

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

NGN
5/17/16

COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND TMA, LLC TO PERMIT AN ELECTRICAL SERVICE BOX 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, located at 300 Sixth Street, Rapid City, SD 57701 (herein after referred to as the "City") and **TMA, LLC**, a South Dakota limited liability company, of 329 Main Street, Rapid City, South Dakota, 57701 (herein after referred to as the "Landowner").

WHEREAS, the Landowner is renovating property located at 329 Main Street; and

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

WHEREAS, the Landowner has requested authorization from the City to allow an electric meter and associated electrical service boxes (hereinafter "electrical service hardware") to encroach into the adjacent public right of way; and

WHEREAS, the proposed electrical service hardware 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 electrical service hardware 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 land which is subject to this Agreement is generally located at 329 Main Street, Rapid City, South Dakota and is legally described as follows:

Lots 13, 14, 15 and 16 in Block 87 of the Original Town, City of Rapid City, Pennington County, State of South Dakota.

2. The Landowner is hereby authorized to install electrical service hardware within the public right of way along the alley adjacent to the above-described property in order to provide electrical service to the building located on the above property. The electrical service hardware shall be designed in accordance with all applicable codes and regulations, and such hardware shall protrude no further than eighteen inches (18") into the right of way. Prior to installation, the Landowner will submit sufficient plans and drawings to the City to demonstrate compliance with these requirements and to further demonstrate there will be sufficient space to accommodate traffic in the alley. The Landowner's plans and drawings must be approved by the City Building Official and City Engineer prior to energizing the building.

3. In addition to the approvals required in Paragraph 2, the Landowner acknowledges that the International Building Code and National Electric Code, as adopted by the City, require that with any replacement of the electrical service hardware, the electrical service must be brought up to the then-current code, which likely will include removal from the public right of way.

4. The Landowner agrees it is solely responsible for any maintenance and upkeep on the electrical service hardware 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 electrical service hardware authorized in this Agreement, the electrical service hardware will be considered in the nature of a revocable license to occupy that portion of the public right of way where the structure is located. If the City engages in a street, utility or other public construction project which necessitates removal, or if the City otherwise determines it necessary to remove the encroachment, the Landowner agrees to do so at its sole expense. The Landowner further agrees to remove the encroachment 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 electrical service hardware authorized in this Agreement and the Landowner refuses to repair or remove the structures, the City may remove or repair the structures 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 liability insurance coverage for the property subject to this Agreement with maximum limits of at least Two Million Dollars per occurrence and Four Million Dollars aggregate. The Landowner will defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the electrical service hardware authorized by this Agreement.

8. 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 with the Pennington County Register of Deeds' Office.

9. The Landowner acknowledges the City's authorization to allow its proposed electrical service hardware 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. Landowner warrants that it has the power to enter into this Agreement, and the officer signing for it has full power and authority to do so.

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 11 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 Rapid City, South Dakota, in the Pennington County Circuit Court.

[Signature pages follow]

Dated this _____ day of _____, 2016.

CITY OF RAPID CITY

Steve Allender, Mayor

ATTEST:

Finance Officer

(SEAL)

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

On this the _____ day of _____, 2016, 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 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 _____

TMA, LLC

By Matthew P. Enman

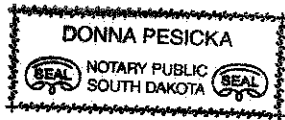
Its Owner

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

On this 20th day of MAY, 2016, before me, the undersigned officer, personally appeared MATTHEW P. ENMAN, who acknowledged himself to be the owner of TMA, 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.

(SEAL)



Donna Pesicka
Notary Public - South Dakota
My Commission Expires 10/23/2018