



# CITY OF RAPID CITY

**RAPID CITY, SOUTH DAKOTA 57701-2724**

## **Risk Management**

300 Sixth Street

605-394-6620

### **MEMORANDUM**

DATE: October 8, 2010

TO: Public Works Department  
Public Work Committee

FROM: Keith L'Esperance  
Risk Manager 

SUBJECT: McCarthy Properties Sewer Claim Report

Please place the attached updated claim forms, releases, supporting documentation and final findings report on the October 12, 2010, Public Works Committee agenda. This is submitted with recommendation that the Public Works Committee affirm payment made to McCarthy Properties on July 6, 2010, by vote to accept the report from Risk Management on a claims processing procedural error and ratify the return of the funds due under the City sewer backup reimbursement policy. This claim originally occurred March 7, 2007, and was not settled until June 21, 2010.

Thank you.

Attachments



EQUAL OPPORTUNITY EMPLOYER

May 24 07 08:11a

Water Reclamation

605-394-5478

p.4

Sent to Risk Manager:

Sent to Black Hills Agency:

**Claim Form**  
**City of Rapid City**  
**300 Sixth Street**  
**Rapid City, SD 57701**  
**(605) 394-4143**

Claimant: McCarthy Properties, LLC Home Phone \_\_\_\_\_  
 Address: 2834 Jackson Blvd., Suite 202 Business Phone 605/716/9385  
 Date and Time of Incident: 3/7/07 approximately 9:00 p.m.  
 Location of Incident: 601 12th Street, Rapid city, SD  
 Type of Accident:  
 (Check all that apply): ( ) Injured Person (X) Property Damage ( ) Automobile Accident

**Injured Person**

Occupation: \_\_\_\_\_ Employed by: \_\_\_\_\_  
 Did you see a doctor? Yes ( ) No ( ) Doctor's Name: \_\_\_\_\_  
 Were you hospitalized? Yes ( ) No ( ) Hospital: \_\_\_\_\_  
 Have you returned to work or school? Yes ( ) No ( ) Age: \_\_\_\_\_  
 Probable disability period: \_\_\_\_\_  
 Why were you on the premises? \_\_\_\_\_

Describe incident (nature & extent of injury): \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

Name of police officer or governmental authority this was reported to: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

**Property Damage**

List property damaged: No property damage  
 Age of damaged property: \_\_\_\_\_  
 Estimated cost of repair: clean up from back up  
 How was property damaged? \_\_\_\_\_  
 \_\_\_\_\_

**Automobile Accident**

Driver, if other than owner: \_\_\_\_\_  
 Address: \_\_\_\_\_ Home Phone: \_\_\_\_\_  
 Estimated cost of repair: \_\_\_\_\_ Business Phone: \_\_\_\_\_  
 Vehicle: (year, make, model): \_\_\_\_\_  
 Name and Department of governmental employee involved in accident: \_\_\_\_\_  
 \_\_\_\_\_

Where did accident take place? \_\_\_\_\_  
 Your description of accident and damage: \_\_\_\_\_  
 \_\_\_\_\_

*(Attach copy of Police Report)*

**SOUTH DAKOTA LAW REQUIRES THE FOLLOWING:**

SDCL 3-21-2: Notice prerequisite to action for damages -- Time limit. No action for the recovery of damages for personal injury, property damage, error or omission or death caused by a public entity or its employees may be maintained against the public entity or its employees unless written notice of the time, place and cause of the injury is given to the public entity as provided by this chapter within one hundred eighty days after the injury.

SDCL 3-21-3: Persons to whom notice must be given. Notice shall be given to the following officers as applicable: In the case of a county, to the County Auditor; in the case of a municipality, to the Mayor or City Finance Officer. In the case of other public entities, to the chief executive officer or secretary of the governing board.

5-16-07  
 Date

City of Rapid City

Claimant

Item #1

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Water Reclamation

605-394-5478

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#1

# Wastewater Collection BackUp Report

Address 601 12 th St Ste 1 Complaint Responded by CCLG  
 Date 3 /27/2007  
 Property Owner Casto Travel Linda Ingalls  
 Telephone# (605) 388-6900

Room	Dimension Length	Dimension Width	Type of Floor	R. Ft
11	11	8	concrete	88
10	6	15	concrete	90
9	14	25	concrete	350
8	25	15	concrete	375
7	21	18	concrete	378
6	28	21	concrete	588
5	5	5	concrete	25
4	8	15	concrete	120
3	68	65	concrete	4420
2	26	13	concrete	338
1	5	10	concrete	50

