COVENANT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND DAKOTA HEARTLAND, INC. CONCERNING EAST NORTH STREET 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 (“City”) and DAKOTA HEARTLAND, INC., a South Dakota corporation, of P.O. Box 330, Rapid City, SD 57709, (“Landowner”).

WHEREAS, Landowner owns property located at 510 North Cambell Street in Rapid City, South Dakota as well as the parcel directly to the east described as Lot A of Lots 7 and 12 of Forkner Addition (“the Property”); and

WHEREAS, Landowner seeks to construct an East North Street Access Road to provide access from Century Road to the Property at 510 North Cambell Street; and

WHEREAS, a retaining wall on the Property encroaches into the East North Street right of way; and

WHEREAS, the parking lot for the Property also encroaches into the East North Street right of way; and

WHEREAS, Landowner acknowledges that the retaining wall and the parking lot are located within the East North Street right of way and that the City may legally require the immediate removal of the retaining wall and/or the parking lot at Landowner’s cost; and

WHEREAS, the Landowner wishes to construct a street extension within the East North Street right of way to provide access to the Property through the East North Street Frontage Road; and

WHEREAS, the City is willing to authorize the Landowner’s occupation of the East North Street right of way 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 510 N. Cambell Street, Rapid City, South Dakota and is legally described as follows:

   Lot B of Lots 7, 8, 9 and 12 of Forkner Addition Less Lots H1, H2, H3 and H4 in the City of Rapid City, Pennington County, South Dakota

(“the Property”).

2. The Landowner is hereby authorized to continue to maintain the parking lot and the retaining wall within the East North Street right of way adjacent to the above-described Property. Landowner agrees that as a condition of the City allowing the parking lot and retaining wall to remain in the East North Street right of way, Landowner will remove said encroachments 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. Landowner agrees to bear the entire cost of removing the encroachments from the public right of way.

3. From the execution of this Agreement, the encroachment into the right of way will be considered in the nature of a revocable license permitting Landowner to occupy those portions of the public right of way where the parking lot and retaining wall are located.

4. If the City becomes aware of safety or maintenance issues related to the encroachments authorized in this Agreement and if the Landowner refuses to repair or remove the encroachments, the City may remove the encroachments 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.

5. The parties agree that the encroachments shall not be added to or enlarged at their location in the East North Street right of way. The parties agree that if either encroachment 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 encroachment shall not be restored except in legal conformity with the regulations of the zoning district in which it is located.

6. The Landowner agrees to defend, indemnify and otherwise hold the City harmless from any and all claims arising from or related to the location of the encroachments within the East North Street right of way.

7. Landowner 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, 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.

8. The Landowner acknowledges the City’s license to permit the continued occupation of the encroachments within the East North Street right of way is good and sufficient consideration for the promises it has made herein.

9. 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.

10. 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. 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 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 paragraph 7 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.

13. 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.

14. 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 ________________, 2018.

CITY OF RAPID CITY

__________________________
Mayor

ATTEST:

__________________________
Finance Officer

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

On this the ____ day of ________________, 2018, 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 ___________________
Dated this 25th day of January, 2018.

DAKOTA HEARTLAND, INC.

By

Its

STATE OF SOUTH DAKOTA

) ss.

COUNTY OF PENNINGTON

) ss.

On this 25th day of January, 2018, before me, the undersigned officer, personally appeared Doyle Estes, who acknowledged himself to be the president of DAKOTA HEARTLAND, INC., and that as such president, being duly authorized to do so, executed the foregoing instrument for the purposes therein contained.

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

(seal)

BRENDA HAFNER
NOTARY PUBLIC
STATE OF SOUTH DAKOTA

Notary Public, South Dakota
My Commission Expires: March 13, 2021