

**4/4/13 Draft**

PROJECT NO. 69-46 KA-3114-01  
CONSTRUCTION  
CITY OF OVERLAND PARK, KANSAS

**A G R E E M E N T**

**THIS AGREEMENT** is made and entered into as of the Effective Date by and between **Michael S. King, Secretary of Transportation** (the “Secretary”), Kansas Department of Transportation (“KDOT”), and the **City of Overland Park, Kansas** (the “City”), collectively, the “**Parties.**”

**RECITALS:**

WHEREAS, the Secretary is empowered by the laws of Kansas to enter into agreements incident to the construction, improvement, reconstruction and maintenance of the state highway system; and

WHEREAS, the Secretary and the City are empowered by the laws of Kansas to enter into agreements for the construction and maintenance of city streets and city connecting links, and for the construction of city streets to benefit economic development; and

WHEREAS, the City desires to construct an interchange at 159<sup>th</sup> Street in Overland Park and US Highway 69 (the “Interchange Improvement”); and

WHEREAS, the Secretary deems it necessary to install auxiliary lanes on US Highway 69 as part of the Interchange Improvement (collectively, the Auxiliary Lanes and the Interchange Improvement are referred to herein as the “Improvements”) in order to provide an acceptable level of safety and service for traffic between existing interchanges at 151<sup>st</sup> and 167<sup>th</sup> streets; and

WHEREAS, the Improvements will provide access from and to US Highway 69 at 159<sup>th</sup> Street which will benefit economic development of the surrounding area; and

WHEREAS, KDOT had investigated options to construct the Improvements to US Highway 69 at a future date; and

WHEREAS, significant cost savings can be realized by constructing the Improvements at the present time, which savings are in the best interest of the Secretary and the City, and beneficial to the State of Kansas; and

WHEREAS, the City is willing to participate in the cost of the Improvements by utilizing funds generated through sales taxes imposed by the City on a transportation development district established within an area to be served by the Improvements; and

WHEREAS, in consideration of the cost savings to be realized by constructing the Improvements at this time, the economic development benefits which will result from the Improvements, and the City’s willingness to participate in the cost of the Improvements as set

forth herein, the Secretary has agreed to make funds available at this time for the Improvements, has authorized the highway construction and economic development construction project described in this Agreement, and has agreed that the City shall administer the design and construction of the Improvements as set forth herein.

NOW THEREFORE, in consideration of these premises and the mutual covenants set forth herein, the Parties agree to the following terms and provisions.

## ARTICLE I

**DEFINITIONS:** The following terms as used in this Agreement have the designated meanings:

1. **“Agreement”** means this written document evidencing the legally binding terms and conditions of the agreement between the Parties.
2. **“Act”** means the Transportation Development District Act as set forth in K.S.A. 2011 Supp. 12-17,140 *et seq.*, and as amended from time to time.
3. **“Applicable Laws and Regulations”** shall mean any federal or state law, statute, rule, regulation, ordinance, order, directive, code, interpretation, policy, permit, license, authorization, directive, or requirement applicable to the Project.
4. **“Auxiliary Lanes”** means continuous additional northbound and southbound lanes on US Highway 69 as shown on the Design Plans to be installed between existing interchanges at 151<sup>st</sup> and 167<sup>th</sup> Streets, in Overland Park, Kansas, but which are not part of the Interchange described below, the beginning and ending of points of which are described as follows:
  - (a) Northbound Auxiliary Lane: US Highway 69 Station 522+14 to Station 539+50 and Station 575+50 to Station 609+74; and
  - (b) Southbound Auxiliary Lane: US Highway 69 Station 510+68 to Station 533+90 and Station 582+00 to Station 600+14.
5. **“City”** means the City of Overland Park, Kansas, with its place of business at 8500 Santa Fe Drive, Overland Park, Kansas, 66212.
6. **“Conditions Precedent”** means the conditions specified in Article IV, paragraph 4 of this Agreement which must occur or be satisfied prior to the Secretary becoming obligated to perform under this Agreement.
7. **“Construction”** means the work done on the Project after Letting, consisting of building, altering, repairing, improving or demolishing any structure, building or highway; any draining, dredging, excavation, grading or similar work upon real property.

8. **“Construction Contingency Items”** mean unforeseeable elements of cost within the defined project scope identified after the Construction phase commences.

9. **“Construction Contract”** means the contract awarded to the lowest Responsible Bidder following Letting by the City, upon written concurrence by the Secretary, for Construction of the Project.

10. **“Construction Engineering”** means inspection services material testing, engineering consultation and other reengineering activities required during construction of the Project.

11. **“Consultant”** means any engineering firm or other entity retained by the City to perform services for the Project.

12. **“Contractor”** means the entity awarded the Construction Contract for the Project by the City, and any subcontractors working for the Contractor or the City with respect to the Project.

13. **“Design Plans”** means design plans, specifications, estimates, surveys, and any necessary studies or investigations, including, but not limited to, environmental, hydraulic, and geological investigations or studies necessary for the Project under this Agreement.

14. **“Developer”** means DMP159/69 LLC, a Kansas limited liability company with its principal place of business at 127821 Metcalf Avenue, Suite 200, Overland Park, Kansas, 66213.

15. **“Developer Agreement”** means a certain agreement entered into between the City and Developer dated \_\_\_\_\_, 2013, which provides in part for the creation of a TDD and the imposition of a TDD Sales Tax which shall be used, in part, to fund the costs of the Project.

16. **“Development”** means the area in Overland Park, Kansas, described in **Exhibit A** attached hereto, being developed by the Developer, which is bounded by 159th Street on the north, 167<sup>th</sup> street on the south, Antioch Road on the west, and US Highway 69 on the east, and in which the following will be constructed: a shopping center, hospital, office development, apartments, and single-family homes.

17. **“Effective Date”** means the date this Agreement is signed by the Secretary or his designee.

18. **“Eligible Expenses”** means Reimbursable Costs eligible for reimbursement with TDD Sales Tax proceeds under the Act.

