KANSAS

DEPARTMENT OF TRANSPORTATION
DEB MILLER, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

SALLY A. HOWARD, CHIEF COUNSEL

August 30, 2005

Mr. David L. Corliss
Assistant City Manager and
Director of Legal Services
City of Lawrence
6 East 6th - PO Box 708
Lawrence, Kansas 66044

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

Dear Mr. Corliss:

The Kansas Department of Transportation (KDOT) and the City of Lawrence (City) are joint participants in the widening and improvement of West 6th Street/U.S. Highway 40 in Lawrence, Kansas, with each participating financially in the engineering and/or acquisition costs of the right-of-way and additional easements. Representatives of KDOT and the legal staff of the City have had a number of recent discussions regarding efforts needed to resolve setback issues faced by the Westgate and Northland properties.

During the planning process, KDOT and the City discussed the potential impact of the road widening and/or permanent easements needed for utilities on the 50 foot building and parking setback along 6th street (Lawrence City Ordinances 21-1201 through 1204) and the peripheral boundary setbacks (Lawrence City Ordinance 20-1008-D)(2). In December, 2002, Lawrence Planning Director, Linda Finger, wrote a letter to KDOT identifying various properties and the impact of the acquisition of additional right-of-way, which would infringe on the existing 50-foot building and parking setback on 6th Street, as well as the impact of the use of permanent easements for utilities in lieu of right-of-way. The letter primarily focuses on the impact of the taking of additional right-of-way because at the time of the planning of this street improvement during 2002, we believe that both KDOT representatives and the City of Lawrence staff interpreted the existing city ordinances to allow permanent easements for utilities and sidewalks within the 50-foot setback.

In an effort to address this setback issue, KDOT, in consultation with the City, determined that in order to cause the least amount of damage to the individual landowners impacted that they would use permanent easements for utilities and sidewalks outside the boundaries of the right-of-way instead of taking right-of-way for those purposes. As reflected by

OFFICE OF CHIEF COUNSEL
DWIGHT D. EISENHOWER STATE OFFICE BUILDING
3RD FLOOR WEST, 700 S.W. HARRISON STREET, TOPEKA, KS 66603-3754
PUBLIC ACCESS AT NORTH ENTRANCE OF BUILDING
VOICE 785-296-3831 TTY 785-296-3585 FAX 785-296-0119 http://www.ksdot.org

Linda Finger's December 19, 2002, letter, the City, through its staff, agreed to take steps necessary to reduce the 50-foot setback for each property owner impacted by a right-of-way taking to the extent necessary for the existing improvements to remain in compliance with the City's regulations after the taking. Because KDOT amended its taking language to specifically limit the new takings for public and utility purposes, KDOT and the City believed that no variances or amendments to the statutory scheme were necessary for the Westgate or Northland properties. These two property owners, who are essentially the same investor group led by Mr. Duane Schwada and Mr. Tim Fritzel, are the only owners which have pending appeals and are currently impacted by this setback issue. The Westgate property contains the Dillons grocery store and the shops adjacent thereto. The Northland/Domino tract contains the People's Bank and The Kwik Shop. On both of these properties an eminent domain action was required to acquire essentially a 25-foot public and utility easement primarily for sidewalks and utilities along 6th Street and a 22-foot easement on Wakarusa.

In both cases, the court appointed appraisers believed that an amendment to the city ordinances or a granting of a variance was likely and awarded damages to the property only for the taking of the permanent easements and gave little damage to the remainder, other than the cost related to obtaining the variances. In both cases the landowners have appealed the court appointed appraisers' award. In each case, the landowners have taken the position that the taking of the permanent easement for public and utility purposes caused their properties to violate the 50-foot building and parking lot setback regulations. The landowners also contend that 21-1202 does not allow the City to grant a variance to these properties because the ordinance requires a complete deprivation of use and neither property qualifies under the language of the ordinance.

