

## SETTLEMENT AGREEMENT

**THIS AGREEMENT** is entered into on the \_\_\_\_ day of \_\_\_\_\_, 2007, by and among, Debra L. Miller, in her capacity as the Secretary of Transportation for the State of Kansas ("KDOT"), Westgate, L.C., a Kansas limited liability company ("Westgate"), and The City of Lawrence, Kansas, a municipal corporation ("City").

**WHEREAS**, KDOT instituted eminent domain action for improvement of U.S. 40/6<sup>th</sup> Street in Lawrence, Kansas in a case entitled *Debra L. Miller, in her capacity as the Secretary of Transportation for the State of Kansas v. Diamond Head Limited Partnership, et al.*, Case No. 03 C 311, in the District Court of Douglas County, Kansas; and

**WHEREAS**, Westgate is the owner of real property located near Wakarusa Drive on U.S. 40/6<sup>th</sup> Street, Lawrence, Kansas, which is legally described as:

Lots 1 and 2 of Westgate Place No. 3, all in the City  
of Lawrence, Douglas County, Kansas.

A portion of which was acquired by KDOT in the above-captioned condemnation case. Westgate filed an appeal of its Court Appointed Appraisers award in Case No. 04 C 214, in the District Court of Douglas County, Kansas ("the Westgate case"); and

**WHEREAS**, the Westgate case involved questions of the condemnation by KDOT of a "permanent easement for public and utility purposes", its use and its impact on Westgate's building and parking setbacks under the Code of the City of Lawrence, Kansas; and

**WHEREAS**, the Westgate case was tried to a jury, judgment granted and that judgment is currently on appeal to the Kansas Supreme Court in Case No. 05-95225-S; and

**WHEREAS**, KDOT and Westgate each wish to settle all issues involved in the Westgate case and its appeal, Kansas Supreme Court Case No. 05-95225-S; and

**WHEREAS**, City is a participant with KDOT in the U.S.40/6<sup>th</sup> Street improvement project pursuant to a System Enhancement Agreement No. 23 K-6880-01, and City joins in this Settlement Agreement solely as it relates to (1) its formal ratification of Exhibit 1 hereto; (2) the revisions of the final development plans of Westgate's property located near the Southeast corner of U.S.40/6<sup>th</sup> Street and Wakarusa Drive; and (3) the representations contained in paragraph 10 of this Agreement.

**NOW THEREFORE**, KDOT, Westgate, and City, each agree that it will act in good faith to implement the terms of this Agreement in a timely fashion and each acknowledges that time is of the essence of this Agreement and each further agrees as follows:

1. Prior to February 1, 2007 and upon approval of the revised final development plans described hereafter, KDOT will pay to Westgate the unpaid portion of the judgment granted by the trial court in Douglas County District Court, Case No. 04 C 214, in the amount of \$317,412.00, plus judgment interest from the date of acquisition, February 5, 2004. Westgate shall deliver an executed satisfaction of judgment to KDOT's counsel in exchange for payment of this amount.
2. Within fifteen (15) days after the last of the designated signatures appears on this Agreement, KDOT will submit for review by Westgate two revised final development plans for each of the two lots owned by Westgate within Westgate Place No. 3. The revised final development plans will conform to the following specifications:
  - (i) The revised final development plans shall show the repeal of the 50-foot green space easement along U.S. 40/6<sup>th</sup> Street and all adjustments of the peripheral boundaries along U.S. 40/6<sup>th</sup> Street and Wakarusa Drive, pursuant to City Ordinances numbered 7948, 7949 and 8004;

- (ii) The revised final development plans shall indicate that KDOT's permanent easements for public and utility purposes do not allow its use for any roadway purposes on the Westgate properties;
  - (iii) The revised final development plans shall contain a note or notes indicating that the revised final development plans may be amended by the property owner under the Code of the City of Lawrence, Kansas;
  - (iv) The revised final development plans shall contain a note or notes that indicate each of the Westgate properties fully comply with all setback requirements as established by the Code of the City of Lawrence, Kansas;
  - (v) The revised final development plans shall show all of KDOT's permanent easements for public and utility purposes; and
  - (vi) The revised final development plans shall show the existing signage that was excluded from the KDOT taking of its permanent easements on the Westgate properties.
3. Westgate may object to the revised final development plans only upon reasonable grounds related to the terms of this Agreement or the already approved and filed final development plans for each lot. Westgate shall have three (3) business days after receipt to approve or object to the revised final development plans.
4. Within three (3) days of the approval of the revised final development plans by Westgate, KDOT will submit the revised final development plans, at its own expense,

to the Lawrence-Douglas County Metropolitan Planning Department for approval by the City and for filing by the City at the Douglas County, Kansas Register of Deeds.