19. **“Engineer’s Estimate”** means the estimate of costs of the Project by a licensed professional engineer based on the Design Plans prepared by the City and submitted to the Secretary.

20. **“FHWA”** means the Federal Highway Administration, an agency within the United States Department of Transportation.

21. **“Hazardous Waste”** includes, but is not limited to, any substance which meets the test of hazardous waste characteristics by exhibiting flammability, corrosivity, or reactivity, or which is defined by state and federal laws and regulations, and any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, including but not limited to leaking underground storage tanks. Any hazardous waste as defined by state and federal laws and regulations and amendments occurring after November 11, 1991, is incorporated by reference and includes but is not limited to: (1) 40 C.F.R. § 261 *et seq.*, Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Toxicity Characteristics Revisions; Final Rule; (2) 40 C.F.R. § 280 *et seq.*, Underground Storage Tanks; Technical Requirements and State Program Approval; Final Rules; (3) 40 C.F.R. § 300, National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule; and (4) K.S.A. 65-3430 *et seq.*, Hazardous Waste.

22. **“Interchange”** means that portion of the Project consisting of design and construction of a new interchange to be constructed at US Highway 69 and 159<sup>th</sup> Street, including on and off ramps, turn lanes, and bridge construction, retaining walls and other incidental items as shown on the Design Plan, but excluding the Auxiliary Lanes.

23. **“KA-3114-01”** is the number assigned to the Project by KDOT, and when used in this Agreement means the Project.

24. **“KDOT”** means the Kansas Department of Transportation, an agency of the State of Kansas, with its principal place of business at 700 Harrison Street, Topeka, Kansas, 66603, including its officers, employees and agents.

25. **“Letting or Let”** means, after approval of the Project by the Secretary, the process of receiving bids for any portion of the Project.

26. **“Maximum Reimbursement Amount”** means the sum of the Reimbursable Costs for the Interchange, not to exceed \$14,000,000.00, plus one hundred percent (100%) of the Reimbursable Costs for the Auxiliary Lanes.

27. **“Non-Participating Costs”** means the costs of any items or services which are not eligible for participation of federal aid funds under applicable laws and regulations of the FHWA, which are designated on the Design Plans as not being Participating Costs, or which are designated as not constituting Participating Costs on any change orders agreed to and signed in writing by the Parties after Letting.

28. **“Notice of Acceptance”** means a written notification from the Secretary that the Secretary has received certification from the City that the Project has been completed in substantial compliance with the Project plans, specifications, and applicable standards and that the Secretary accepts the construction provided for and contemplated by the Agreement as completed in accordance with the requirements of this Agreement.

29. **“Participating Costs”** means expenditures for items or services which are an integral part of highway, bridge and road construction projects which are (a) eligible for participation of federal-aid funds under applicable laws and regulations of the FHWA or (b) which are shown on the Design Plans as Participating Costs or which are shown as Participating Costs on any change orders agreed to in writing by the Parties after Letting.

30. **“Parties”** means the Secretary and KDOT, individually and collectively, and the City.

31. **“Preliminary Engineering”** means pre-Construction activities, including but not limited to design work, generally performed by a consulting engineering firm that takes place before Letting.

32. **“Project”** means all phases and aspects of the construction endeavor to be undertaken by the City between 151<sup>st</sup> and 167<sup>th</sup> Streets on US Highway 69 and on 159<sup>th</sup> Street in Overland Park, Kansas, which includes the Interchange and Auxiliary Lanes and is the subject of this Agreement.

33. **“Project Limits”** means that area of Construction for the Project, including all areas between and within the Right of Way boundaries as shown on the Design Plans.

34. **“Responsible Bidder”** means one who makes an offer to deliver contractual services in response to a request for bid with the technical capability, financial capacity, human resources and equipment required to perform the contractual services and a record of having met similar schedules.

35. **“Reimbursable Costs”** means those Participating Costs incurred for the Interchange or Auxiliary Lanes that are reimbursable by the Secretary, as described in Article II, paragraph 1, in this Agreement.

36. **“Right of Way”** means the real property and interests therein necessary for construction of the Project, including fee simple title, dedications, permanent and temporary easements, and access rights, as shown on the Design Plans.

37. **“Secretary”** means Michael S. King, in his official capacity as the Secretary of Transportation of the State of Kansas, and his successors.

38. **“Transportation Development District”** and **“TDD”** mean the district established by the City pursuant to **Ordinance No. [\_\_\_\_\_]** in connection with the Development in accordance with the Act, for the purpose of imposing a transportation

development district sales tax in order to generate funds to, in part, provide payment to the Secretary for the City's participation in the costs of the Project.

39. **“TDD Administrative Fee”** means an annual amount which is equal to the greater of Five Thousand and 00/100 Dollars (\$5,000.00) or one percent (1%) of the TDD Sales Tax proceeds deposited into the TDD Sales Tax Fund (as that term is defined in the Development Agreement), which is paid to the City for administrative expenses associated with the TDD.

40. **“TDD Sales Tax”** means the tax authorized, imposed, collected or required to be collected under the Act by the City under the TDD.

41. **“Utility” or “Utilities”** means all privately, publicly or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water, and other similar commodities, including fire and police signal systems which directly and/or indirectly serves the public.

## ARTICLE II

### THE SECRETARY AGREES AS FOLLOWS:

1. **Reimbursement of costs for the Project.** The Secretary agrees to reimburse the City for certain costs as set forth below (collectively, “Reimbursable Costs”), up to the Maximum Reimbursement Amount. In no event shall the Secretary be responsible for Reimbursable Costs for the Interchange which exceed \$14,000,000.00.

(a) **Interchange.** For costs associated with the Interchange, the Secretary will reimburse the City for one hundred percent (100%) of the total actual Participating Costs for the following:

- i. Relocation of Utilities;
- ii. Construction (including the costs of all Construction Contingency Items); and
- iii. Construction Engineering.

Subject to the terms of Article IV, Paragraph 5(a)(4) hereof, the Secretary shall not otherwise be responsible for any costs associated with Preliminary Engineering and Right of Way acquisition for the Interchange portion of the Project.