6822 sq ft

x \$ 3.00 per sq

= \$ 20,466.00

lay 24 07 08:11a

Water Reclamation

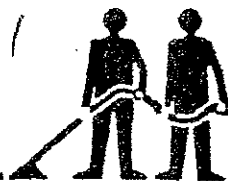
605-394-5478

p.2

# Wastewater Collection BackUp Report

Backup Number:	19.07	Private	<input type="checkbox"/>	Public	<input checked="" type="checkbox"/>
Date	3/27/2007	Property Owner	Casto Travel Linda Ingalls		
Address	601 12 th St Ste 1	Telephone#	(605) 388-6900		
Probable Cause					
Time Start		Time Completed			
From Manhole No		To Manhole No			
Distance of Obstruction		0			
Distance between Manhole		0			
Complaint Responded by CCLG					
Was Backup Policy Issued		<input type="checkbox"/>			
Remarks	Remeasure with Duane from A1 Steam Brothers and Jim that does maintenance on building.				

Linda / contact person  
At Castro Travel



A-1  
Steam  
Brothers

page 1 of 1

☐ RESIDENCE

☒ BUSINESS

McCarthy Properties  
LAST NAME FIRST INITIAL  
4420 Universal Dr.  
ADDRESS APT / SUITE #  
Rapid City, S.Dak. 57702  
CITY STATE ZIP

Att. Theresa 787-9007 - Sewer Cleanup / Blackwater at Castro Business.

Room	Furniture	Steam Clean	Deodorize	Sanitize	Amount
Emergency service call on Wed. March 7 <sup>th</sup> . Linda called from Castro Travel. Inspection. Speak with Linda and city employee. Main line sewer backup. Heavy damage / sludge / whatever. Move lots of stuff to dry area. make a pile to be removed at later date. By Tim / Maintenance Man. Extract sludge. Power wash w/ Deodorize, Sanitize. Apply Disinfectant. Mopped. Swept. Bleached. Placement and rental of 8 air movers to dry. At \$300.00 per day. Used from 3/07/07 to 3/09/07. 480.00					
Placement and rental of (2) Dri-Ez Dehum's with Auto Fanout. Used from 3/07/07 to 3/09/07. At \$80.00 per day. 320.00					
Removal of all drying and cleaning equipment on 3/09/07. Cleanup for future use. Heavy duty cleaning and disinfecting required.					125.00

Total sq. ft cleaned, deodorized, sanitized and disinfectant 75  
7500 sq. ft plus 15 steps. 22,560.00  
clean carpet in Castro Travel. Minimum setup fee. 75.00

**Scotchgard  
Carpet & Upholstery  
Protector**

Extends the time between cleaning jobs and also the life of your carpet. Use 3M Scotchgard after having your carpets professionally cleaned.

3/20/07



TOTAL CARPET 23,660.00  
TOTAL FURNITURE  
SCOTCHGARD  
DEODORIZATION  
TAX 1419.60  
TOTAL CHARGE \$25,079.60

Estimator

Date

Customer Signature

**Special Instructions:**

**Please -**

get back to us when dry. If there are any spots or if you are unhappy with the job. Please set down fans for faster drying

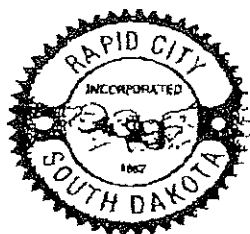
**Duane Leier - Owner**

A-1 STEAM BROTHERS  
5019 Pierre Street  
Rapid City, SD 57702

☐ PAID

☒ CHARGE

Item #1



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## Public Works Department

Utility Maintenance

300 Sixth Street

Téléphone: (605) 394-4163

FAX: (605) 394-6625

Date: 5/23/2007  
To: Water Reclamation  
From: Chip Petrik  
Re: Sewer backup

Claim # 6.07

After reviewing the claim for the sewer backup that occurred at

601 12<sup>th</sup> St.

on 3/07/2007, I recommend we pay the

amount of \$20,466.00 for clean up.

Payable to McCarthy Properties, LLC

Attached are our records 19.07 to confirming this sewer backup.

Thank You

Chip Petrik

Utility Maintenance Supervisor



# McCarthy Properties, LLC

## INVOICE

2834 Jackson Blvd., Ste. 202  
Rapid City SD 57702  
Phone: 605-787-9007 FAX: 605-787-9008

TO: City of Rapid City  
Attn: City Utility Maintenance Dept.  
300 Sixth Street  
Rapid City SD 57701

DATE: 04/30/07  
NAME: Metz Bakery  
LOCATION: 601 12th Street  
Rapid City SD 57701

DESCRIPTION	AMOUNT
Blockage from City's sewer system caused sewage to backflow into property located at 601 12th Street, Rapid City SD on March 7, 2007  6822 sq.ft @ \$3.00 / sq.ft.	\$20,466.00
<b>TOTAL:</b>	\$20,466.00

Questions concerning this invoice?

