

KANSAS

DEPARTMENT OF TRANSPORTATION
DEB MILLER, SECRETARY

KATHLEEN SEBELIUS, GOVERNOR

SALLY A. HOWARD, CHIEF COUNSEL

November 2, 2005

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

Re: Proposed Ordinance Change
October 24, 2005, Letter from Jane Eldredge

Dear Mayor Highberger:

I received a copy of Ms. Eldredge's October 24, 2005, letter in which she expressed a number of concerns, and with this letter I wish to respond.

The Kansas Department of Transportation (KDOT) would defer to Neil Shortlidge, who I understand assisted the City in drafting the ordinance changes, regarding the legality of the proposed modifications. I have reviewed his correspondence and understand that he disagrees with Ms. Eldredge's legal analysis of K.S.A. 12-765.

I must take issue with Ms. Eldredge's suggestion that the City Commission pursue a variance for her client's development plans. I am enclosing a copy of the report drafted by Price Banks who was retained by Ms. Eldredge as an expert witness for the landowner. I encourage the City Commission to review the document and note the professional opinions expressed by Mr. Banks. Initially, Mr. Banks states on page 4 of his report that "[I]n my opinion it is unlikely that the Lawrence Board of Zoning Appeals would approve a variance from the PCD-2 periphery setback requirement along Wakarusa Drive." I would assume that Ms. Eldredge agrees with Mr. Banks on the variance issue and thus cannot understand why she is urging the City Commission to begin a process that she believes will likely fail.

Mr. Banks also states that, in his opinion, it is unlikely that the Lawrence Board of Zoning Appeals would approve a variance from the PCD-2 periphery setback requirement along Sixth Street (Report, page 4). He further notes that, under Section 21-1203, the landowner could only obtain a variance from the setback requirement if he demonstrated a complete deprivation of use. Mr. Banks opines that the landowner would fail to meet this requirement and therefore will not be able to complete development of the site according to the approved plans (Report, page 5).

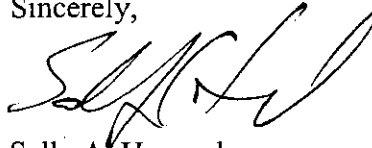
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VOICE 785-296-3831 TTY 785-296-3585 FAX 785-296-0119 <http://www.ksdot.org>

It is difficult to understand why the City Commission is being urged to seek a variance for the previously approved development plans when the expert retained by the landowner has articulated his opinion that such an effort will surely fail.

I believe that the City and KDOT have tried to minimize harm to adjacent landowners caused by the acquisition of right-of-way needed for the Sixth Street project. We believed that we had addressed the setback issue by defining the easement being acquired in a way that would not violate the setback requirements. Now that a Court has indicated to the contrary, I believe the City is taking the appropriate action by modifying the setback ordinances to state that a property that was in compliance with setback requirement will not later be held to violate the same requirements due to a governmental taking beyond the control of the landowner. The proposed modifications to the ordinances alleviate any need for a variance.

Thank you for your consideration.

Sincerely,



Sally A. Howard
Chief Counsel

SAH:hs
Enclosures
c: David Corliss
Jane Eldredge

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April 13, 2005

Jane Eldredge, Attorney at Law
Barber, Emerson, Springer, Zinn & Murray
PO Box 667
1211 Massachusetts Street
Lawrence, Kansas 66044

Re: Douglas County Case No. 03-C-311; the Impact of the Taking of Certain
Land from Lot 2, Westgate Place No. 3, City of Lawrence, Douglas
County, Kansas.

Dear Ms. Eldredge:

Per your request, I have reviewed the documents related to the highway project that resulted in the above-mentioned taking for the purpose of determining the impact of the taking on the development project currently underway on the above-described property.

The following report is based upon an examination of the engineering plans prepared by Bucher Willis and Ratliff Corporation, an examination of the Final Development Plans approved for the retail center by the City of Lawrence, and an examination of the City regulations and Ordinances as they apply to the retail center.

My comments are intended to be professional opinions as to the effect the takings have on existing and proposed improvements on the site in view of the regulatory framework of the City of Lawrence. The opinions set out in the report are the result of professional experience, education and personal experience with retail clients and with the City of Lawrence agencies involved with land use approvals and enforcement.

For the purpose of this report, the concentration is on issues arising from the taking that are related directly to the status of the retail center under the current land use law.

