

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

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

COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND RAPID CENTER, L.L.C., REGARDING FUTURE OFF-SITE STREET IMPROVEMENTS IN THE VICINITY OF ITS PROPERTY LOCATED ON EAST MALL DRIVE.

This Covenant Agreement (this "Agreement") is made and entered into by and between the City of Rapid City, a municipal corporation of the State of South Dakota, located at 300 Sixth Street, Rapid City, South Dakota 57701, hereinafter referred to as the "City," and Rapid Center, L.L.C., a Delaware corporation authorized to conduct business in South Dakota, located at 5850 Avenida Encinas, Suite A, Carlsbad, California 92008, hereinafter referred to as "Rapid Center."

RECITALS

WHEREAS, the Rapid Center is the owner of certain property as hereinafter described, generally located along East Mall Drive between Dyess Ave and N. Elk Vale Rd. (the "Property"); and

WHEREAS, Rapid Center previously intended to construct a retail development on Property; and

WHEREAS, In order to implement its development plans Rapid Center received approval for a Planned Commercial Development; and

WHEREAS, the only portion of the development which came to fruition was a Cabela's sporting goods store; and

WHEREAS, in conjunction with its application for the Planned Commercial Development on the Property, Rapid Center agreed to pay for a portion of the cost of certain off-site roadway improvements which included certain traffic control devices in accordance with the terms and conditions of that Certain Covenant Agreement between Rapid Center and the City

dated June 16, 2008 and approved by the Common Council of the City on June 16, 2008 (the “Original Covenant Agreement”); and

WHEREAS, Rapid Center is no longer actively pursuing the construction of a retail development on the Property; and

WHEREAS, portions of the Property have been rezoned to change the permissible land uses from retail uses to light industrial uses; and

WHEREAS, Rapid Center has obtained a purchaser for a portion of the Property; and

WHEREAS, the lack of construction and changes in the permissible land uses have altered the conclusions in the traffic study the Original Covenant Agreement was based on; and

WHEREAS, the City has obtained an updated traffic study from Rapid Center; and

WHEREAS, the traffic study identifies future improvements which may be needed when the traffic counts in the study area reach certain milestones; and

WHEREAS, these improvements will benefit and be necessitated by, all the landowners in the area, not just Rapid Center; and

WHEREAS, Rapid Center acknowledges it or its heirs, assigns and/or successors in interest will bear some financial responsibility for these future improvements; and

WHEREAS, it is the intent of the parties to enter into an agreement whereby the City will release Rapid Center from its obligations under the Original Covenant Agreement in exchange for Rapid Center agreeing to cooperate with a future assessed project at such time as roadway and traffic control improvements are needed.

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

1. This Agreement pertains to property generally located along East Mall Drive and legally described as:

Lots 1 and 2, Less Lot H-13 of Forefather Flats Subdivision, Rapid City, Pennington County, State of South Dakota; and

That portion of the SW1/4 north of I-90, Less Lot 3 of Starlite Subdivision, Less GLM Subdivision No. 2, Less Forefather Flats Subdivision, Less Lot H-15 and Less ROW all located within Section 28, T2N, R8E, BHM, Rapid City, Pennington County, State of South Dakota; and

Lot 3 of Starlite Subdivision, Rapid City, Pennington County, State of South Dakota.

2. The City agrees to and does hereby forever release Rapid Center, its heirs, affiliates, employees, agents, attorneys, representatives, assigns and successors in interest from any and all damages, losses, obligations and liabilities contained in, in respect of, or relating to the Original Covenant Agreement. The parties agree that, with respect to the specific releases contained above, the releases extend to all claims of the City whether or not claimed or suspected, to and including the date of this Agreement.

3. Rapid Center acknowledges that development of the Property may contribute to the necessity for future roadway improvements to East Mall Drive, including, but not limited to, the potential signalization of the intersections of East Mall Drive with Dyess Ave and Elk Vale Rd. Rapid Center further acknowledges the City has the power to make assessments for local improvements on property adjoining or benefited thereby, to collect same in the manner provided by law, and to fix, determine and collect penalties for nonpayment of any special assessments. In exchange for the promises made in Paragraph 2 of this Agreement, Rapid Center on behalf of itself and its heirs, assigns and successors in interest agree that if at any time in the future the City determines it is necessary or desirous to construct street improvements to East Mall Drive or install signalization which is adjacent to, or benefits the Property through an assessed project, Rapid Center its heirs, assigns, or successors in interest, waive any right to object to such an assessed project as allowed under state law and further agree not to take any action, or participate in any action which seeks to prevent such assessed project. This waiver does not prevent Rapid Center, its heirs, assigns or successors in interest from commenting on, or providing input to the City regarding any such assessed project, or from disputing the amounts actually assessed and the methodology of the assessment.

4. All of the terms and conditions herein set forth shall extend to and be binding upon the heirs, assigns, or successors in interest of Rapid Center, and 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.

5. The City and Rapid Center may undertake any legal or equitable action available to enforce the provisions of this Agreement in addition to any remedy provided herein. In the event the City or Rapid Center is required to undertake any action to enforce the terms of this agreement, the undersigned, its heirs, assigns or successors in interest agree the prevailing party may recover from the other its reasonable expenses, including attorney's fees incurred with respect to such action.

6. If any section(s), or provision of this Agreement is 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.

7. This Agreement shall be construed according to the laws of the State of South Dakota. No modification or amendment to this Agreement shall be valid, unless evidenced by a writing

On this the ____ day of _____, 2011, before me, the undersigned officer personally appeared _____, who acknowledged himself to be the _____ of Rapid Center, L.L.C., 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.

Notary Public, _____

My Commission Expires:
(SEAL)