KDOT and the City contend that the taking of a permanent easement for public and utilities purposes did not cause the landowners' property to violate the City's setback ordinance and the City's staff has testified in depositions consistent with this position. In June 2005, during the Westgate case, Judge Mike Malone ruled that the public and utility easement acquired in this project was actually additional right-of-way, and therefore the remaining property did not comply with 21-1201 after the taking. Based on the Court's ruling, the property after the taking is a non-complying use under the City's zoning ordinances. The trial of the Westgate tract occurred in July, 2005. The KDOT appraisers offered their opinion that a variance or other resolution through the City of Lawrence was the most viable alternative and that if a variance were granted, the damage for the taking to the Westgate tract was in the range of $200,000 to $230,000. The landowners and their expert took the position that no variance could ever be granted and that as a result they would be denied their right to develop the expansion of the Dillons store and also denied the right to develop the "Junior" anchor on the 36,000 square foot unimproved portion of their tract. Through their experts, they claimed that the resulting damages would be 1.27 million dollars. Testimony was also given at trial that even if the setbacks move, as ruled by Judge Malone, that the non-compliance of the property could be corrected by the elimination of approximately 70 parking spaces and the relocation of certain parking islands. The various witnesses' estimate of this cost ranged from approximately $100,000 to as high as $360,000. The jury verdict in the Westgate case was $577,412. The jury obviously granted the landowners some damage for the reconfiguration of the parking lot and some damage to the remainder as a result of a reduction in the size of the lot.

The Northland and Domino case is currently scheduled for trial October 11, 2005. The landowners continue to contend that the public and utility easement taken from their property causes the remainder to violate the City's setback ordinances, and as a result the People's Bank and Kwik Shop are non-complying uses. Based on Judge Malone's ruling in the Westgate trial, we believe that landowners' properties will be held to be non-complying uses. The appraisers retained by KDOT have testified that the land taken for the easements has damaged these properties somewhere between $330,000 and $360,000. Based on conversations with the Planning Director, our appraisers have also testified that the granting of a variance or other change in the ordinances will allow the current use and resolve the setback issues. The landowners contend that the properties have been damaged to the extent of 3.1 million dollars and their expert appraiser contends the damage is 2.2 million dollars. The basis for their contention is that the properties are non-complying uses and their right to rebuild either property in the event of partial or complete destruction is severely limited and their ability to obtain insurance and/or financing for a non-complying property is severely limited.

The granting of a variance as suggested by Linda Finger in 2002 or other action on the part of the City that would bring the landowners' into compliance with the City's ordinances would, in KDOT's opinion, reduce any damage caused to these properties to the value of the permanent easement interests which is in line with the court appointed appraisers' award and the value given by KDOT appraisers.

It is our understanding that the planning and/or legal staff believes that the People's Bank and the convenience store are both proper uses for these properties and continue to be proper uses after the taking. As such, they believe that the continued use of these properties is a benefit to the City as a whole and that granting variances or other ordinance amendments which would allow the continued use of these properties is an appropriate position for the City of Lawrence.

One of the difficulties in obtaining a variance that has come to light during the Westgate litigation and since Linda Finger's 2002 letter is that 21-1202, which is the ordinance that provides for variances from the 50-foot building and parking lot setback along 6th Street, requires that any appeal be submitted directly to the Board of Zoning Appeals, and it requires unwarranted hardship which is the equivalent of a complete deprivation of use. This standard would be very difficult if not impossible to meet in cases of street widening which only partially infringe on the setback area. After consultation with the City Legal Department and Planning staff, it is our belief that they are both in favor of an amendment of these ordinances which would eliminate government takings for street or other public purposes as a cause of any setback violation or, as an alternative, to provide that a government taking satisfies the "complete deprivation of use" requirement of the ordinance.

Clearly, both KDOT and the City of Lawrence had no intent to cause damage to the

Northland or Westgate properties beyond the small permanent easement interest that was acquired. Unfortunately, our efforts to avoid causing the remaining property to be viewed as violating the City's setback requirements have been frustrated by the Court's ruling that the permanent easement interest that was acquired should be considered "right of way," for purposes of the setback ordinances. KDOT believes that the City can still carry out the initial goal of limiting damage to the remainder of the property through an ordinance amendment of 21-1201 or 1202, as well as 20-1008 (D) such that government takings for street or other public purposes would be excluded from consideration in determining whether a setback violation has occurred. The City could also amend the ordinance such that a governmental taking automatically satisfied the requirement that the landowner demonstrate a "complete deprivation of use." Other alternatives certainly exist and any that are satisfactory to the City and remedy setback issues in the pending litigation are acceptable to KDOT. Action on this remedy must be implemented as expeditiously as possible in order to meet the court's current calendar for trial of the Northland, L.C./Domino, L.C. case.

Sincerely,

Sally A. Howard - by [illegible]

Sally A. Howard
Chief Counsel

SAH:hs
c: Deb Miller, Secretary of Transportation
Bill Vicory, KDOT Right of Way
Eldon Shields, Attorney at Law
Gates, Biles, Shields & Ryan, PA

OFFICE OF CHIEF COUNSEL
DWIGHT D. EISENHOWER STATE OFFICE BUILDING
3RD FLOOR WEST, 700 S.W. HARRISON STREET, TOPEKA, KS 66603-3754
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