hook-up fee has been calculated, FMLC, Akers and/or their successors in interest will be required to pay the lower of the two amounts. Such fee will be paid either at the time the owner of a parcel which is subject to this agreement obtains a permit to construct improvements on their property which require connection to the City's water and/or sewer utilities or within (90) days of the owner of an individual property receiving a written request from the City if a permit allowing construction of an improvement that requires connection to the City's water and sewer utilities has already been issued for a parcel subject to this agreement. Such obligation to pay the hook-up fee is individual and will only be imposed on the owner of the parcel on which an improvement has been constructed or a permit has been requested. These hook-up fees cover the cost of the water and sewer improvements being constructed in conjunction with the current Mall Drive Project ST 06-1334b – CIP #50521. Payment of these fees does not relieve FMLC, Akers or their heirs, assigns or successors in interest from potential hook-up or construction fees that

may be imposed as a result of future water or sewer projects such as a north-south water main or lift station upgrades.

5. In addition to the above hook-up fees, FMLC and Akers will be required to pay a previously established fee for this area. This fee is for Project VIC # SSW 95-591 and is \$198.50 per acre. This fee will be paid at the time building permits are obtained.

6. FMLC and Akers further covenant and agree for themselves, their heirs, assigns, and successors in interest, that should the City request Lien to fulfill the obligation he has agreed to undertake in paragraph three of this agreement and he fails to do so in time for the City to award the bid for construction of the proposed segment of East Mall Drive pursuant to SDCL 5-18-7, that they will install the subdivision improvements that they would have otherwise been responsible for in the absence of this agreement. They will be required to install the required subdivision improvements within 90 days of the bid for the construction of the proposed segment of East Mall Drive having been rejected. Should the weather prevent immediate installation of these subdivision improvements, the City Council may accept a surety bond in an amount equal to the estimated cost of installing the improvements, whereby the improvements will be made and utilities installed without cost to the City in the event of default.

7. All of the terms and conditions set forth herein shall extend to and be binding upon the heirs, assigns, and successors in interest of FMLC and Akers, 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.

8. The parties acknowledge that in the absence of the promises made by Lien, Akers and FMLC in this agreement the City would not approve the proposed plat for Lots 1 and 2 of Block 1 of East Mall Drive Business Center Subdivision without the construction of the required subdivision improvements to the proposed segment of East Mall Drive. The parties further acknowledge that the ability to plat the proposed lots prior to constructing East Mall Drive and the City's acceptance of this agreement in lieu of traditional surety for the construction thereof is good and sufficient consideration for the promises made herein.

9. If the City approves a Tax Increment Financing District and associated Project Plan which includes the cost of constructing the proposed segment of East Mall Drive as a reimbursable expense, the City agrees to reimburse Lien for any money that he has given to the City to construct the improvement pursuant to paragraph three of this agreement. He will receive his reimbursement through the proceeds of the Tax Increment District and will be required to enter into a separate Contract for Private Development with the City. The City's obligation to reimburse Lien will be strictly limited to the proceeds of the Tax Increment District. There will be no obligation for the City to use any other revenue source for the reimbursement and the City makes no guarantee that the revenue generated by the district will be sufficient to repay Lien for his entire contribution. Furthermore, the proceeds of the Tax Increment District will be used to pay back the project costs based on each parties pro rata share of the total project costs included in the district.

10. If any section(s), or provision 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 agreement if they can be given effect without the invalid section(s) or provisions.

11. This agreement can only be amended in writing by the consent of all the parties hereto.

12. The parties' rights and obligations under this Agreement shall be governed by, and construed in accordance with, the laws of the State of South Dakota. Any dispute concerning this Agreement shall be venued and litigated in the Circuit Court for the Seventh Judicial Circuit, located in Rapid City, Pennington County, South Dakota.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2007.

CITY OF RAPID CITY

\_\_\_\_\_  
Mayor

ATTEST:

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

FMLC, Inc.

Julie A. Lien

By: \_\_\_\_\_  
Its: President

Chuck Lien  
Chuck Lien

RW Akers  
Robert Akers

STATE OF SOUTH DAKOTA       )  
  )ss.  
COUNTY OF PENNINGTON       )

On this \_\_\_\_ 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 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 as such Mayor and Finance Officer of the City of Rapid City.

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

[SEAL]

\_\_\_\_\_  
Notary Public, State of South Dakota  
My Commission Expires: \_\_\_\_\_

STATE OF SOUTH DAKOTA       )  
  )ss.  
COUNTY OF PENNINGTON       )

On this 10 day of October, 2007, before me, the undersigned officer, personally appeared Julie A. Lien, who acknowledged themselves to be the President of FMLC, Inc. and that as such, being duly authorized so to do, executed the foregoing instrument for the purposes herein contained.



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

Jenny Simonson  
\_\_\_\_\_  
Notary Public, State of South Dakota  
My Commission Expires: 10/13/2011

**My Commission Expires  
October 13, 2011**

STATE OF SOUTH DAKOTA       )  
  )ss.  
COUNTY OF PENNINGTON       )

On this the 10 day of October, 2007, before me, the undersigned officer, personally appeared Chuck Lien, known to me, or satisfactorily proven, to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

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

Jenny Simonson  
\_\_\_\_\_  
Notary Public

**My Commission Expires  
October 13, 2011**