Call: 605-787-9007

**MAKE ALL CHECKS PAYABLE TO:**

McCarthy Properties, LLC  
2834 Jackson Blvd., Ste. 202  
Rapid City SD 57701

**THANK YOU FOR YOUR BUSINESS!**

**McCarthy Properties, LLC****INVOICE**

2834 Jackson Blvd., Ste. 202  
 Rapid City SD 57702  
 Phone: 605-787-9007 FAX: 605-787-9008

TO: City of Rapid City  
 Attn: City Utility Maintenance Dept.  
 300 Sixth Street  
 Rapid City SD 57701

DATE: 05/16/07  
 NAME: Metz Bakery  
 LOCATION: 601 12th Street  
 Rapid City SD 57701

DESCRIPTION	AMOUNT
Blockage from City's sewer system caused sewage to backflow into property located at 601 12th Street, Rapid City SD on March 7, 2007	
McCarthy Anderson	\$142.50✓
MAC Construction	121.63✓
Drain Masters of the Black Hills	74.20
Buck's Electric	216.89
*Please Note: This invoice does not include the cleaning bill from A-1 Steam Brothers we are waiting for a revised bill itemizing hours, labor costs, etc.	
<b>TOTAL:</b>	\$555.22

Questions concerning this invoice?

Call:  
605-787-9007

**MAKE ALL CHECKS PAYABLE TO:**

McCarthy Properties, LLC  
 2834 Jackson Blvd., Ste. 202  
 Rapid City SD 57701

**THANK YOU FOR YOUR BUSINESS!**

**Item #1**





# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## Public Works Department

Utility Maintenance

300 Sixth Street

Telephone: (605) 394-4163

FAX: (605) 394-6625

5/24/2007

McCarthy Properties, LLC  
2834 Jackson Blvd. Suite 202  
Rapid City, South Dakota  
57701

Re: Sewer backup at 601 12<sup>th</sup> St.

Dear: McCarthy Properties

This letter is to inform you that the amount the City is able to refund you for damage caused at 601 12<sup>th</sup> St. for the sewer backup on March 7, 2007 is \$20,466.00. This amount is determined by the Resolution Policy approved by the Common Council.

Enclosed is a Release of Claim Form to be signed by you, notarized and returned to the City Finance Office. A purchase order will be submitted to the council for approval. Once the purchase order is approved a check will then be issued in a timely fashion. If you have any questions regarding the status of your check, please call Tracy at the City Finance Office at (605)394-4142.

If you have any questions you may contact me at 394-4163.

Thank you,

Chip Petrik

Utility Maintenance Supervisor

City of Rapid City Water / Wastewater Division



## RELEASE OF CLAIM

For and in consideration of the sum of **\$20,466.00**  
McCarthy Properties, LLC, owner / occupant of the  
 property, located at 601 12<sup>th</sup> St., Rapid City, South  
 Dakota, hereby releases the City of Rapid City and agrees to hold the  
 City harmless from any and all claims of liability of any kind  
 whatsoever, arising from the back-flow of water or sewage from the  
 City's sewer system onto the above-described premises on or about  
 the 7th Day of March, 2007.

The undersigned further recognizes and agrees that payment by  
 the City of said sum does not, in any way, constitute any  
 acknowledgment or indication of any responsibility or legal liability  
 for any damage arising out of this or any other event.

It is further agreed that this release shall be binding upon  
 the undersigned, his heirs, executors, successors, and assigns.

DATED this 30th day of May, 2007.

## ACKNOWLEDGMENT

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

On this the 30th day of May, 2007, before me, the  
 undersigned officer, personally appeared Steve McCarthy, know  
 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.

Teresa Harris  
 NOTARY PUBLIC

My Commission Expires: 12/10/09





# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## PUBLIC WORKS DEPARTMENT

Water Reclamation Division

David Van Cleave / Superintendent  
City web: [www.rcgov.org](http://www.rcgov.org)

Phone: 605-394-4174  
Fax: 605-394-5478  
e-mail: [dave.vancleave@rcgov.org](mailto:dave.vancleave@rcgov.org)

### MEMORANDUM

TO: Dirk Jablonski, Public Works Committee  
CC: Karen Jones

FROM: Dave Van Cleave

DATE: 5 June 2007

RE: Sewer Backup claim at 601 12<sup>th</sup> Street

Dirk,

Attached is a sewer backup claim from McCarthy Properties, LLC for a backup that occurred in the commercial building at 601 12<sup>th</sup> street. Rags and roots in the City main caused the backup. Following the \$3.00 per square foot guidelines set by the council for cleaning, the claim amounts to \$20,466.00. Since the amount exceeds \$5,000.00 this claim requires council approval. The Water Reclamation Division recommends approval of this claim.