5. So long as the revised final development plans comply with the Code of the City of Lawrence, Kansas, the City shall approve and file the revised final development plans with the Douglas County, Kansas Register of Deeds. It shall be KDOT's exclusive responsibility to ensure that the revised final development plans comply with the Code of the City of Lawrence, Kansas. In the event the City fails to approve and file both of the revised final development plans for any reason, other than failure to comply with the Code of the City of Lawrence, Kansas; then KDOT and Westgate agree to stipulate that the City's failure to approve or file the revised final development plans shall be admissible into evidence in any subsequent court hearing.
6. Prior to February 1, 2007 and upon approval and filing of the revised final development plans, KDOT will dismiss with prejudice its appeal of the case *Debra L. Miller, in her capacity as the Secretary of Transportation for the State of Kansas v. Westgate, LC*, Kansas Supreme Court Case No. 05-95225-S.
7. KDOT agrees that if the use of its permanent easements require digging up or disturbing in any way Westgate's existing landscaping, trees, irrigation lines, utilities, sidewalks, signs, or anything else, that KDOT will repair or replace the landscaping, trees, irrigation lines, utilities, sidewalks, signs, or anything else.
8. On or before February 1, 2007, KDOT shall file the fully executed partial release of easement in the form of Exhibit 2, and its attachments, with the Douglas County, Kansas Register of Deeds.

9. KDOT hereby releases any right it may have acquired to use the permanent public and utility easement for roadways on the Westgate property. KDOT agrees that its primary purposes for the permanent public and utility easements acquired on the Westgate properties is for utilities, sidewalks and roadway signage. KDOT will construct no roadway within the permanent easements for public and utility purposes without acquiring the additional right to do so by negotiation with the landowners or by eminent domain. KDOT excluded from the permanent easements it acquired the "Westgate Shopping Center" and "Dillons" monument signs located within the permanent easements it acquired.
10. So far as any obligations to Westgate, the participation of the City in this Agreement is only as to its agreement that time is of the essence of this Agreement and its exercise of good faith in the timely implementation of the terms of this Agreement, including (1) its ratification of Exhibit 1 hereto; (2) its approval and filing of the revised final development plans with the Douglas County, Kansas Register of Deeds no later than January 30, 2007; and (3) its representation that there is no need to replat the properties because the KDOT revised final development plans will illustrate the location of the KDOT permanent easement, the elimination of the 50-foot green space easement and the adjustments to the peripheral setbacks on this property. The setbacks will be measured from the exterior property lines which were not modified by the KDOT acquisition.

11. All parties shall execute three original copies of this Agreement, so that each party has one fully executed original in its possession.

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KANSAS DEPARTMENT OF  
TRANSPORTATION (KDOT):

By: \_\_\_\_\_  
Debra L. Miller, in her capacity as the  
Secretary of Transportation for the State of  
Kansas

**ACKNOWLEDGMENT**

STATE OF KANSAS                     )  
  ) ss:  
COUNTY OF SHAWNEE             )

This instrument was acknowledged before me on the \_\_\_\_ day of January, 2007 by  
DEBRA L. MILLER, in her capacity as the Secretary of the Kansas Department of  
Transportation on behalf of whom this Settlement Agreement was executed.

SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Notary Public

My Appointment Expires: \_\_\_\_\_

CITY OF LAWRENCE, KANSAS: a  
municipal corporation

By: \_\_\_\_\_  
Mike Amyx, Mayor  
City of Lawrence, Kansas

**ACKNOWLEDGMENT**

STATE OF KANSAS                     )  
  ) ss:  
COUNTY OF DOUGLAS            )

This instrument was acknowledged before me on the \_\_\_\_ day of January, 2007 by MIKE AMYX, in his capacity as the Mayor of the City of Lawrence, a Kansas municipal corporation on behalf of whom this Settlement Agreement was executed.


SUBSCRIBED AND SWORN to before me this \_\_\_\_ day of \_\_\_\_\_, 2007.

\_\_\_\_\_  
Notary Public

My Appointment Expires: \_\_\_\_\_



WESTGATE, L.C., a Kansas limited liability company

By:   
Timothy B. Fritzel, Managing Member of  
Westgate, L.C.