(b) **Auxiliary Lanes.** For costs associated with the Auxiliary Lanes, the Secretary will reimburse the City for one hundred percent (100%) of the total actual Participating Costs, including but not limited to the following:

- i. Preliminary Engineering;
- ii. Right of Way acquisition;
- iii. Relocation of Utilities;
- iv. Construction (including the costs of all Construction Contingency Items);  
and
- v. Construction Engineering.

2. **Reimbursement Payments to City.** The Secretary will make cost reimbursement payments to the City for amounts not less than \$1,000.00 and no more frequently than monthly. Such payments will be made after receipt of documentation in a form reasonably acceptable to the Secretary establishing Reimbursable Costs paid by the City for the Project, and verification by a licensed professional engineer employed by the City that the Project is being constructed in substantial compliance with the Design Plans. The Parties stipulate that all costs reimbursed by the Secretary under this Agreement constitute and meet the requirements of Eligible Expenses under the Act.

3. **Sole Source of Funds for Payment of Previously Paid Eligible Expenses.** The Secretary acknowledges and agrees that the City's financial obligation, as set forth in Article III, paragraph 19 (b): (i) is restricted to funds generated from the TDD; and (ii) is subject to the TDD Sales Tax Fund being the exclusive and sole source of funds from which the Secretary may receive payment from the City for previously paid Reimbursable Costs (as Eligible Expenses under the Act). Provided, however, the limitation on the City's financial obligations described in this paragraph does not include any obligation of the City for costs identified in Article III, paragraph 18.

4. **Maintenance.** After Notice of Acceptance, the Secretary will be responsible for maintenance of the Project in accordance with a separate maintenance agreement between the Parties, the form of which shall be similar to other comparable maintenance agreements between the Parties.

### ARTICLE III

#### THE CITY AGREES AS FOLLOWS:

1. **Legal Authority.** The City shall, by resolution, authorize execution of this Agreement and authorize all actions necessary to undertake and complete the Project. The City further agrees to adopt all necessary ordinances and/or resolutions and to take such legal steps as may be required to give full effect to the terms of the Agreement and to undertake and fulfill each and every obligation and commitment under this Agreement.

2. **Design and Specifications.** The City shall be responsible to make or contract to

have made all necessary Design Plans for the Project, including both the Interchange and Auxiliary Lane portions. The City agrees to furnish KDOT one (1) set of final Design Plans printed on Mylar sheeting for its records.

**3. Conformity with State and Federal Requirements.** The City shall be responsible to design the Project or contract to have the Project designed in conformity with the state and federal design criteria appropriate for the Project as set forth in the current versions of the following documents as applicable: KDOT Local Project LPA Project Development Manual; KDOT Design Manual; City of Overland Park Procedures Manual; KDOT Geotechnical Bridge Foundation Investigation Guidelines; KDOT Bureau of Design's road memorandums; KDOT Standard Specifications for State Road and Bridge Construction with Special Provisions required by the Secretary or the by the City with the Secretary's concurrence, and with any necessary Project Special Provisions required by KDOT or the City; A Policy on Geometric Design of Highways and Streets of the American Association of State Highway and Transportation Officials Policy; and the latest version, as adopted by the Secretary, of the Manual on Unified Traffic Control Devices ("MUTCD").

**4. Responsibility for Adequacy of Design.** The City shall be responsible for and require any Consultant retained by it to be responsible for the adequacy and accuracy of the Design Plans for the Project. Any review of these items performed by the Secretary or his representatives is not intended to and shall not be construed to be an undertaking of the City's and its Consultant's duty to provide adequate and accurate Design Plans for the Project. Reviews by the Secretary are not done for the benefit of the Consultant, the construction Contractor, the City, the Developer, any other political subdivision, or the traveling public. The Secretary makes no representation, express or implied warranty to any person or entity concerning the adequacy or accuracy of the Design Plans, or any other work performed by a Consultant or the City.

**5. Submission of Plan to Secretary.** Upon their completion, the City shall have the Design Plans submitted to the Secretary by a licensed professional engineer and/or licensed professional architect attesting to the conformity of the Design Plans with the items in paragraph 3 above. The final Design Plans must be signed and sealed by a licensed professional engineer and/or licensed professional architect responsible for preparation of the Design Plans. In addition, geological investigations or studies must be signed and sealed by either a licensed geologist or licensed professional engineer in accordance with K.S.A. 74-7042, who is responsible for the preparation of the geological investigations or studies.

**6. Submission of Engineer's Estimate.** The City shall provide to the Secretary during the design phase of the Project the Engineer's Estimate of costs of the Project and any corrections, amendments or supplements thereto, as such estimates are available.

**7. Acquisition of Right of Way.** The City will, in its own name, acquire by purchase, dedication or condemnation all of the Right of Way shown on the final Design Plans. The City agrees the necessary Right of Way shall be acquired in accordance with, and if applicable such acquisition will comply with, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, and administrative regulations contained in 49



C.F.R. pt. 24, entitled Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs. The City shall certify to the Secretary such Right of Way has been acquired and, upon request, provide copies of the acquisition documents, including plans, deeds, condemnation cases, coordinates, and plats, to the Secretary. The City further agrees it will have recorded in the Office of the Johnson County Register of Deeds all Right of Way deeds, dedications, permanent easements and temporary easements.

**8. Right of Way paid for by the Secretary.** For Right of Way acquisition necessary for construction of the Auxiliary Lanes, to be reimbursed by the Secretary pursuant to Article II, Paragraph 1(b) hereof, the City shall comply with procedures established by KDOT's Bureau of Right of Way and the Office of Chief Counsel. The City agrees to provide copies of all documents, including recommendations and coordination for administrative condemnation proceedings, condemnation appeals, bills, contract, journal entries, case files, or documentation to the Office of Chief Counsel upon request.