Dave Van Cleave



EQUAL OPPORTUNITY EMPLOYER

PUBLIC WORKS COMMITTEE  
JUNE 12, 2007

been maintained by the City except for snow removal. He said that a preliminary cost estimate to bring the street up to current City Standard Specifications is \$11,000.00, and he said that he does not feel major reconstruction is necessary. Mr. Bettman advised that he was authorized to offer \$5,000.00 toward the cost to repair the street. Hadcock moved, second by Chapman to agree to a 50/50 split with Pennington County Housing Authority and to fund the City's portion with CIP funds. In response to Alderman Chapman, Jablonski indicated that staff was asked to provide a cursory review and probable cost. Bettman said that after a more detailed cost estimate has been established he will present it to the Pennington County Housing Commission for a reassessment of what they are willing to pay. Okrepkie offered a substitute motion, second by Hadcock to continue for two weeks to allow staff time to prepare a more accurate cost estimate. Motion carried unanimously. (Continue to the June 26, 2007 Public Works Committee Meeting)

No. PW061207-01 - Request from owners of Art Alley to upgrade the asphalt paving in the alley between Saint Joseph Street and Main Street from Sixth Street to Seventh Street to a stamped / painted brick pattern for an approximate amount of \$21,000.00. Hadcock moved, second by Chapman to continue for two weeks to allow time to raise additional funds for the upgrade. The project schedule was discussed and it was determined that a decision should be made at the next Public Works Committee Meeting in order for the project to stay on schedule. Motion carried unanimously. (Continue to the June 26, 2007 Public Works Committee Meeting)

### **ITEMS FROM THE MAYOR**

Agreement regarding joint water supply and storage between Rapid City and Box Elder. Mayor Shaw identified the need for increasing water supply and water storage because of the amount of development east of Elk Vale Road and in Box Elder. Shaw reported that the city of Box Elder has preliminary plans to drill a well and construct a storage tank utilizing a \$2,000,000 Tax Increment Finance District that is currently in place. Shaw noted that Rapid City also has a need for a new low pressure storage tank facility in the area, and a combined project would be more cost effective. Shaw said that combining the two projects could save money for Rapid City to use for other City projects. He mentioned that Box Elder and the developer are unofficially in agreement with combining the facility projects. Mayor Shaw suggested that the Committee direct staff to prepare an agreement between the City of Rapid City and the City of Box Elder. Mayor Shaw commented that a partnership like this is a big step toward regionalization. Alderman Okrepkie extended his appreciation to Mayor Shaw for his leadership on this issue. Okrepkie moved, second by Chapman to direct staff to prepare a joint water supply and storage agreement between the City of Rapid City and the City of Box Elder. In response to Alderman Hadcock, Hani Shafai explained the areas served by two different pressure zones at two different elevations. Motion carried unanimously. *On consent calendar*

### **PUBLIC WORKS DIRECTOR'S ITEMS**

No. PW061207-02 – Chapman moved, second by Okrepkie to authorize payment of a sewer backup claim to McCarthy Properties, LLC for property located at 601 12<sup>th</sup> Street in the amount of \$20,466.00. Motion carried unanimously. *On consent calendar*

Forefather Flats Covenant Agreement. Growth Management Director Marcia Elkins noted that the agreement had been discussed at a Special Council Meeting on Friday, June 8<sup>th</sup>. She indicated that the final documents have been prepared. Alderman Okrepkie asked if all parties are in agreement with the changes made. Assistant City Attorney Joel Landeen indicated that minor language changes were made, and it is his understanding that all parties are in agreement. Alderman Hadcock advised that she does not approve of connection fees. After a brief discussion regarding the developer's timeline, it was determined that approval at the regularly scheduled City Council meeting is acceptable. Chapman moved, second by Okrepkie to approve the Covenant Agreement between the City of Rapid City and Rapid Center, LLC

2007 – 2008 RETAIL (ON-OFF SALE) MALT BEVERAGE WITH VIDEO LOTTERY

12. Angies, Inc. dba **Angie's**, 1028 East North Street for a Retail (On-Off Sale) Malt Beverage License with Video Lottery

