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OF COUNSEL

October 24, 2005

Jane M. Eldredge
Email: jeldredge@barberemerson.com

Via Hand Delivery

Mayor Dennis "Boog" Highberger
City of Lawrence
Sixth and Massachusetts
Lawrence, Kansas 66044

RECEIVED

OCT 24 2005

**CITY MANAGERS OFFICE
LAWRENCE, KS**

Re: City Commission Regular Agenda Items 5a and 6

Dear Mayor Highberger:

We represent the landowners in two condemnation cases. The first, Miller vs. Westgate, L.C., Case No. 04 C 214 in the District Court of Douglas County, Kansas, was tried to a jury of twelve persons during the week of July 11, 2005. Judgment was entered for the landowner in the amount of \$577,412. KDOT then appealed the case to the Kansas Court of Appeals. KDOT's chief counsel, by letter dated August 30, 2005, requested the City of Lawrence to change its subdivision regulations and zoning ordinances in an effort to minimize KDOT's exposure to and responsibility for the significant damages to the landowners in the second case, KDOT vs. Northland Venture, L.C. and Domino, L.C., Case No. 04 C 214 in the District Court of Douglas County, Kansas, that was set for a jury trial on October 11, 2005.

As a result of KDOT's request to the City of Lawrence for text amendments, the trial in the *Northland* case has been continued until the week of February 6, 2006.

The landowners appreciate the City's current interest in reducing the damages suffered by the landowners and strongly urge the City Commission to enact only valid and enforceable text amendments to the Lawrence City Code, rather than to adopt the changes approved by the Planning Commission that do not appear to be valid and enforceable.

AGENDA ITEM 5a. PROPOSED CHANGES TO THE ZONING CODE SECTIONS 20-1314 AND 20-2002.13

We support the adoption of these text amendments. They are clearly authorized by K.S.A. 12-755. However, to solve the KDOT takings problem, these changes must be retroactive and must be effective as of February 4, 2004, which is the day before KDOT took our clients' properties.

The code changes alone are not sufficient. We request that the City Commission also initiate the necessary variances to the four approved final development plans for Westgate Place No. 3, Lots 1, 2, 3 and 4. In December 2002 the Planning Director wrote that the City would initiate the necessary variances to these final development plans as soon as the City was notified that the takings had occurred. Copies of these letters are attached. Now is the time to finally initiate the variances to each of the four final development plans. The text changes and the variances will ensure that the damages arising as a result of the properties' non-compliance with the zoning code are reduced after the takings.

AGENDA ITEM 5b. PROPOSED CHANGES TO SUBDIVISION REGULATIONS ARTICLE 12, CHAPTER 21.

We do not support the adoption of these text amendments because they conflict with state law and do not appear to be valid or enforceable.

We do support the intention to reduce damages arising from the properties' non-compliance with the extraordinary 50-foot setback along Sixth Street after the taking. The state planning and zoning statutes (K.S.A. 12-741 - 12-771) are the enabling legislation that permit cities and counties to enact and enforce planning, zoning and subdivision regulations. However, the locally enacted regulations may not conflict with the state law. (K.S.A. 12-741.) The text amendments proposed in Item 5b do conflict with state law.

The state planning and zoning laws are "uniform" in nature and once a city "opts in" by electing to follow these statutory provisions, the City cannot "opt out" by adopting local regulations that conflict with any statewide or uniform statutes. *Moore v. City of Lawrence*, 232 Kan. 353, 654 P.2d 445 (1982); *Bigs v. City of Wichita*, 271 Kan. 455, 23 P.3d 855 (2001); *Crumbaker v. Hunt Midwest Mining, Inc.*, 275 Kan. 872, 69 P.3d 601 (2003); and *Topeka v. Board of County Commissioners*, 277 Kan. 874, 89 P.3d 924 (2004).

State law specifically provides the procedure for establishing extraordinary setbacks for existing or proposed major streets or highways. Once the city and county have established these setbacks on existing or proposed major streets or highways, only the Board of Zoning Appeals ("BZA") may "modify or vary the restrictions in specific cases" and only based on a very strict standard of a finding of "unwarranted hardship, which constitutes a complete deprivation of use". Otherwise, the state law requires strict observation of the setback to protect the public welfare and public safety. (K.S.A. 12-765.)

The proposed text amendments are in direct conflict with the state law because they attempt to usurp the BZA's sole authority to "modify or vary the restrictions in specific cases", by creating exceptions to the application of the uniform standards in cases of governmental takings. We cannot support these proposed text amendments because they are not consistent with state law and will not provide the relief intended to be provided to the landowners.

In the alternative, the City and Douglas County may simply repeal the subdivision regulations contained in Article 21, Chapter 12, thereby repealing the extraordinary setbacks for Sixth Street. The City still would rely on the setback requirements contained within each zoning district. Properties along Sixth Street would be treated the same as all other properties within the same zoning designations. They would be subject to front, rear and side yard setbacks and peripheral boundaries. These setbacks and peripheral boundaries may receive variances under less stringent circumstances than those surrounding the current 50-foot setback on Sixth Street.