**9. Relocation Assistance.** The City will contact the Secretary if there will be any displaced persons on the Project prior to making the offer for the property. The Parties mutually agree the Secretary will provide relocation assistance for eligible persons as defined in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, and 49 C.F.R. pt. 24, entitled Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs, and in general accordance with K.S.A. 58-3501 to 58-3507, inclusive, as amended, and Kansas Administrative Regulations 36-16-1 *et seq.*

**10. Non-highway Use of Right of Way.** If the City uses the Right of Way acquired for the Project for any purpose other than highway use, the City shall be required to receive prior written approval for such use from the Secretary or KDOT.

**11. Trails and Sidewalks on the Right of Way.** With regard to bike or pedestrian paths or sidewalks ("Trails/Sidewalks") constructed pursuant to the Design Plans or to be constructed by the City in the future on Right of Way acquired for the Project, the City agrees as follows:

(a) City Maintains Trails/Sidewalks. When the Project is completed and Notice of Acceptance is issued, the City, at its own cost and expense, will maintain, including snow removal, the Trail/Sidewalk and make ample provision each year for such maintenance. If notified by the State Transportation Engineer of any unsatisfactory maintenance condition, the City will begin the necessary repairs within thirty (30) days and will prosecute the work continuously until it is satisfactorily completed. Any notification by the State Transportation Engineer, however, is not intended to and shall not be construed to be an undertaking of the City's absolute duty and obligation to maintain the Trail/Sidewalk.

(b) City Responsible for Repairs and Providing Alternative Accessible Routes. The City agrees that the primary purpose of the Right of Way is for the construction and maintenance of US Highway 69. In the event that the construction or maintenance of US

Highway 69 reasonably requires the Trail/Sidewalk to be damaged or removed, the City shall be responsible for all repairs to the Trail/Sidewalk made necessary as a result of the US Highway 69 construction or maintenance. In the event the Trail/Sidewalk is temporarily closed or removed for any reason and for any length of time, the City will be wholly responsible for providing an alternative accessible path and for compliance with all laws and regulations relating to accessibility.

(c) Secretary May Determine Trail/Sidewalk Interferes with KDOT Right of Way. If the Secretary, in his sole judgment, determines that continued use of the Trail/Sidewalk is or will interfere with KDOT use of its highway Right of Way or is otherwise rendered impractical, inconvenient, or unsafe for use by the traveling public, the City will remove the Trail/Sidewalk and restore the KDOT Right of Way location to its original condition prior to the construction of the Trail/Sidewalk.

**12. Hazardous Waste.** The City agrees to the following with regard to Hazardous Waste:

(a) Removal of Hazardous Waste. The City shall locate and be responsible for remediation and cleanup of any Hazardous Waste discovered within the Project Limits. The City shall take appropriate action to cleanup and remediate any identified Hazardous Waste prior to Letting. The City will also investigate all Hazardous Waste discovered during Construction and shall take appropriate action to cleanup and remediate Hazardous Waste. The standards to establish cleanup and remediation of Hazardous Waste include, but are not limited to, federal programs administered by the Environmental Protection Agency, State of Kansas environmental laws and regulations, and City and County standards where the Hazardous Waste is located.

(b) Responsibility for Hazardous Waste Remediation Costs. The City shall be responsible for all damages, fines or penalties, expenses, fees, claims and costs incurred from remediation and cleanup of any Hazardous Waste within the Project Limits associated with the Interchange which is discovered prior to Letting or during Construction. Notwithstanding the foregoing, the Secretary shall be responsible for all damages, fines or penalties, expenses, claims and costs incurred from remediation and cleanup of any Hazardous Waste within the Project Limits associated with the Auxiliary Lanes which is discovered prior to Letter or during Construction.

(c) Hazardous Waste Indemnification. To the extent permitted by Applicable Laws and Regulations and subject to the Kansas Tort Claims Act, including but not limited to the exceptions and maximum liability provisions, the City shall hold harmless, defend, and indemnify the Secretary, his agents and employees from all claims, including contract claims and associated expenses, and from all fines, penalties, fees or costs imposed under state or federal laws arising out of or related to any act of omission by the City in undertaking cleanup or mediation for any Hazardous Waste.

(d) No Waiver. By signing this Agreement the City has not repudiated, abandoned, surrendered, waived or forfeited its right to bring any action, seek indemnification or seek

any other form of recovery or remedy against any third party responsible for any Hazardous Waste on any Right of Way within the Project limits. The City reserves the right to bring any action against any third party for any Hazardous Waste on any Right of Way within the Project limits.

(e) No Third Party Beneficiaries Created by Hazardous Waste Provisions. It is hereby specifically agreed between the Parties that any provisions of this Hazardous Waste clause is not intended to make the public, or any member thereof, a third party beneficiary hereunder, or to authorize anyone not a party of or to this Agreement to maintain a suit for personal injuries, property damages, or Hazardous Waste claims. The duties, obligations and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed by Applicable Law and Regulations.

**13. Utilities.** The City agrees to the following with regard to Utilities:

(a) Relocation of Utilities. The City will move or adjust or cause to be moved or adjusted all Utilities necessary to construct the Project in accordance with the final Design Plans. New or existing Utilities to be installed, moved or adjusted will be located or relocated in accordance with the KDOT Utility Accommodation Policy (“UAP”), as amended or supplemented. In accordance with the UAP, the Secretary will authorize the City to move or adjust utilities located within existing KDOT Right of Way.

(b) Cost of Relocation. The expense of the removal or adjustment of the Utilities located on public Right of Way shall be borne by the owners. The expense of the removal or adjustment of privately owned Utilities located on private Right of Way or easement shall be borne by the Secretary in accordance with this Agreement.

(c) Time of Relocation. The City will expeditiously take such steps as necessary to facilitate the early adjustment of any Utilities, initiate the removal or adjustment of the Utilities, and proceed with reasonable diligence to prosecute this work to completion. The City further agrees to move or adjust or cause to be moved or adjusted all necessary Utilities, including those located within KDOT Right of Way, prior to the scheduled Letting except those necessary to be moved or adjusted during Construction and those which would disturb the existing street surface. The City will initiate and proceed to complete the adjusting of any remaining Utilities so that Construction is not delayed.