**Public Works Committee Consent Items**

13. No. PW061207-16 - Direct staff to prepare a joint water supply and storage agreement between the City of Rapid City and the City of Box Elder.
14. No. PW061207-02 – Authorize payment of a sewer backup claim to McCarthy Properties, LLC for property located at 601 12<sup>th</sup> Street in the amount of \$20,466.00.
15. No. PW061207-03 – Approve Change Order No. 2F for Solar Powered School Zone Beacons and School Speed Zone Signs Project No. SIG06-1617 / CIP No. 50638 to Brown Traffic Products, Inc. for an increase of \$17,270.75.
16. No. PW061207-04 – Approve Change Order No. 4 for Meade Street Reconstruction - Phase 1, East Meade Street from Birch Avenue to Hoefer Court Project No. DR03-1333 / CIP No. 50145 to Highmark, Inc. for a decrease of \$66,492.62.
17. No. PW061207-06 – Authorize staff to advertise for bids for Paper Refuse Bags, for resale.
18. No. PW061207-07 – Authorize staff to advertise for bids for Catron Boulevard Sanitary Sewer Main Extension, Project No. SS06 -1635 / CIP 50671.
19. No. PW061207-08 – Authorize staff to advertise for bids for Miscellaneous Improvements Project 2007, Project No. MIP07-1612 / CIP #50298.
20. No. PW061207-09 – Authorize the Mayor and Finance Officer to sign a Permanent Utility Easement with Black Hills Power, Inc. to allow Black Hills Power, Inc. access to the electrical power system for the Well 12 and Stoney Creek Booster Station project, City Project #W03-953 / CIP50318.
21. No. PW061207-10 – Authorize the Mayor and Finance Officer to sign a Professional Services Agreement with FMG, Inc. for analysis and design of drainage elements 2 and 20 in the Knollwood Drainage Basin; Project No. DR04-1390 / CIP #50312 for an amount not to exceed \$169,910.00.
22. No. PW061207-11 – Authorize the Mayor and Finance Officer to sign a Funding, Maintenance and Encroachment Agreement with the South Dakota Department of Transportation for Project PH 1777(13) PCN00LM Signal Upgrade, Pavement Markings and ADA Ramps at Sheridan Lake Road and West Main Street for an estimated cost of \$13,107.00.
23. No. PW061207-12 – Authorize the Mayor and Finance Officer to sign a Sewer Construction Fee Resolution for Southside Drive Sanitary Sewer Trunk Line.

**CONSTRUCTION FEE RESOLUTION**

WHEREAS, Rapid City Municipal Code Section 13.08.365 and SDCL Section 9-48-15 allows the Common Council to impose sewer construction fees for connection to the sanitary sewer utility in certain areas; and

WHEREAS, sanitary sewer has been extended westerly, 3700 lineal feet, from the Water Reclamation Facility per plans filed with the City under Public Works File No. SS06-1594, Southside Drive Sanitary Sewer Trunk Line as shown on Exhibit A, attached hereto and incorporated hereto; and

Sent to Risk Manager: \_\_\_\_\_

Sent to Black Hills Agency: \_\_\_\_\_

**Claim Form**  
**City of Rapid City**  
**300 Sixth Street**  
**Rapid City, SD 57701**  
**(605) 394-4143 (fax #605-394-2232)**

Claimant: McCarthy Properties, LLC Home Phone \_\_\_\_\_  
 Address: 2834 Jackson Blvd., Suite 202 Business Phone 605.716.9385  
 Date and Time of Incident: 3/7/07 approximately 9:00 pm Cell Phone \_\_\_\_\_  
 Location of Incident: 601 12th Street, Rapid City, SD Email \_\_\_\_\_  
 Type of Accident: \_\_\_\_\_  
 (Check all that apply): ( ) Injured Person (X) Property Damage ( ) Automobile Accident

**Injured Person**

Occupation: \_\_\_\_\_ Employed by: \_\_\_\_\_  
 Did you see a doctor? Yes ( ) No ( ) Doctor's Name: \_\_\_\_\_  
 Were you hospitalized? Yes ( ) No ( ) Hospital: \_\_\_\_\_  
 Have you returned to work or school? Yes ( ) No ( ) Age: \_\_\_\_\_  
 Probable disability period: \_\_\_\_\_  
 Why were you on the premises? \_\_\_\_\_

Describe incident (nature &amp; extent of injury): \_\_\_\_\_

Name of police officer or governmental authority this was reported to: \_\_\_\_\_

**Property Damage**

List property damaged: No property damage  
 Age of damaged property: \_\_\_\_\_  
 Estimated cost of repair: clean up from back up  
 How was property damaged? \_\_\_\_\_

**Automobile Accident**

Driver, if other than owner: \_\_\_\_\_  
 Address: \_\_\_\_\_ Home Phone: \_\_\_\_\_  
 Estimated cost of repair: \_\_\_\_\_ Business Phone: \_\_\_\_\_  
 Vehicle: (year, make, model): \_\_\_\_\_  
 Name and Department of governmental employee involved in accident: \_\_\_\_\_  
 Where did accident take place? \_\_\_\_\_  
 Your description of accident and damage: \_\_\_\_\_

(Attach copy of Police Report)

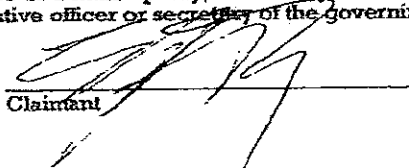
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SDCL 3-21-3: Persons to whom notice must be given. Notice shall be given to the following officers as applicable: In the case of a county, to the County Auditor; in the case of a municipality, to the Mayor or City Finance Officer. In the case of other public entities, to the chief executive officer or secretary of the governing board.

