

PREPARED BY: City Attorney's Office  
300 Sixth Street  
Rapid City, SD 57701  
(605) 394-4140

**COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND KEVIN A. CARROLL AND BRADLEY G. BAILEY TO PERMIT A STRUCTURE TO ENCROACH INTO THE ADJACENT CLIFF DRIVE RIGHT OF WAY**

THIS AGREEMENT IS MADE and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2019, by KEVIN A. CARROLL AND BRADLEY G BAILEY, joint tenants with rights of survivorship and not as tenants in common, located at 4270 Cliff Drive, Rapid City SD 57702 ("Owners"), 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, Owners are the owners of real property within the City of Rapid City located at 4270 Cliff Drive and legally described as follows:

Lot One (1) of Lot G of Canyon Lake Heights, in the City of Rapid City, as shown by the plat recorded in Book 8 of Plats on Page 235, in the Office of the Register of Deeds, Pennington County, South Dakota

("the Property"); and

WHEREAS, the Owners wish to reconstruct a retaining wall adjacent to their property and within the Cliff Drive right of way in order to make improvements to the residence and to remove one of the driveway approaches onto Cliff Drive; and

WHEREAS, Owners have applied for a building permit from the City to perform the same; and

WHEREAS, the driveway and retaining wall in existence at the time of execution of this covenant agreement currently encroach into the Cliff Drive right of way, and have for a number of years; and

WHEREAS, the City is agreeable to permitting the continued encroachment into the Cliff Drive 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:

**Lot One (1) of Lot G of Canyon Lake Heights, in the City of Rapid City, as shown by the Plat Recorded in Book 8 of Plats on Page 235, in the Office of the Register of Deeds, Pennington County, South Dakota.**

2. Encroachment Authorization. The Owners are hereby authorized to continue to maintain the retaining wall within the Cliff Drive right of way adjacent to the above-described Property. Owners agree that as a condition of the City allowing the structure to remain in the Cliff Drive right of way, Owners 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. Owners agree 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 Owners to occupy that portion of the public right of way where the retaining wall is located. As a condition of this license, if Owners desire to alter or reconstruct the wall in a way that would require a building permit, Owners agree to submit their plans for any reconstruction or alteration of the wall to the City as part of the building permit and obtain the City’s approval of the same before work begins.

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

5. Indemnification and Hold Harmless. The Owners agree to defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the location of the retaining wall within the Cliff Drive 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.

6. Successors in Interest. Owners acknowledge 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 Owners, 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.

7. 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.

8. 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).

9. 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.

10. 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.

11. This Agreement shall be construed according to the laws of the State of South Dakota. Any action concerning this Agreement shall be venued 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)

\_\_\_\_\_  
KEVIN A. CARROLL

\_\_\_\_\_  
BRADLEY G. BAILEY

State of South Dakota        )  
  ss.  
County of Pennington        )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, the undersigned officer personally appeared KEVIN A. CARROLL and BRADLEY G. BAILEY, known to me or satisfactorily proven to be the persons who names are subscribed to the within instrument and acknowledged that they executed the foregoing Covenant Agreement for the purposes therein contained.

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

\_\_\_\_\_  
Notary Public, \_\_\_\_\_(state)

My Commission Expires:

(SEAL)