

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

NEW  
5-16-13

**COVENANT AND HOLD HARMLESS AGREEMENT BETWEEN THE CITY OF  
RAPID CITY AND L&C REVOCABLE TRUST TO ALLOW CERTAIN DRIVEWAY  
IMPROVEMENTS TO ENCROACH INTO THE 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 Leonard B. Collins and Cheryl Collins, Co-Trustees of the **L & C REVOCABLE TRUST** dated October 11, 2012, of 2015 Sheridan Lake Road, Rapid City, SD 57702 (herein after referred to as the "Landowner").

WHEREAS, the Landowner is developing property that is described below; and

WHEREAS, the Landowner is desirous of constructing a private driveway that will be located partially within the public right of way, and partially without, to serve Lot 2 of the property described below; and

WHEREAS, the Landowner has requested authorization from the City to construct such a driveway encroaching upon the public right of way; and

WHEREAS, there exists an access easement over Lot 1 for the benefit of Lot 2; and

WHEREAS, Landowner does not wish to disturb the current use of Lot 1 to construct a driveway access for Lot 2; 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;

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 at 2015 Sheridan Lake Road, Rapid City, South Dakota and is legally described as follows:

**Lots 1 and 2 of Lot Y of Block 2, Strathavon Addition 1952, City of Rapid City, Pennington County, South Dakota**

2. The Landowner is hereby authorized to construct a private driveway within the public right of way and adjacent to Sheridan Lake Road in order to provide access to Lot 2 of the above described property. The improvements shall be designed in accordance with all applicable codes and regulations. Prior to construction, the Landowner will submit sufficient plans and drawings to the City to demonstrate compliance with this requirement. The Landowner's plans and drawings must be approved by the City Engineer prior to construction.

3. Landowner agrees that while this covenant agreement is in effect, it will not vacate, or act in any way to impair or revoke the access easement in favor of Lot 2 over Lot 1.

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

5. 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.

6. From the date construction of the improvements authorized in this Agreement is completed, 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 desires 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, as provided in ¶7. City warrants that it will not arbitrarily order removal of the improvements.

7. If the City becomes aware of dangerous safety conditions or serious maintenance issues related to the improvements authorized in this Agreement, it shall notify Landowner, and Landowner shall have sixty (60) days to cure such condition or issue. If Landowner disagrees with a determination related to safety or maintenance, Landowner may propose an alternate solution. If no solution can be agreed upon, the City reserves the right to order repair, alteration or removal of the improvements as it deems necessary. If Landowner refuses to repair, alter or remove the improvements, the City may remove, alter 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.

8. The Landowner agrees to maintain sufficient liability insurance coverage in the minimum amount of \$300,000 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 construction of the improvements, the use of the driveway, and any hazard created by the improvements authorized by this Agreement.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

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

17. 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 \_\_\_\_\_ day of \_\_\_\_\_, 2013.

CITY OF RAPID CITY

\_\_\_\_\_  
Mayor

ATTEST:

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

(seal)

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

On this the \_\_\_\_ day of \_\_\_\_\_, 2013, 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.

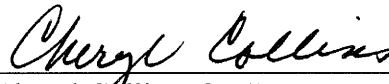
(seal)

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

**L & C REVOCABLE TRUST**



\_\_\_\_\_  
Leonard B. Collins, Co-Trustee

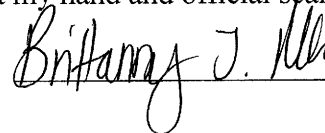


\_\_\_\_\_  
Cheryl Collins, Co-Trustee

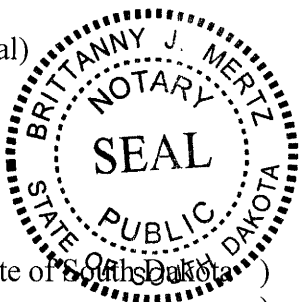
State of South Dakota )  
 ) ss.  
County of Pennington )

On this the 17<sup>th</sup> day of May, 2013, before me, the undersigned officer, personally appeared LEONARD B. COLLINS, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that he executed the same in the capacity therein stated and for the purposes therein contained.

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



(seal)



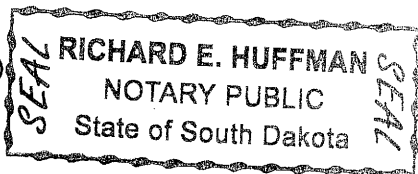
State of South Dakota )  
 ) ss.  
County of Pennington )

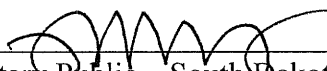
Notary Public – South Dakota  
My Commission Expires My Commission Expires April 28, 2017

On this the 17 day of May, 2013, before me, the undersigned officer, personally appeared CHERYL COLLINS, known to me or satisfactorily proven to be the person described in the foregoing instrument, and acknowledged that she executed the same in the capacity therein stated and for the purposes therein contained.

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

(seal)



  
Notary Public – South Dakota  
My Commission Expires March 20, 2017