Date 9/9/10

City of Rapid City

Claimant 

## RELEASE OF CLAIM

For and in consideration of the sum of **\$20,466.00**

McCarthy Properties, owner / occupant of the

property, located 601 12<sup>th</sup> St, Rapid City, South

Dakota, hereby releases the City of Rapid City and agrees to hold the

City harmless from any and all claims of liability of any kind

whatsoever, arising from the back-flow of water or sewage from the

City's sewer system onto the above-described premises on or about

the 7th Day of March, 2007.

The undersigned further recognizes and agrees that payment by the City of said sum does not, in any way, constitute any acknowledgment or indication of any responsibility or legal liability for any damage arising out of this or any other event.

It is further agreed that this release shall be binding upon the undersigned, his heirs, executors, successors, and assigns.

DATED this 29th day of September, 2010.

ACKNOWLEDGMENT

State of South Dakota )  
SS.  
County of Pennington )

On this the 29th day of September, 2010, before me, the undersigned officer, personally appeared Stephen McCarthy, 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.



Teresa Harris  
NOTARY PUBLIC

My Commission Expires: 12-10-15

This document is an addendum to the original claim from March 7, 2007. The updated claim form and this release are executed and attached to the original claim to properly account for the return of \$18,887.98 that was returned by McCarthy Properties to the City from the original claim and then returned back to McCarthy Properties for final payment of the original claim when the disputed commercial cleaner account was settled through mediation.



JAMES W. OLSON  
ROBERT M. NASH  
ERIKA S. OLSON

WILSON, OLSON & NASH, P.C.  
LAWYERS  
CREEKSIDE PROFESSIONAL OFFICES  
2640 JACKSON BOULEVARD  
P.O. BOX 1552  
RAPID CITY, SOUTH DAKOTA 57709

ERNEST GUNDERSEN (1915-1972)  
J.H. BOTTUM (1903-1984)  
JAMES H. WILSON (1927-1989)

(605) 342-7090  
FAX - (605) 342-9259

June 18, 2010

Steve McCarthy  
McCarthy Properties  
2834 Jackson Blvd., Suite 202  
Rapid City, SD 57702

Re: A-1 Steam Brothers

Dear Steve:

This letter is to confirm that, as a result of mediation of the dispute over the cleanup expense as a result of the City sewer backup at McCarthy Properties' building located at 612 12<sup>th</sup> Street, Rapid City, South Dakota on March 7, 2007, the claim has been settled for the sum of \$21,080.00. You are required to make this payment within five (5) business days of June 15, 2010. This is full settlement and payment of all obligations for the cleanup that was required as a result of the sewer backup on March 7, 2007.

Please advise the City of Rapid City Finance Office of this matter. Pursuant to ordinance, you should be entitled to payment of the allowance provided by ordinance less the funds previously paid to you. I compute the balance which the City should pay to be the sum of \$18,887.98, the amount which you returned to the City when prior attempts to settle with A-1 Steam Brothers failed.

The mediation brings to an end a difficult problem. I trust that there will not be a problem with the City of Rapid City on this matter.

Thank you.

Very truly yours,  
WILSON, OLSON & NASH, P.C.

  
James W. Olson

JWO/lw

McCarthy Properties LLC

Amount allowed per Policy Resolution	<u>20,644.00</u>
--------------------------------------	------------------

Bills submitted	
A-1 Steam Brothers	<u>21,080.00</u>
Mediated settlement for cleaning	

Report to the Public Works Committee for the McCarthy Properties Sewer Back-up Claim

This report is the completion of an investigation initiated by Risk Management into the sewer back-up claim originally submitted by McCarthy Properties on June 4, 2007, for an event that occurred on March 7, 2007. Because this issue has continued to languish and since I was brought into it by simply answering a question about process, I volunteered to try and resolve it through a claims rebuilding process. Hopefully this report will bring closure.

History

On March 7, 2007, McCarthy Properties suffered a sewer back-up at 601 12<sup>th</sup> Street. The event started that evening and grew substantially in the early morning hours of March 8, 2007. Linda Ingalls from Casto Travel called Drain Masters the evening before; he was unable to unplug the line and suggested she call the City in the morning to check the sewer line for obstruction. Had Linda called the City that night, the backup would have been much less severe but she didn't know and was not informed by the plumber that the city crews were on 24 hour call for these events.