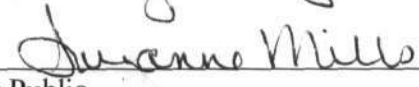
**ACKNOWLEDGMENT**

STATE OF KANSAS                     )  
  ) ss:  
COUNTY OF DOUGLAS            )

This instrument was acknowledged before me on the 8<sup>th</sup> day of January 2007 by  
TIMOTHY B. FRITZEL, in his capacity as the Managing Member of Westgate, L.C., a Kansas  
limited liability company on behalf of whom this Settlement Agreement was executed..

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of January, 2007.



  
Notary Public

My Appointment Expires: 7-30-07



EXHIBIT 1

SIXTH AND MASSACHUSETTS STREET • P.O. BOX 708

LAWRENCE, KANSAS 66044-0708 • FAX (785) 832-3160 • PHONE (785) 832-3150

December 19, 2006

Eldon Shields  
Gates, Biles, Shields & Ryan, P.A.  
10990 Quivira, Suite 200  
Overland Park, KS 66210-1284

RE: KDOT v. Northland, LC and Domino, LC and  
KDOT v. Westgate, LC

Dear Eldon:

You have indicated that as part of the settlement agreement with Westgate, Northland and Domino, KDOT has agreed to be responsible for preparing revised Final Development Plans so that they will note that the properties are currently in compliance with the setback requirements of the City and also that the Final Development Plans are modifiable. In discussing this with you, I have indicated that I believe those revisions are minor and the revised Final Development Plans can be administratively approved by the Planning Director.

You have also asked me to consider whether there is a requirement to replat these properties for compliance with the City Code and specifically, with respect to conformance of the properties to the required peripheral setback along both Wakarusa Drive and W. 6th Street. I have reviewed the approved Final Plat of Westgate Place No. 3 and the relevant city code provisions. In my opinion, there is no need to replat the property. The revised Final Development Plans will illustrate the location of the KDOT permanent easement. The peripheral setback is measured from the exterior property lines of planned unit developments and the KDOT acquisition does not modify those exterior property lines in any way. The peripheral setback is required to be shown on the Final Development Plans and, as I understand, will be shown on the revised Final Development Plans.

Please let me know if you have additional questions regarding the planning process.

Sincerely,

A handwritten signature in cursive script, reading "Sheila M. Stogsdill".

Sheila M. Stogsdill  
Interim Planning Director

C: David Corliss, City Manager  
John Miller, Staff Attorney

## **EXHIBIT 2**

### **PARTIAL RELEASE OF EASEMENT**

This partial Release of Easement (the "Release") is made this \_\_\_\_\_ day of \_\_\_\_\_, 2007 (the "Effective Date"), by Debra L. Miller, in her capacity as the Secretary of Transportation for the State of Kansas ("KDOT").

### **RECITALS**

- A. KDOT is the owner of a permanent easement described on Exhibit A and, by reference, made a part hereof (the "Easement") obtained from Westgate, L.C. (The "Owner") through the right of eminent domain in a case entitled *Debra L. Miller in her capacity as the Secretary of Transportation for the State of Kansas v. Diamond Head Limited Partnership, et al.*, Case No. 03 C 311, in the District Court of Douglas County, Kansas (the "Condemnation Action"), for public and utility purposes.
- B. Owner is the owner of the real estate described on Exhibit B and, by reference, made a part hereof (the "Owner's Parcel"), over which the Easement is located, and Owner filed an appeal of its Court Appointed Appraisers award in Case No. 04 C 214, in the District Court of Douglas County, Kansas (the "Appeal"); KDOT filed an appeal of the judgment in that case to the Kansas Supreme Court in Case No. 05-95225-S.
- C. As part of the settlement of the Appeal and the Kansas Supreme Court Case No. 05-9225-S, KDOT has agreed to partially release the Easement by excluding any use of the Easement, for roadway purposes. KDOT and Owner agree that the Easement shall not be used for the construction of a roadway, including, without limitation, a highway, street, or road ("Roadway"), unless KDOT acquires an additional right to do so from the Owner, its successors or assigns, or by the power of eminent domain commenced after the date of this Release, all in accordance with the terms and provisions of this Release.