Sincerely,



Price T. Banks

IMPACT ANALYSIS
of
THE US HIGHWAY 40 RECONSTRUCTION PROJECT
on
LOT 2, WESTGATE PLACE NUMBER 3,
CITY of LAWRENCE, KANSAS

prepared by

Price T. Banks

April 13, 2005

The Site

Lot 2, of Westgate Place Number 3 (the subject property) consists of a retail shopping center containing a grocery store, smaller shops, vacant land which has been approved for additional retail stores, and support facilities including parking lots, a cross access easement, driveways, sidewalks and landscaped areas.

The Subject property lies within the PCD-2 (Planned Commercial Development) zoning district as set forth in Article X of Chapter 20 of the Code of the City of Lawrence (Zoning Ordinance). The PCD-2 District is a Planned Unit Development under the provisions of the Zoning Ordinance. Planned Unit Developments are subject to a more complicated approval process than projects in conventional zoning districts. Planned Unit Development projects are also subject to approval conditions that are imposed on a case-by-case basis, and are subject to extraordinary development standards that do not apply in conventional zoning districts.

Planned Unit Development projects are subject to a multi-tiered approval process that includes the review and approval, by the Planning Commission and the Governing Body, of three separate plans: 1) A preliminary Development Plan, 2) A Final Development Plan, and 3) A Final Plat. At each stage, the documents are reviewed by a professional staff to assure compliance with all regulations ordinances and policies.

The approved Development Plans for the subject property include a Grocery Store, and a building containing retail shops, both of which were constructed prior to the taking. The plans also show an addition to the grocery store, and a "junior anchor" retail store which are approved and the owners intend to construct in the near future.

The Takings

As part of the US Highway 40 reconstruction project, the State of Kansas Department of Transportation has taken two separate strips of land from the subject property for widening the right-of-way.

The State has taken a 25 foot wide strip along the North side of the site adjacent to Highway 40 (Sixth Street).

The State has taken a 22 foot wide strip along the West side of the site adjacent to Wakarusa Drive from the northern property line of the subject property, approximately 64 feet to the curb cut entering the site.

The combined impact of the takings prevents the owners of the subject property from completing the development, creates a situation in which the subject property does not comply with City of Lawrence regulations and ordinances, and will seriously encumber both parking and circulation within the shopping center.

Because of the Regulations of the City of Lawrence, the two takings affect the subject property in different ways. A 30 foot periphery setback along both Sixth Street and Wakarusa Drive is established by provisions in the City's Zoning Ordinance. An extraordinary setback for parking lots and buildings along Sixth Street is established by the City's Subdivision Regulations, and is governed by different procedures. Therefore each taking has a different impact on the subject property, with Wakarusa Drive only being impacted by the 30 foot periphery setback and Sixth Street needing to comply with both sets of regulations even though the setbacks overlay each other in that area.

The 22 foot strip along Wakarusa Drive

As indicated earlier, the subject property is within the PCD-2 (Planned Commercial Development) zoning district as set out in the Zoning Ordinance of the City of Lawrence. The Ordinance requires at Section 20-1008 (D)(2):

"Periphery Boundary All buildings structures and parking lots shall be set back from the periphery boundary or periphery street rights-of-way not less than 30 feet."

After the taking, the subject property no longer provides the setback along Wakarusa Drive as required by Section 20-1008 (D)(2) of the ordinance, but instead has a setback of approximately eight feet.

After the taking the subject property no longer complies with the Zoning Ordinance of the City of Lawrence.

Section 20-1601 of the ordinance provides, in part:

“--Except upon written authorization from the Board of Zoning Appeals, as provided in sections 20-1708 and 20-1709, no such building permit shall be issued for any building where said construction, moving, alteration, or use thereof would be in violation of any provisions of this ordinance.”

In my opinion, a building permit will not be issued for construction on the subject property, therefore the owners will be foreclosed from proceeding with their plans to complete the development of Westgate Place.

Section 20-1708 of the ordinance provides that the Board of Zoning Appeals may grant variances from specific terms in the ordinance, however, Section 20-1709.1 and Kansas Law at K.S.A. 12-759 both contain permissive, not directive, language relating to the Board and state that the Board “may” grant variances. There is no guarantee that a setback variance would be granted. Moreover, both the ordinance and the statute require that all five of the following conditions be met before a variance may be granted:

- a) That the variance request arises from such conditions which are unique to the property in question and not ordinarily found in the same zone or district; and are not created by an action or actions of the property owner or applicant.
- b) That the granting of the variance will not adversely affect the rights of adjacent property owners or residents.
- c) That the strict application of the provisions of this chapter for which variance is requested will constitute unnecessary hardship upon the property owner represented in the application. d) That the variance desired will not adversely affect the public health, safety, morals, order, convenience, prosperity or general welfare, and,
- e) That granting the variance desired will not be opposed to the general spirit and intent of the zoning regulations.