By the time Utility Maintenance arrived the morning of March 8 and jetted the line, the affected area covered an estimated 6,822 square feet as measured (twice) by Utility Maintenance. Linda received a list from the City of commercial cleaners to call. After several cleaners informed Linda they did not do sewer cleanup, she was able to reach A-1 Steam Brothers who responded. By the time A-1 arrived, the City had jetted the line, the sewer water had receded substantially and A-1 completed the cleanup over the next approximately day and a half. At the time of cleanup, Mr. Duane Leier from A-1 made the statement to Linda that the City pays \$3.00 per square foot for sewer cleanup and that's what he would be charging.

On May 16, 2007, McCarthy Properties submitted a claim for a total by my calculations of \$25,634.82 (\$555.22 from McCarthy Properties and \$25,079.60 from A-1 Steam Brothers). By city policy, \$20,466 was payable based on the 6,822 affected square feet that the backup covered. On May 23, 2007, the claim went through the normal channels for processing with recommendation to pay the \$20,466 based on the affected square footage. On May 24, 2007, a letter was sent to McCarthy Properties explaining the reimbursement and a release form. The claim form was returned with a date of May 30, 2007, and on June 5, 2007, Water Reclamation Superintendent Dave Van Cleave forwarded the claim to Public Works Director Dirk Jablonski and the Public Works Committee advising of the claim and the need to present to the Council as it exceeded the \$5,000 limit specified by policy. The claim was placed on the Public Works agenda for June 12, 2007, and was approved by Council on June 18, 2007. The funds were released to McCarthy Properties on June 19, 2007. Over the next two years, there was a dispute between McCarthy Properties and A-1 Steam Brothers over the amount of the billing. That dispute does not involve the City. The City by its policy only deals directly with the property owner, only with the expenses for commercial cleaning and does not negotiate prices with the cleaning service providers. As in other sewer backup cases, McCarthy

Properties ended up paying the commercial cleaner more than the City policy allowed based on the affected square footage.

McCarthy Properties and A-1 Steam Brothers were unable to reach an agreement on settling the bill. On March 27, 2009, McCarthy Properties returned \$18,887.98 to the City because Mr. McCarthy believed he was doing the right thing by returning the money since the dispute had not yet been settled and paid and didn't look like it would be. The money was receipted back into the Water Reclamation cost center from where it was paid out of originally. On May 18, 2009, Duane Leier from A-1 Steam Brothers asked the City Council to bypass McCarthy and pay him directly to which the Council declined and said it was not the City's fight.

On June 21, 2010, the Finance Office received a letter from Attorney Jim Olson on behalf of McCarthy Properties requesting the \$18,887.98 be paid to McCarthy Properties because the claim had finally been settled through mediation for \$21,080, an amount higher than the maximum the City calculated. Assistant Finance Officer Pauline Sumption came to me and asked about paying the claim to which I responded I thought it would be appropriate as long as it followed the sewer backup policy. I still stand by that opinion because it was a legitimate claim in 2007 per the backup policy and was still a legitimate claim in 2010. On June 22, 2010, Pauline had the same conversation with Finance Officer Jim Preston who rendered the same opinion. On June 23, 2010, the purchase order was processed through Finance, placed on the bill list for the July 6, 2010, Council meeting and the check was issued to McCarthy Properties on July 7, 2010, to settle the original 2007 claim. This is where the breakdown in properly processing the return occurred.

#### A-1 Steam Brothers Bill

The cleanup from the sewer backup on March 7, 2007, was a legitimate event that fell within the parameters of the sewer backup policy. The A-1 Steam Brothers' cleanup bill has been problematic since it was tendered. Regardless of how much or how little work was performed, Mr. Leier billed McCarthy \$3.00 per affected square foot because he knew "that's what the City pays for sewer backup cleaning" as stated to Linda Ingalls at Casto Travel on the day Mr. Leier arrived to do the cleaning. In my phone interview with Mr. Leier, he said he has cleaned up many city sewer backups over the years, he was one of the few who still did sewer cleanup and that \$3.00 per square foot was not enough for what he described as a "nasty, filthy, awful job".

Contrary to Mr. Leier's statement that he is only one of a few that still do sewer cleanup, there are many in the area that perform sewer backup cleaning. In reviewing the records for the last five years, there are at least nine other companies identified as having provided cleaning services for sewer backup events. In fact, the records show there was a sewer backup, on August 6, 2007, at another downtown location five months after the McCarthy Properties event that was more complicated than the McCarthy backup and that had the identical affected square footage of 6,822. The commercial cleaner charged the customer, and the City reimbursed the property owner, \$4,113.33 or just 60.3 cents per square foot compared to A-1's bill for the McCarthy backup of \$20,466 or \$3.00 per square foot. The perceived unfairness of the A-1 Steam Brothers bill certainly explains

why Steve McCarthy aggressively questioned and spent money out of his own pocket battling with Mr. Leier over this bill. The City, however, was caught in the middle to follow policy and pay what appeared to be a staggering sum for the amount of work that was done.