(d) Permitting of Private Utilities. The City shall certify to the Secretary all privately owned Utilities occupying public Right of Way required for the construction of the Project are permitted thereon by franchise, ordinance, agreement or permit and the instrument shall include a statement as to which Party will bear the cost of future adjustments or relocations required as a result of street or highway improvements.

**14. Removal of Encroachments.** The City will initiate and proceed with due diligence to remove or require the removal of the encroachments. It is further agreed all such encroachments will be removed before the Project is advertised for Letting providing and that the physical removal thereof has been fully provided for between the City and the owner thereof and

will be accomplished within a time sufficient so as not to present a hindrance or delay to Construction.

**15. Traffic Control.** The City will determine the manner in which traffic is to be handled during Construction in accordance with the latest version, as adopted by the Secretary, of the MUTCD. Plans for handling traffic during Construction must be included in the Design Plans provided by the City. Detour routes and road closings, if necessary, shall be noted on the Design Plans.

**16. Letting of Construction Contract.** The City shall Let the Project after written notification is received by the City from the Secretary that all Conditions Precedent under this Agreement have been fulfilled or waived. The City shall award the Construction Contract to the lowest Responsible Bidder upon the following conditions: (1) the Reimbursable Costs for the Interchange, as determined by the Secretary based on the bid amounts, will not exceed \$14,000,000.00, and (2) receipt of written concurrence in the award by the Secretary. If Reimbursable Costs for the Interchange, as determined by the Secretary based on bid amounts, will exceed \$14,000,000.00, the Parties shall proceed according to Article IV, paragraph 5(a)(3).

**17. Administration of Construction.** Following the award of the Construction Contract, the City shall administer the Construction of the Project in accordance with the City of Overland Park Project Procedures Manual, and final Design Plans, including administration of payments due the Contractor. All Construction Contingency Items must be approved by the Secretary.

**18. Costs of the Project.** The City agrees to pay for certain costs of the Project as set forth below, which costs are not Reimbursable Costs under this Agreement:

- (a) Interchange. For costs associated with the Interchange, the City agrees to pay for one hundred percent (100%) of the total costs for the following:
  - i. Preliminary Engineering.
  - ii. Right of Way acquisition.
- (b) Non-Participating Costs. The City shall pay for any Non-Participating Costs incurred for the Project.
- (c) Invoices for Reimbursement. The City shall submit invoices to the Secretary for Reimbursable Costs paid by the City for the Project in accordance with Article II, paragraph 2, above.
- (d) Excess Costs. Provided and to the extent that the City first agrees in writing as set forth in Article IV, paragraphs 3, 4(d), or 5(a)(3), the City shall be responsible for and pay all costs of the Interchange which exceed \$14,000,000.00.

**19. Transportation Development District.** Prior to or concurrently with the execution of this Agreement, the City shall take all necessary governmental and legal action to cause the creation of the TDD, including requiring the Developer to take all necessary action, as set forth in the Developer Agreement, for the creation of the TDD. With regard to the TDD, the City agrees as follows:

(a) Imposition of Sales Tax. In connection with creation of the TDD, the City shall pass an ordinance, creating the TDD, which shall include a 1.0% TDD Sales Tax, and contain wording required by the Act and otherwise reasonably satisfactory to the Secretary, and take all other necessary action to impose a TDD Sales Tax of not less than 1.0% within the TDD.

(b) City's Financial Obligation. The City shall commit and pay to the Secretary the TDD Sales Tax proceeds generated from the TDD, less the City's permitted TDD Administrative Fee, for payment of costs previously paid by the Secretary to the City for Eligible Expenses under the Act (being identified as Reimbursable Costs under this Agreement) until such time as the total amount of TDD Sales Tax remitted to the Secretary equals \$11,000,000.00.

(c) Remittance to the Secretary. The City shall provide a certified copy of its ordinance authorizing the imposition of the TDD Sales Tax to the state director of taxation pursuant to K.S.A. 12-17,145(b), and shall take all necessary actions to cause all TDD Sales Tax monies transmitted quarterly from the Kansas State Treasurer to the City to be remitted to the Secretary for payment of Eligible Expenses under the Act until such time as the total amount of TDD Sales Tax remitted to the Secretary equals \$11,000,000.00.

(d) Verification of the Creation of the TDD. The City shall execute any documents requested by KDOT to demonstrate that the City has in fact created a TDD and the City has committed that TDD revenue shall be paid to the Secretary as set forth in subsections (b) and (c) above.

(e) Termination of TDD. Prior to the end of the twenty-two (22) year term of the TDD, the City agrees and shall take all necessary action to reasonably ensure that absent prior written consent and approval of the Secretary, the TDD and the TDD Sales Tax shall not be terminated, withdrawn, modified, reduced, allowed to expire, or otherwise allowed to cease to be imposed, collected, and/or remitted to the state director of taxation, remitted to the Kansas State Treasurer, remitted to the City or remitted to the Secretary until a total of \$11,000,000.00 of TDD Sales Tax has been paid to the Secretary.

(f) Default. The City further agrees to execute any documents reasonably requested by the Secretary to establish the Secretary's right, in the event the City ceases to make TDD Sales Tax payments required by this Agreement to the Secretary, to make a claim upon the TDD Sales Tax to the State Treasurer and have quarterly remittances from the State Treasurer to the City paid directly to the Secretary until the City's obligations hereunder are fulfilled. Nothing in this provision is intended to preclude the Secretary

from pursuing any and all remedies available under state and federal law for the City's violation or breach of any provision of this Agreement.

**20. Prior Costs Incurred.** The City shall be responsible for and pay for all Project costs incurred by the City prior to the Effective Date of this Agreement, except the Secretary shall reimburse the City for costs for Preliminary Engineering for the Auxiliary Lanes incurred prior to the Effective Date.