As a result of the KDOT taking along Sixth Street, Sixth Street now has 150 feet of right-of-way which is substantially greater than any other road in Douglas County. All of KDOT's "takings" permit the future use by KDOT of the entire 150 feet for highway purposes regardless of whether the taking was called a "right-of-way" as it was on the north side of Sixth Street or a "permanent easement" as it was on the south side of Sixth Street. Because the current and future uses of the permanent easements and rights-of-way are identical, the Judge in the *Westgate* case ruled that KDOT's taking of a "permanent easement" was a taking of a "right-of-way". Thus, both the north and south sides of Sixth Street have increased rights-of-way to a total of 150 feet. This is 46 more feet than KDOT has proposed to use in its current project along Sixth Street. There is enough remaining right-of-way to add more than 4 additional lanes to Sixth Street in the future. No extraordinary setbacks are needed along Sixth Street any longer.

Highberger, Mayor Dennis
October 24, 2005
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SUMMARY

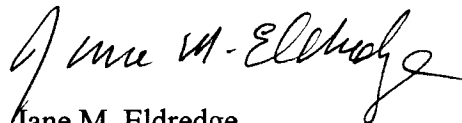
In order to implement the intended relief, we request that the City Commission:

1. Approve and adopt the text amendments proposed in Item 5a;
2. Initiate all necessary variances to the four final development plans for Westgate Place No. 3, Lots 1, 2, 3 and 4;
3. Reject the text amendments proposed in Item 5b; and
4. Repeal the Subdivision Regulations Article 21, Chapter 12.

Thank you for your consideration.

Sincerely,

BARBER EMERSON, L.C.


Jane M. Eldredge

JME/klb

Attachments



December 19, 2002

Eilene L. Ramsey
R/W Property Appraiser
Bureau of Right of Way
Thatcher Building
217 SE Fourth Street
Topeka, KS 66603-3504

RE: Lot 4, Westgate Place No. 3, PEOPLES BANK
FDP, Phase VB, Westgate PCD

Responding to the Kansas Department of Transportation's request, the Lawrence/Douglas County Planning Department has reviewed the approved planning documents (plats and development plans) for the legal description referenced above. This letter will serve as documentation from the Planning Department as to the nature of impacts and remedial steps that will be necessitated by one or both of the following:

1. Acquisition of additional right-of-way.
2. Acquisition of a permanent 25' easement immediately adjacent to the highway right-of-way line along W. 6th Street.

Twelve properties have been identified along the south side of W. 6th Street/U.S. Hwy. 40 that will be impacted by the acquisition of permanent easements. Of these 12 properties, eight are also impacted by the acquisition of additional highway right-of-way, which intrudes into the 50' required building and parking setback along the highway. The attached table identifies the properties by legal description (commercial establishment) and lists the planning documents that have been approved for each property. Impacts and steps to remedy these impacts are also listed for each property in the table.

Specific action(s), as outlined in the attached table, the Planning Department will take to mitigate the identified impacts are based on the road construction plans for Hwy. 40/W. 6th Street improvements on file in the Public Works Department as of December 1, 2002.

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DEC 23 2002

RIGHT OF WAY

December 19, 2002

Page Two

None of the mitigation measures/actions will be taken until the Planning Department has been notified by the Kansas Department of Transportation that additional right-of-way or permanent easements have been acquired for the properties in the attached table.

If you have questions, please contact me at (785) 832-3154, or Sheila Stogsdill, Assistant Planning Director, at (785) 832-3157.

Sincerely,

A handwritten signature in black ink, appearing to read "Linda M. Finger", with a long horizontal flourish extending to the right.

Linda M. Finger
Planning Director, City/County
lfinger@ci.lawrence.ks.us

attachment

c. Terese Gorman, City Engineer

LEGAL DESCRIPTION [DEVELOPMENT NAME]	APPROVED DOCUMENTS	CODE STATUS FOLLOWING R/W ACQUISITION	RECOMMENDED CITY ACTION	NET IMPACT ON PROPERTY FOR CITY CODE COMPLIANCE WITH CHAPTERS 20 & 21
Lot 4, Westgate Place No. 3 [Peoples Bank]	- FDP, Phase II, Westgate PCD - Final Plat of Westgate Place No. 3	- Reduction of required 50' building/parking setback [re: Sec. 21-1203]. - Non-compliant situation created for existing parking lot and building because of reduction to 50' required building/parking setback.	- After acquisition of necessary right-of-way, when exact dimension is known from the dedicated R/W to the parking lot and building, staff place on the Planning Commission agenda consideration of a variance from Section 21-1203 requiring a 50' setback to the newly created distance. Section 21-1203 occurs in the Subdivision Regulations and therefore the Planning Commission is the proper body to consider this variance request. - Request City Commission initiate a modification to the Final Development Plan pursuant to Section 20-1014(b)(2) to reduce the required peripheral setback along W. 6th St/Hwy. 40 to the 25± feet that will remain upon acquisition of additional highway R/W.	Existing buildings and parking lot were in compliance with City Code requirement as per 50' setback prior to acquisition of additional right-of-way. Based on this pre-existing state, the buildings and parking lot are acknowledged as pre-existing and non-compliance is noted. A variance granted by the Planning Commission for Westgate Place No. 3 would permit the owner/developer to construct new or significantly redevelop the existing site at the same setback from 6th Street R/W.