

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

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND MHL, LLC  
TO ALLOW CERTAIN IMPROVEMENTS TO ENCROACH INTO THE ADJACENT  
PUBLIC RIGHT OF WAY**

This Covenant Agreement (the "Agreement") is made and entered into by and between the CITY OF RAPID CITY, a municipal corporation of the State of South Dakota, of 300 Sixth Street, Rapid City, SD 57701 (herein after referred to as the "City"), and MHL, LLC., a South Dakota limited liability corporation, of PO Box 8303, Rapid City, SD 57709 (herein after referred to as the "Landowner").

WHEREAS, the Landowner is renovating property located at 502, 508, 510 and 512 Main Street; and

WHEREAS, the Landowner is trying to maintain the historical elements of the building; and

WHEREAS, the entrances to the building are constructed above the street grade; and

WHEREAS, the building is setback zero feet from the public right of way; and

WHEREAS, the Landowner has requested authorization from the City to construct steps, railings, benches, and decorative paving within the public right of way; and

WHEREAS, the buildings located on the real property subject to this Agreement currently share a common water line located in the public right of way; and

WHEREAS, some private encroachments into the public right of way can be legal so long as they do not interfere with the use of the public right of way; and

WHEREAS, the two primary purposes generally cited for the existence of a public right of way are to provide a means of passage for the public and to provide a means of access to and egress from abutting lands; and

WHEREAS, the Landowner's request is consistent with one of the primary purposes for a right of way; and

WHEREAS, the proposed improvements would not unduly interfere with the use of the public right of way, but would pose a potential liability issue for both the City and Landowner; and

WHEREAS, the City is willing to authorize the Landowner's proposed improvements if the Landowner agrees to certain terms and conditions designed to protect the public right of way and to further insulate the City from liability for the Landowner's special use of the public right of way.

NOW THEREFORE, in consideration of the mutual covenants and conditions contained herein, it is agreed by the parties as follows:

1. The real property which is subject to this Agreement is generally located in the 500 block of Main Street, Rapid City, South Dakota and is legally described as follows:

**Lots Twenty-four (24), Twenty-five (25), Twenty-six (26), and Twenty-seven (27) in Block Seventy-five (75) of the Original Townsite of the City of Rapid City, Pennington County, South Dakota;**

**Lot Twenty-eight (28) in Block Seventy-five (75) of the Original Townsite of the City of Rapid City, Pennington County, South Dakota;**

**Lot Twenty-nine (29) in Block Seventy-five (75) of the Original Townsite of the City of Rapid City, Pennington County, South Dakota; and**

**Lots Thirty (30) through Thirty-two (32), inclusive, of Block Seventy-five (75), Original Town of Rapid City, Pennington County, State of South Dakota;**

2. The Landowner is hereby authorized to install steps, railings, benches, and decorative paving within the public right of way along Main Street in order to provide access to the sidewalk corridor and adjacent buildings located on the above property. The improvements shall be designed in accordance with all applicable codes and regulations. Prior to installation, the Landowner will submit sufficient plans and drawings to the City to demonstrate compliance with this requirement and to further demonstrate there will be sufficient sidewalk space to accommodate pedestrian traffic. The Landowner's plans and drawings must be approved by the City Engineer prior to installation.

3. Landowner agrees that it owns and is responsible for maintenance of the shared water line located in the public right of way. Should replacement of the waterline be necessary, Landowner agrees to replace said water line in conformity with the Rapid City Municipal Code.

4. The Landowner agrees it is solely responsible for any maintenance and upkeep on the improvements once completed. The Landowner specifically acknowledges that once completed, the Landowner is in the best position to provide necessary maintenance and upkeep.
5. From the date of installation of the improvements authorized in this Agreement, the improvements will be considered in the nature of a revocable license to occupy that portion of the public right of way where the improvements are located. If the City engages in a street project which necessitates removal, or otherwise needs to remove the improvements, the Landowner agrees to do so at its sole expense. The Landowner further agrees to remove the improvements if requested by the City due to maintenance or safety concerns.
6. If the City becomes aware of safety or maintenance issues related to the improvements authorized in this Agreement and the Landowner refuses to repair or remove the improvements, the City may remove or repair the improvements at the Landowner's sole expense. If the Landowner refuses to pay the City for the cost of such work and forces the City to obtain a judgment for the cost, the Landowner agrees to pay the City's reasonable attorney's fees.
7. The Landowner agrees to maintain sufficient liability insurance coverage as determined by the City for the property subject to this Agreement. The Landowner will defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the improvements authorized by this Agreement.
8. Landowner acknowledges that this Agreement is made for the direct benefit of the real property noted above. All of the terms and conditions herein set forth shall extend to and be binding upon the heirs, assigns, and successors in interest of the Landowner, 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 in the office of the Pennington County Register of Deeds.
9. The Landowner acknowledges that the benefit to its property by the City's authorization to allow its proposed improvements to encroach upon the public right of way is good and sufficient consideration for the promises it has made herein.
10. The parties may undertake any legal or equitable action available to enforce the provisions of this Agreement in addition to any other remedies provided herein.
11. Failure of a party to insist upon adherence to any term of this Agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon adherence to that term, or any other term of this Agreement.
12. This Agreement constitutes the entire agreement of the parties. No other writings or negotiations are part of this document. This Agreement may only be modified by mutual agreement of both parties. Any modifications or addendums to this Agreement must be in writing.

13. This Agreement is intended solely for the benefit of the parties hereto along with their heirs, assigns and successors in interest and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as allowed under paragraphs 8 and 12 of this Agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

14. If any section(s), or provisions 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 application if they can be given effect without the invalid section(s) or provisions.

15. This Agreement shall be construed according to the laws of the State of South Dakota. Any action concerning this Agreement shall be venued in Pennington County, South Dakota in the Circuit Court for the Seventh Judicial Circuit.

16. Landowner warrants that it has the power to enter into this Agreement and its members/managers signing on its behalf for it have full power and authority to do so.

Dated this 5<sup>th</sup> day of July, 2011.

MHL, LLC.

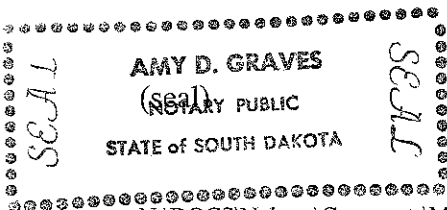
By Dan Tribby

Its Property manager

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

On this 5<sup>th</sup> day of July, 2011, before me, the undersigned officer, personally appeared Dan Tribby, who acknowledged himself/herself to be the Property manager of MHL, 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.



Amy Graves  
Notary Public - South Dakota  
My Commission Expires My Commission Expires  
January 30, 2012

CITY OF RAPID CITY

\_\_\_\_\_  
 Mayor

ATTEST:

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

(seal)

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

On this the \_\_\_\_ day of \_\_\_\_\_, 2011, before me, the undersigned officer, personally appeared Sam Kooiker and Pauline Sumption, 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 instrument 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.

(seal)

\_\_\_\_\_  
 Notary Public – South Dakota  
 My Commission Expires \_\_\_\_\_