**21. Consultant Contract Language.** The City shall include language requiring conformity with Article III, paragraph 3, above, in all contracts between the City and any Consultant contracted with by the City to perform services for the Project. In addition, any contract between the City and any Consultant contracted with by the City to prepare and certify Design Plans for the Project covered by this Agreement shall also contain the following provisions:

(a) Completion of Design. Language requiring completion of all plan development stages no later than the current Project schedule's due dates as issued by KDOT, exclusive of delays beyond the Consultant's control.

(b) Progress Reports. Language requiring the Consultant to submit to the City (and to the Secretary upon request) progress reports at monthly or at mutually agreed intervals in conformity with the official Project schedule.

(c) Third Party Beneficiary. Language making the Secretary a third party beneficiary in the agreement between the City and the Consultant. Such language shall read:

“Because of the Secretary of Transportation of the State of Kansas’ (Secretary’s) obligation to administer state funds, federal funds, or both, the Secretary shall be a third party beneficiary to this agreement between the City and the Consultant. This third party beneficiary status is for the limited purpose of seeking payment or reimbursement for damages and costs the Secretary or the City or both incurred or will incur because the Consultant failed to comply with its contract obligations under this Agreement or because of the Consultant’s negligent acts, errors, or omissions. Nothing in this provision precludes the City from seeking recovery or settling any dispute with the Consultant as long as such settlement does not restrict the Secretary’s right to payment or reimbursement.”

**22. Authorization of Signatory.** The City shall authorize a duly appointed representative to sign any or all routine reports for the City as may be required or requested by the Secretary in the completion of the Project. Right of Way descriptions must be signed and sealed by a licensed land surveyor responsible for the preparation of the Right of Way descriptions.

**23. Inspections.** The City is responsible for Construction Engineering for the Project in accordance with the Design Plans.

(a) By City Personnel. City personnel who are fully qualified to perform inspection services in a competent and professional manner may be utilized by the City to inspect the Project, in which case the City shall provide the Secretary with a list of such personnel and their certifications.

(b) By a Consultant. If the City does not have sufficient qualified engineering employees to accomplish the Construction Engineering, it may engage the professional services of a qualified consulting engineering firm to perform the necessary services. However, any Consultant retained must represent it is in good standing and full compliance with the statutes of the State of Kansas for registration of professional engineers, the FHWA and all Federal agencies; provide personnel who are fully qualified to perform the services in a competent and professional manner; and provide the Secretary with a list of assigned inspectors and their certifications.

(c) Protective Clothing. The City will require at a minimum that all City personnel and all Consultant personnel performing Construction Engineering comply with the high visibility apparel requirements of the *KDOT Safety Manual*, Chapter 4, Section 8 Fluorescent Vests. If the City executes an agreement for inspection services, the agreement shall contain this requirement as a minimum. The City may set additional clothing requirements for adequate visibility of personnel.

**24. General Indemnification.** To the extent permitted by Applicable Laws and Regulations and subject to the Kansas Tort Claims Act, including but not limited to the exceptions and maximum liability provisions, the City agrees to defend, indemnify, hold harmless, and save the Secretary and his or her authorized representatives from any and all costs, liabilities, expenses, suits, judgments, damages to persons or property or claims of any nature whatsoever arising out of or in connection with the City's negligence or other actionable fault in the performance of this Agreement. The City shall not be required to defend, indemnify, hold harmless, and save the Secretary for negligent acts or omissions of KDOT or the Secretary or his or her authorized representatives or employees.

**25. Indemnification by Contractors.** The City shall require any Contractors working on the Project to indemnify, hold harmless, and save the Secretary, KDOT, its officers, employees and agents, and the City from personal injury and property damage claims arising out of the act or omission of the Contractor, the Contractor's agent, subcontractors (at any tier), or suppliers (at any tier). If the Secretary or the City defends a third party's claim, the Contractor shall indemnify the Secretary, KDOT, its officers, employees and agents, and the City for damages paid to the third party and all related expenses incurred either by the Secretary, the City, or both in defending the claim.

**26. Plan Retention.** The City shall maintain and make available for inspection by the Secretary upon request a complete set of final plans reproducible, as-built prints, approved shop drawings, and structural materials certification for five (5) years after final acceptance of the

Project. The City shall provide access to or copies of all of the above-mentioned documents to the Secretary.

27. **Accounting.** Upon request by the Secretary, and in order to enable the Secretary to report all costs of the Project to the legislature, the City shall provide the Secretary an accounting of all actual Non-Participating Costs which are paid directly by the City to any party outside of the Secretary and all costs incurred by the City not to be reimbursed by the Secretary for Preliminary Engineering, Interchange Right of Way, Interchange Utility adjustments, Construction, and Construction Engineering work phases, or any other major expense associated with the Project.

28. **Traffic Signals.** The City shall conform the location, form and character of informational, regulatory and warning signs, of traffic signals and of curb and pavement or other markings installed or placed by any public authority, or other agency as authorized by K.S.A. 8-2005, to the manual and specifications adopted by KDOT under K.S.A. 8-2003, and any amendments thereto are incorporated by reference and shall be subject to the approval of the Secretary.

29. **Economic Development Determination.** The City shall retain a third party to prepare a report to quantify the impact of the Project on economic development and submit to the Secretary information detailing the number of jobs created, average salary, and other economic benefits generated due to economic development activities associated with the Project. This information shall be submitted within one year of the date of Notice of Acceptance.

30. **Audit.** The City shall participate and cooperate with the Secretary in an annual audit of the Project. The City shall make its records and books available to representatives of the Secretary for audit for a period of five (5) years after date of final payment under this Agreement. If any such audit reveals payments have been made with state funds to the City for items not considered Participating Costs, the City shall promptly reimburse the Secretary for such items upon notification by the Secretary.

