COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND COPPER CANYON HOMES, INC. TO PERMIT A STRUCTURE TO ENCROACH INTO THE ADJACENT ST JAMES STREET RIGHT OF WAY

THIS AGREEMENT IS MADE and entered into this 2, 8, day of Feb, 2019, by COPPER CANYON HOMES, INC., a South Dakota corporation located at 13768 47th Avenue W., Rapid City SD 57702 ("Owner"), and the CITY OF RAPID CITY, a municipal corporation of the State of South Dakota located at 300 Sixth Street, Rapid City, SD 57701 ("City").

WHEREAS, Owner is the owner of real property within the City of Rapid City located at 818 St. James Street and legally described as follows:

The East Fifty-Five Feet One Inch (E55’ 1”) of Lots Sixteen through Nineteen (16-19), inclusive, in Block Thirty-Eight (38) of Boulevard Addition; and the East Fifty-Five Feet One Inch (E55’ 1”) of Lot Twenty (20) in Block Thirty-Eight (38) of West Boulevard Addition to the City of Rapid City, together with the West Half (W1/2) of the Vacated Alley Pursuant to Resolution Recorded in Book 40 of Misc. Records on Page 2735, in the Office of the Register of Deeds, Pennington County, South Dakota ("the Property"); and

WHEREAS, the residential structure on the Property is individually listed on the National Register of Historic Places; and

WHEREAS, Owner has applied for a building permit from the City to restore a portion of the home located on the Property, specifically, a covered porch attached to the house; and

WHEREAS, the covered porch has covered the adjacent sidewalk and encroached into the right of way by five feet two inches, for a length of sixteen and one-half feet, and Owner proposes to restore the covered porch to the same dimensions; and
WHEREAS, Owner’s intended restoration of the covered porch has been approved by the City after a historical preservation review, and the restoration is beneficial to the property remaining on the National Register of Historic Places; and

WHEREAS, the structure on the Property has occupied a portion of the St. James Street right of way since it was constructed many decades ago; and

WHEREAS, Owner has agreed to construct additional sidewalk within the right of way adjacent to the covered porch in order to ameliorate the encroachment and to assist with pedestrian and bike traffic; and

WHEREAS, the City’s permission to restore the covered porch at its original location is in accordance with SDCL 1-19A-11.1, which concerns the City’s issuance of a building permit which would encroach upon, damage or destroy historic property; and

WHEREAS, the City is agreeable to permitting the continued encroachment into the right of way under the terms and conditions provided herein.

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

1. The Property. This Agreement pertains to, and includes that property ("Property") which is legally described as follows:

   The East Fifty-Five Feet One Inch (E55' 1") of Lots Sixteen through Nineteen (16-19), inclusive, in Block Thirty-Eight (38) of Boulevard Addition; and the East Fifty-Five Feet One Inch (E55' 1") of Lot Twenty (20) in Block Thirty-Eight (38) of West Boulevard Addition to the City of Rapid City, together with the West Half (W1/2) of the Vacated Alley Pursuant to Resolution Recorded in Book 40 of Misc. Records on Page 2735, in the Office of the Register of Deeds, Pennington County, South Dakota.

2. Encroachment Authorization. The Owner is hereby authorized to continue to maintain the residential structure within the St. James Street right of way adjacent to the above-described Property. Owner agrees that it will expand the sidewalk adjacent to the residential structure as part of its work to restore the covered porch. Owner agrees that as a condition of the City allowing the structure to remain in the St. James Street right of way, Owner will remove said structure from the right of way within 180 days of receiving a request to do so if the City engages in a street, utility or other public construction project which necessitates removal or if the City otherwise determines that it is necessary to remove the encroachment. Owner agrees to bear the entire cost of removing the structure from the public right of way.
3. **License.** From the execution of this Agreement, the encroachment into the right of way will be considered in the nature of a revocable license permitting Owner to occupy that portion of the public right of way where the structure is located.

4. **Removal of Structure.** If the City becomes aware of safety or maintenance issues related to the structure authorized in this Agreement and the Owner refuses to repair or remove the structure, the City may remove or repair the structure at the Owner’s sole expense. If the Owner refuses to pay the City for the cost of such work and forces the City to obtain a judgment for the cost, the Owner agrees to pay any attorney’s fees incurred by City.

5. **Structure is Damaged or Destroyed.** The parties agree that if the structure is damaged or destroyed to the extent of more than 50 percent of its value at the time of damage, the license described in Section 3 shall be automatically revoked, and the structure shall not be restored except in legal conformity with the regulations of the zoning district in which it is located.

6. **Indemnification and Hold Harmless.** The Owner agrees to defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the location of the structure within the St. James Street right of way. In the event the City is required to undertake any action to enforce the terms of this Agreement or any City ordinance or regulation in connection with this Agreement, the undersigned, its heirs, assigns or successors in interest agree the City may recover from the owner of the Property its reasonable expenses, including attorney's fees incurred with respect to such action.

7. **Successors in Interest.** Owner acknowledges that this Agreement is made for the direct benefit of the Property noted above. All of the terms and conditions herein set forth shall extend to and be binding upon the heirs, assigns, or successors in interest of the Developer, and be considered as a covenant running with the Property described herein. Furthermore, it is agreed that, in accepting title to the 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 Codified Laws.

8. **Remedies.** The City may undertake any legal or equitable action available to enforce the provisions of this Agreement in addition to any remedy provided herein.

9. ** Severability.** If any section(s), or provision(s) 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(s) of this Agreement if the same can be given effect without the invalid section(s) or provision(s).

10. **Waiver.** 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.
11. **Entire Agreement.** 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.

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

DATED this __________ day of ______________________, 2019.

CITY OF RAPID CITY

__________________________
Steve Allender, Mayor

ATTEST:

__________________________
Finance Officer

(SEAL)

State of South Dakota )

ss.

County of Pennington )

On this the ______ day of ______________________, 2019, before me, the undersigned officer, personally appeared Steve Allender 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 Covenant Agreement 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.

__________________________
Notary Public, South Dakota

My Commission Expires:

(SEAL)
COPPER CANYON HOMES, INC.

By

Printed Name Brandon Powles

Its Member

State of South Dakota )
ss.
County of Pennington )

On this the 28th day of February, 2019, before me, the undersigned officer personally appeared Brandon Powles, who acknowledged himself/herself to be the member of Copper Canyon Homes, Inc., and that as such member, being authorized so to do, executed the foregoing Covenant Agreement for the purposes therein contained.

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

(Kelly A. Heil)
Notary Public, South Dakota (state)

My Commission Expires: 10/05/2022