### **PARTIAL RELEASE**

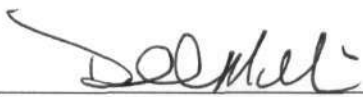
**NOW, THEREFORE**, for good and valuable consideration, the receipt of which is hereby acknowledged, KDOT hereby agrees as follows:

- 1. **Recitals.** The Recitals set forth above are a part of this Release.
- 2. **Partial Release of Easement.** KDOT hereby releases, vacates, quitclaims and abandons the use of the Easement for the construction of a roadway, including, without limitation, a highway, street, or road; it being the intention of KDOT to vacate and terminate the use of the Easement, for purposes of constructing a Roadway, KDOT agrees that if it should desire to construct a Roadway or use the easement for a roadway after the date of this Release, KDOT may not do so unless it obtains such right from the Owner, its successors or assigns, or acquires such right in the exercise of the power of eminent domain.

3. **Ratification of Remaining Easement.** Nothing in this Release shall in any way diminish KDOT's right, title and interest in and to the remaining portion of the Easement not released in this Release. KDOT does not release the Easement or the description of the Easement, but rather KDOT's release only pertains to the uses of the Easement that KDOT obtained in the Condemnation Action.
4. **Benefit of Partial Release.** This Release shall be binding upon and inure to the benefit of KDOT and the owner of the Owner's Parcel and their respective successors and assigns.

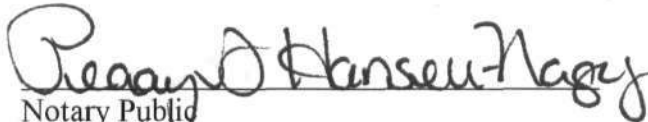
IN WITNESS WHEREOF, KDOT has executed this Release as of the Effective Date.

KDOT:

  
Debra L. Miller, in her capacity as the  
Secretary of Transportation for the State of Kansas

STATE OF KANSAS                    )  
  ) ss:  
COUNTY OF SHAWNEE            )

This instrument was acknowledged before me on this 10<sup>th</sup> day of January 2007, by Debra L. Miller, Secretary of Transportation for the State of Kansas.

  
Notary Public

My Appointment Expires: 03/12/2009



## **EXHIBIT A**

### **[Legal Description of Easement as Taken]**

A PERMANENT EASEMENT for public and utility purposes over and upon a tract of land in Lot 2, Westgate Place No. 3, City of Lawrence, Douglas County, Kansas, according to the recorded plat thereof, described as follows: BEGINNING at the Northwest corner of Lot 2; FIRST COURSE, thence on an assumed bearing of thence South 01 degree 51 minutes 23 seconds East, 19.394 meters (63.63 feet) along the West line of said Lot 2; SECOND COURSE, thence North 88 degrees 06 minutes 41 seconds East, 6.741 meters (22.12 feet); THIRD COURSE thence North 01 degree 53 minutes 19 seconds West, 19.384 meters (63.60 feet) to the North line of said Lot 2; FOURTH COURSE, thence South 88 degrees 11 minutes 41 seconds West, 6.730 meters (22.08 feet) along said North line to the point of beginning. The above described tract contains 131 square meters (1406 square feet), more or less; and

A PERMANENT EASEMENT for public and utility purposes over and upon a tract of land in Lots 1 and 2, Westgate Place No. 3, City of Lawrence, Douglas County, Kansas, according to the recorded plat thereof, described as follows: BEGINNING at the Northwest corner of said Lot 2, said point being the Northeast corner of Lot 3; FIRST COURSE, thence on an assumed bearing of North 88 degrees 11 minutes 41 seconds East, 208.787 meters (685.00 feet) along the North line of said Lots to the East line of said Lot 1; SECOND COURSE, thence South 01 degree 48 minutes 19 seconds East, 7.620 meters (25.00 feet) along said East line; THIRD COURSE, thence South 88 degrees 11 minutes 41 seconds West, 208.780 meters (684.97 feet) to the West line of said Lot 2; FOURTH COURSE, thence North 01 degree 51 minutes 23 seconds West, 7.620 meters (25.00 feet) along said West line to the point of beginning. The above described tract contains 1591 square meters (17125 square feet), more or less.

Plaintiff-Condennor specifically excludes from the acquisition of the above-described Permanent Easements the "Westgate Shopping Center" and "Dillon's" monument signs located within the described Permanent Easements. KDOT will require its contractors to preserve and protect such signs from damage during construction, and agrees to repair or replace such signs at its costs should damage occur during construction.

**EXHIBIT B**

**[Legal Description of Owner's Parcel]**

Lots 1 and 2 of Westgate Place No. 3, all in the City of Lawrence, Douglas County, Kansas.