#### ARTICLE IV

#### THE PARTIES MUTUALLY AGREE AS FOLLOWS:

1. **Incorporation of Final Plans and Attachments.** The final Design Plans, Project plans, specifications, special provisions, Construction Contract Proposal (as available), the Project Procedures Manuals, the agreement estimate for Construction Engineering services (if applicable), the Contractual Provisions Attachment (Form DA-146a, Rev. 06-12) containing provisions required in all contracts entered into by an agency of the State of Kansas, attached hereto, and Special Attachment No. 1 pertaining to the implementation of the Civil Rights Act of 1964, attached hereto, are all essential documents of this Agreement and are hereby incorporated by reference into this Agreement and made a part hereof.



2. **Inspections by KDOT.** Representatives of the Secretary and/or KDOT, its officers, employees and agents, may make periodic inspection of the Project and any records of the City relating to the Project as may be deemed necessary or desirable. The Secretary does not undertake (for the benefit of the City, the Contractor, the Consultant, or any third party) the duty to perform the day-to-day detailed inspection of the Project, or to catch the Contractor's errors, omissions, or deviations from the final Design Plans and specifications.

3. **Modification of Design.** If at any time prior to Letting it appears, based on the Engineer's Estimate, that the Reimbursable Costs for the Interchange will exceed \$14,000,000.00, the Parties shall collaborate in good faith to modify the design and/or scope of the Interchange to decrease the Reimbursable Costs to an amount which does not exceed \$14,000,000.00. In the event that the Parties cannot in good faith modify the design and/or scope of the Interchange to an amount which is equal to or less than \$14,000,000, then the City, at its sole discretion, may elect to be responsible for costs of the Interchange which exceed \$14,000,000. If at any time during the design of the Project and prior to Letting it appears, based on the Engineer's Estimates, that the Reimbursable Costs for the Auxiliary Lanes will exceed \$3,000,000.00, then in the Secretary's sole discretion (a) the Parties shall collaborate in good faith to modify the design and/or scope of the Auxiliary Lanes to decrease the Reimbursable Costs to an amount which does not exceed \$3,000,000.00 or (b) the Secretary commits to be responsible for costs of the Auxiliary Lanes which exceed \$3,000,000.00.

4. **Conditions Precedent to the Secretary's Obligations.** The Secretary's performance of his obligations under this Agreement are specifically conditioned upon the occurrence of the each of the following Conditions Precedent prior to the date(s) or time specified:

(a) **Developer Agreement.** That prior to or concurrently with execution of this Agreement, the City and Developer have entered into the Developer Agreement, the terms of which are satisfactory to the Secretary, which obligates the Developer to take all necessary action for the establishment of the TDD, that encompasses the Developer's and City's acknowledgement and agreement that all of the TDD Sales Tax remitted to the City in the manner set forth in the Act, less the TDD Administrative Fee, shall be remitted by the City to the Secretary representing the City's participation in Eligible Costs of the Project until the total amount remitted to the Secretary equals \$11,000,000.00, and which includes language making the Secretary a third party beneficiary thereof.

(b) **Establishment of TDD.** Prior to Letting, verification from the City to KDOT in the form of a certified copy of the TDD ordinance that the City has imposed a TDD Sales Tax of not less than 1.0% on the TDD.

(c) **Commencement of Development.** The City, prior to Letting, shall provide written verification to the Secretary that development necessitating the Project is underway, consistent with the Performance Milestones set forth in Exhibit H to the Developer Agreement, which verification shall be provided by providing copies of construction permits obtained by Developer. The Secretary may also conduct its own inspections and independent verification to confirm that development is underway.

(d) Project Costs. That the Reimbursable Costs for the Project based on the Engineer's Estimate prior to Letting, as modified by the Parties (if necessary) pursuant to Article IV, paragraph 3 above, do not exceed \$14,000,000.00 for the Interchange unless the City has elected and agreed by written amendment to be responsible for costs of the Interchange which exceed \$14,000,000 pursuant to Article IV, paragraph 3 above.

**5. Cancellation of Project:** The Parties agree the Project may be cancelled and this Agreement terminated prior to the awarding of the Construction Contract for any of the following events:

(a) By the Secretary:

1. ***Reduced Funding of State Highway Fund.*** If at any time funds held by the State Highway Fund and/or appropriation of monies directed to the State Highway Fund in significant amounts are redirected, removed or reduced, whether due to acts of the Kansas Legislature, other officials of the State of Kansas, and/or FHWA or otherwise, such that the Secretary reasonably determines it is not prudent to allocate funds to the Project.

2. ***Conditions Precedent.*** If any of the Conditions Precedent specified in Article IV, paragraph 4 hereof, are not satisfied prior to Letting.

3. ***Project Costs.*** If, based on bids received during Letting, the Secretary determines that the Reimbursable Costs for the Interchange will exceed \$14,000,000.00, unless (1) the City agrees in writing to an assignment of responsibility for the excess Interchange costs, or (2) the Parties agree to modify the design of the Interchange pursuant to Article IV, paragraph 3, and re-Let the Project after such modification. If the Project is re-Let all applicable provisions of this Agreement shall apply.

4. ***Payment of Costs.*** If the Secretary cancels the Project for any reason specified herein, the Secretary shall reimburse the City for: (i) any costs incurred prior to the notice of cancellation for Preliminary Engineering, Utility relocations and Right of Way acquisition related to the Project, and (ii) any costs incurred by the City after cancellation of the Project for the completion of Preliminary Engineering related to the Project performed by Consultant(s) engaged prior to the notice of cancellation. The Secretary shall reimburse the City within thirty (30) days after receipt by the Secretary of the statement of the costs incurred by the City.

5. ***Effect of Cancellation.*** If the Secretary cancels the Project for any reason specified herein, the Design Plans that are the product of Preliminary Engineering costs reimbursed by the Secretary will be owned by the Secretary and the City will promptly take all steps necessary to effectuate the transfer of such documents to the Secretary.

(b) By the City:

1. ***Conditions Precedent.*** If any of the Conditions Precedent to the Secretary's Obligations specified in Article IV, Paragraph 4 hereof, are not able to be fulfilled by the City or otherwise.

2. ***Payment of Costs.*** If the City cancels the Project it shall reimburse the Secretary for any costs incurred by the Secretary, including costs incurred by the City and reimbursed by the Secretary, prior to the cancellation of the Project. The City agrees to reimburse the Secretary within thirty (30) days after receipt by the City of the statement of the costs incurred by the Secretary prior to the cancellation of the Project.