When there is a sewer backup, the affected property owner or tenant doesn't have time to get a bid or a couple of quotes. It's an immediate, acute, emergency health and environmental threat that needs to be taken care of promptly. The owner or tenant has to rely on and trust the fair business practices of the service provider and expect that the provider will not take advantage of resident's vulnerability.

#### McCarthy Properties Returning the Funds

This is a case of no good deed goes unpunished. In hindsight, Mr. McCarthy returning the money turned out to be unexpectedly problematic from a procedural and claims processing perspective because we didn't follow the path of reopening the 2007 claim. Since he was unable to come to an agreement with Mr. Leier, Mr. McCarthy was trying to do what he felt was the right thing by returning the money. Technically, if returning the funds was his intent, the entire \$20,466 would have been the correct amount. The items for which Mr. McCarthy withheld funds were not reimbursable expenses. Mr. McCarthy erred in deducting those expenses from the original amount but I don't think he knew those were non-covered expenses. But that's beside the point. The ultimate cost of the cleanup expense at \$21,080 was higher, not lower, than the City's reimbursement.

Mr. McCarthy has spent a great deal of his own time and money trying to settle this claim with Mr. Leier and, whether noticed or not by anyone, he did this on behalf of and in defense of the City, too. I commend Mr. McCarthy for doing everything he could at his own substantial expense to protect the City's interests, as well as his own.

#### Council Request to Pursue Bond Coverage

I have spoken with the City's insurance broker regarding the possibility of recovering the funds paid to McCarthy Properties through the city's Public Employee Dishonesty Bond. In initial discussions with the carrier, it is the collective opinion of those experts that the City has not suffered a loss as defined by the policy language. The original amount was approved by Council vote. McCarthy Properties was paid the exact amount that was returned to the City on March 27, 2009, again approved by the Council on the bill list. In order to qualify as a loss under the bond, the act must fall within the definition of what would be "employee dishonesty". The opinion is that that did not happen here. However, coverage cannot be fully determined and accepted or denied unless a formal claim is turned into the carrier and our instructions were to investigate the possibility of recovery through the bond. That has been done as directed and it appears that is not an avenue for recovery.

#### Subsequent Claim Reprocessing

When the funds were returned to McCarthy Properties in 2010, it was the belief of the staff -- me included -- that it was all part of the original 2007 claim for which the City

was responsible and had approved payment. I still maintain it was connected to the 2007 claim because the return of the funds was applicable to that claim file. In researching this claim, I can find no evidence of any intentional acts by anyone to circumvent the requirements of the sewer backup policy. It was an approved expenditure in 2007 and the same 2007 expense would be applicable in 2010.

As directed by the Public Works Committee, the Finance Office did approach Mr. McCarthy, requested that he return the funds and start the process over again as a new claim. Risk Management asked Mr. McCarthy the same question. Mr. McCarthy declined to do so. The money he received was in settlement of a 2007 claim for which he complied with the requirements for reimbursement. This was an internal processing and procedural error. Even if Mr. McCarthy had agreed to return the \$18,887.98 and filed a new claim to start the process over again, the funds would have had to be returned to him as concession for a legitimate claim under the sewer backup policy from 2007. Additionally, the City would also have incurred and added still more administrative costs to issue yet another check to get to the same outcome.

The City Attorney's Office has advised that the request to return the funds to McCarthy Properties constituted a new claim. As a matter of appropriate claims processing and clear communications, the request for return of the funds should have caused the 2007 claim to be reopened with an explanation of current facts and been resubmitted to the Public Works Committee to complete the process. The fact that the procedure to reopen the 2007 claim for the purpose of returning the funds to McCarthy was an oversight does not negate the City's responsibility to pay the claim. It had already been paid in 2007 and this twist of returning the funds to the City and then requesting them back only reaffirms the merits of the claim as defined by the sewer backup policy. Had this second claim followed the correct path for resubmission in June 2010, the request to return the funds would have come back through the Public Works Committee as a reopened claim, the Committee would have reviewed the information and made a decision to approve or deny. If approved, it would have been forwarded to Council and approved or denied. Had it been denied at either position in the chain, it likely would have set the City up for a lawsuit from McCarthy Properties to recover the funds that were legitimately owed to the claimant. Staff simply missed the proper routing of the claim.

I have placed on the Public Works agenda the 2007 claim information from file, a new claim form and new release applicable to the 2007 claim signed by McCarthy Properties and supporting documentation to close the paperwork loop on this file. Further, I have recommended that the Public Works Committee and City Council accept this report from Risk Management as identifying and correcting a procedural error and ratify the payment of the funds per the sewer backup policy.

Respectfully submitted October 12, 2010



Keith L'Esperance  
Risk Manager