The standards are not easy standards to meet. In this case, satisfying standard a) would be difficult because the conditions creating the hardship are not unique to the property in question but occur wherever property has been taken along Sixth Street or Wakarusa Drive, or in relation to other street widening projects in the City. A variance from the

setback requirements would decrease green space along two arterial streets in Lawrence and, therefore it may be difficult to satisfy standards d) and e). In my opinion it is unlikely that the Lawrence Board of Zoning Appeals would approve a variance from the PCD-2 periphery setback requirement along Wakarusa Drive.

In combination with the taking, the City's setback requirements results in the loss of the cross access easement in the setback area and also results in the loss of nine parking spaces near the west side of the site. The loss of the cross access easement seriously encumbers traffic circulation on the site, and the loss of parking impairs future sales and rentals.

The 25 foot strip along Sixth Street.

The Sixth Street frontage of the subject property is subject to the same periphery setback as the Wakarusa Drive frontage, and therefore, the same problems and procedures apply that are discussed above. Owners could apply to the Lawrence Board of Zoning Appeals, for a variance from the setback requirements, and the same five statutory requirements [a) through e)] that are set forth above would apply.

In my opinion it is unlikely that the Lawrence Board of Zoning Appeals would approve a variance from the PCD-2 periphery setback requirement along Sixth Street.

Moreover, Sixth Street is subject to an overlaying extraordinary setback that is not set out in the Zoning Ordinance, but is found in a different portion of the City Code.

City Subdivision Regulations require a 50 ft parking and building setback from Sixth Street in this area.

The City of Lawrence Subdivision Regulations, in Section 21-1201 of the City Code, provides as follows:

"Building and parking setback lines are hereby established on certain major streets or highways as follows: West Sixth Street from County Road 13 to Monterey Way: setback line of 50 feet."

The area of the setback includes the subject property.

Section 21-1203 of the Subdivision Regulations provides:

"No building or occupancy permit shall be issued for any new building within the plat approval jurisdiction of the City of Lawrence, or the

unincorporated land in Douglas County which fails to comply with the requirements of this Article." {Article 12}

After the taking, the subject property no longer complies with the provisions of the City Subdivision Regulations because the 50 foot setback line will encroach into the parking areas on the North side of the site. Therefore, as the site exists after the taking, no permits will be issued for any new buildings on the subject property.

Section 21-1202 of the Subdivision Regulations provides for appeals from the setback requirements of Section 21-1201 as follows:

"Notwithstanding article 8 of this Chapter, any appeal of the building and parking setback line established for major streets or highways shall be to the Board of Zoning Appeals. The Board of Zoning Appeals shall have the power to modify or vary the building and parking setback line in specific cases *in order that unwarranted hardship, which constitutes a complete deprivation of use* as distinguished from merely granting a privilege, may be avoided." (*emphasis added*)

There is no "complete deprivation of use" because the subject property currently is being used. It contains commercial enterprises, however, a substantial portion of the site is currently vacant and plans have been approved for additional commercial development in the form of a 14,796 square foot addition to the grocery store on the site, and also what is referred to as a "junior anchor" that is 36,000 square feet in size.

In my opinion, an appeal using Section 21-1202 will fail to meet the "complete deprivation of use" test. Therefore, the owners will not be issued building permits and, consequently, will not be able to complete development of the site according to approved plans.

In combination with the taking, the 50 foot setback along Sixth Street, as required by Section 21-1201 of the City Code, causes the loss of 72 of the parking spaces along the North side of the site as well as the loss of use of the private cross access easement. The loss of the cross access easement seriously encumbers traffic circulation on the site, and the loss of parking impairs future sales and rentals.

Combined Impact.

In my opinion, the takings will prevent the owners of the subject property from obtaining building permits for completing construction of the shopping center according to the approved plans. The owners are left with a dysfunctional retail center that has substantially less appeal to current and future occupants than the center had as it existed

prior to the taking. A total of not less than 81 parking spaces will be lost, and traffic circulation within the site, and to and from adjacent properties will be severely encumbered.