6. **The City's Representations.** The City hereby represents the following to the Secretary:

- (a) That the Developer Agreement, upon full execution and delivery, is a legally binding and enforceable obligation of the City and the Developer;
- (b) That this Agreement, upon full execution and delivery, is a legally binding and enforceable obligation of the City;
- (c) That all governmental actions have or shall be taken by the City and Developer with respect to the Developer Agreement and this Agreement (as applicable);
- (d) That the TDD has been or shall be lawfully established by the City;
- (e) That all governmental actions necessary have been or shall be performed by the City to impose the TDD Sales Tax for the purposes set forth herein and in the Developer Agreement to be evidenced by a certified copy of the TDD ordinance provided to the Secretary; and
- (f) That the Parties agree Reimbursable Costs identified in this Agreement constitute "costs" or a "project" (as defined in the Act) and are eligible for reimbursement with TDD Sales Tax proceeds under the Act.

7. **Compliance with Federal and State Laws.** The Parties agree to comply with all Applicable Laws and Regulations as they apply to the Project.

8. **Binding Agreement.** This Agreement and all contracts entered into under the provisions of this Agreement shall be binding upon the Secretary, the City, and their successors in office.

9. **No Third Party Beneficiaries.** No third party beneficiaries are intended to be created by this Agreement, nor do the Parties herein authorize anyone not a Party to this Agreement to maintain a suit for damages pursuant to the terms or provisions of this Agreement.

10. **Headings.** All headings in this Agreement have been included for convenience of reference only and are not to be deemed to control or affect the meaning or construction or the provisions herein.

11. **Cash Basis and Budget Laws.** Nothing in this Agreement is intended to violate the provisions of the Kansas Cash Basis Law (K.S.A. 10-1100 *et seq.*) and the Kansas Budget Law (K.S.A. 7925 *et seq.*) and at all times should be construed and interpreted so as to ensure that the City is at all times in compliance with such laws.

12. **Termination of Agreement.** Unless terminated pursuant to Article IV, paragraph 5 above, this Agreement and each Party's obligations and responsibilities to the other Parties hereunder, shall not terminate until the earlier of the following events: (1) the amount of TDD Sales Tax remitted to the Secretary as provided for herein totals \$11,000,000.00, or (2) the twenty-two (22) year TDD collection period described in the Act expires.

**IN WITNESS WHEREOF** the Parties hereto have caused this Agreement to be signed by their duly authorized officers as of the Effective Date.

**THE CITY OF OVERLAND PARK, KANSAS**

ATTEST:

\_\_\_\_\_  
CITY CLERK

By: \_\_\_\_\_  
MAYOR

**KANSAS DEPARTMENT OF TRANSPORTATION**  
Michael S. King, Secretary of Transportation

(SEAL)

BY: \_\_\_\_\_  
Jerome T. Younger, P. E.  
Deputy Secretary and  
State Transportation Engineer

---

(Date)

**EXHIBIT A**

All that part of the West half of Section 18, Township 14 South, Range 25 East, in the City of Overland Park, Johnson County, Kansas, describes as follows:

BEGINNING at the Northwest corner of the Northwest Quarter of Section 18, Township 14 South, Range 25 East; thence North 87 degrees 43 minutes 05 seconds East along the North line of the Northwest Quarter of said Section 18 a distance of 2648.57 feet to the Northeast corner thereof, said point also lying on the West right of way of US Highway 69; thence South 2 degrees 01 minutes 55 seconds East along the West right of way line of US Highway 69 a distance of 437.70 feet to a point; thence South 6 degrees 51 minutes 56 seconds West along the West right of way line of US Highway 69 a distance of 527.33 feet to a point; thence South 3 degrees 46 minutes 28 seconds West along the West right of way line of US Highway 69 a distance of 1891.88 feet to a point; thence in a Southwesterly direction along the West right of way line of US Highway 69 and along a curve to the left whose initial tangent bears South 3 degrees 46 minutes 54 seconds West, having a radius of 5889.60 feet, through a central angle of 2 degrees 04 minutes 52 seconds, an arc distance of 213.92 feet to a point; thence South 7 degrees 33 minutes 28 seconds West along the West right of way line of US Highway 69 a distance of 312.00 feet to a point; thence South 12 degrees 57 minutes 32 seconds East along the West right of way line of US Highway 69 a distance of 417.30 feet to a point; thence in a Southeasterly direction along the West right of way line of US Highway 69 and along a curve to the left whose initial tangent bears South 5 degrees 18 minutes 07 seconds East, having a radius of 5859.60 feet, through a central angle of 5 degrees 14 minutes 23 seconds, an arc distance of 535.85 feet to a point; thence South 0 degrees 14 minutes 14 seconds West along the West right of way line of US Highway 69 a distance of 455.91 feet to a point; thence South 10 degrees 15 minutes 27 seconds West along the West right of way line of US Highway 69 a distance of 478.93 feet to a point; thence South 87 degrees 39 minutes 28 seconds West along the West right of way line of US Highway 69 a distance of 171.42 feet to a point; thence South 2 degrees 20 minutes 32 seconds East along the West right of way line of US Highway 69 a distance of 80.00 feet to a point on the South line of the Southwest Quarter of said Section 18; thence South 87 degrees 39 minutes 28 seconds West along the South line of the Southwest Quarter of said Section 18 a distance of 2150.75 feet to the Southwest corner thereof; thence North 2 degrees 00 minutes 07 seconds West along the West line of the Southwest Quarter of said Section 18 a distance of 2654.54 feet to the Southwest corner of the Northwest Quarter of said Section 18; thence North 2 degrees 01 minutes 22 seconds West along the West line of the Northwest Quarter of said Section 18 a distance of 2654.22 feet to the POINT OF BEGINNING and containing 13,026,742 Square Feet or 299.053 Acres, more or less.

EXHIBIT B