Parking-

The subject property currently has 603 parking spaces which, according to the approved development plan, are proposed to serve 91,651 net square feet of retail buildings. After the taking, and after compliance with City regulations and ordinances, there will be 522 parking spaces to serve existing and proposed establishments. Available parking will be reduced from one space per 152 square feet to one space per 176 square feet. A primary consideration of potential retail tenants or purchasers is the amount of parking available to serve their business.

It should be noted that, although the City of Lawrence parking standard for Planned Commercial Developments is one space per 200 net square feet of commercially used buildings, a frequently used standard is one space per 100 square feet which is twice the required parking for Planned Commercial Developments. That standard (one space per 100 square feet applies in Lawrence's conventional zoning districts for restaurants and grocery stores. A lower standard is used in Planned Commercial Developments in Lawrence because PCDs often include office uses that are not included in conventional commercial zoning. Most retail centers in Lawrence provide substantially more spaces than the minimum required by the Planned Commercial Development parking standards.

In my opinion the decrease in available parking will impair the ability of the owners to lease or sell to retail businesses.

Traffic Circulation-

Two private cross access easements serving the subject property will be lost because of the demolition and reconstruction necessary to meet the City of Lawrence regulations and ordinances. Both cross access easements facilitate traffic movements within this site and provide access to and from adjacent properties which will also be impacted by the street widening. In each case, the loss of the easement will prevent efficient travel to and from adjacent properties because the location of improvements. Because the site is located at the intersection of two major streets, access from those streets will be severely limited by restrictions on curb cuts and the installation of raised center medians. Therefore, efficient internal circulation is critical to facilitate traffic movement between properties. Limits on internal circulation impair access to the businesses on the sites, and a primary

consideration of potential retail tenants or purchasers is the access customers have to the business.

In my opinion the limitations on access created by poor internal circulation will impair the ability of the owners to lease or sell to retail businesses.

Non-Compliance Issues-

The takings have caused the subject property to be non-compliant with the City of Lawrence Zoning Ordinance and Subdivision Regulations. In addition to the aforementioned prohibition against issuing building permits, the non-compliant situation will affect the ability to sell the property or obtain financing or refinancing. Typically, each case, an appraisal and title work are required, and non-compliance with government regulations is noted.

Its non-compliant status is likely to negatively affect financing as well as the ability to market the subject property.

Vita of Price Banks

Price has worked in local government planning for over 35 years. For twenty years he served in or directed planning agencies, for six years he served as County Administrator for a county in the Detroit, Michigan metropolitan area, and for the past ten years he has practiced law and served as a planning consultant. His law practice centers on municipal law, land use law, and real estate and development issues.

Price chaired the committee responsible for drafting the Kansas Planning and Zoning enabling legislation adopted in 1992, and helped to organize and conduct a series of workshops to familiarize local officials with the new law. Mr. Banks has written articles on planning and zoning, and is a frequent speaker to groups interested in planning issues. He has taught courses in land use planning and land use law at the graduate school at the University of Kansas, and has been a frequent guest lecturer at the University of Kansas Law School, speaking to classes on land use law and real estate law.

Price is a past president of the Kansas Chapter of the American Planning Association, (APA) and sat on the education committee of the Chapter Presidents Council of the national APA. He is a member of the Kansas Bar Association. Price has been a witness in numerous land use litigation cases, and has provided private consultant services for both public and private sector agencies. He has acted as a facilitator for strategic planning workshops and retreats for businesses, governmental agencies and non-profit corporations.

Price served for twelve years as Planning Director for the Lawrence-Douglas County Metropolitan Planning Commission from 1982 to 1994.

Since 1994 Price has served as project manager or prime consultant on the following major planning projects:

- Seward County, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- City of McPherson, Kansas, Comprehensive Downtown Plan.
- City of Colby, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- City of Goodland, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- City of Independence, Kansas, Airport Zoning Regulations.
- Jefferson County, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- City of Liberal, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- City of Linwood, Kansas, Benefit District Finance Plan for improvements for Peak Addition.
- Barton County, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.
- Great Bend, Kansas, Comprehensive Plan and Zoning and Subdivision Regulations.

Price holds a Bachelor of Science Degree in Urban Planning and a Master of Science in Community Development, both from Michigan State University, and a Juris Doctor from the Thomas M. Cooley School of Law in Lansing, Michigan.