

## CONSTRUCTION AND ACCESS AGREEMENT

**THIS** Construction And Access Agreement ("Agreement") is made this \_\_\_\_ day of July, 2017, by and between the City of Lawrence, Kansas, a municipal corporation, the University of Kansas, a State institution of higher education, and HERE Lawrence Property Owner, LLC, a Delaware limited liability company.

### RECITALS

- A.** The City of Lawrence, Kansas, a municipal corporation ("City"), is the holder of those Rights of Way on which Fambrough Drive is currently located in Lawrence, Douglas County, Kansas.
- B.** The University of Kansas, a State institution of higher education ("KU"), owns, as part of its main campus, that real property, located in Lawrence, Douglas County, Kansas, that is south of Fambrough Drive and west of Mississippi Street ("KU Property") and which is adjacent to the current Fambrough Right of Way as depicted in Exhibit A attached hereto. The KU Property is legally described as follows:

QUIVERA PLACE BLK 30 LTS 1 THRU 12 INCL;ALSO BLK 31 LTS 1 THRU 12 INCL;ALSO BLK 32 LTS 7 THRU 12 INCL;ALSO ALL VACATED STREETS & ALLEYS,ETC ACCRUING THERETO;ALSO 36-12-19 BEG AT PT25 FT S OF N LINE SE 1/4 SD SEC & 980 FT W FROM W SIDE MISS ST TH W 229 FT S 305 FT E 229 FT N 305 FT TO PT BEG;ALSO THES 10 FT OF ABOVE DESC TR & W 16 FT OF E 143 FT ABOVE DESC TR RESERVED FOR ALLEY OR ROADWAY;ALSO W 1/2 VAC MAINE ST ADJ THIS TR ORD #3264 PASSED 11-27-62-1.6034A (U06183-06,6223A,23B,28-01,28-02,28-03,28-04,28-05& 28-06 COMBINED 1988)

QUIVERA PLACE BLK 32 LT 1

QUIVERA PLACE BLK 32 LTS 2 & 3(U06224-01 & 25 COMBINED 1988)

QUIVERA PLACE BLK 32 LT 4

QUIVERA PLACE BLK 32 N 45 FT LT 5

- C.** HERE Lawrence Property Owner, LLC, a Delaware limited liability company (HERE) owns that real property, located in Lawrence, Douglas County, Kansas,

and commonly known as 1101 and 1115 Indiana Street (HERE Property), which real property is adjacent to the Indiana Street and Mississippi Street Rights of Way south of Eleventh Street.

- D. HERE has redeveloped the HERE Property but, in order to obtain full use and occupancy of the HERE Property and approval from the City is in need of additional parking, and HERE has entered into a lease agreement with STADPKG, LLC, a Kansas limited liability company, and subsidiary of the Kansas University Endowment Association (such landlord, KUEA) to build parking on land north of Fambrough Drive between Mississippi Street and Illinois Street (the "Leased Parking Area").
- E. HERE, the City, and the University all desire to realign Fambrough Drive to curve through KU Property west of Mississippi Street so that the realigned street will connect to Eleventh Street east of Mississippi Street and for portions of the current Fambrough Drive that connect to Mississippi Street to be abandoned, the City's Right of Way vacated, and property rights in the abandoned portions of Fambrough Drive to revert to the University and to KUEA, and the KUEA portion to be used in the Leased Parking Area.
- F. The parties have agreed, subject to execution of this Construction and Access Agreement and compliance with its terms, that HERE will construct, at its sole cost and in full compliance with City and KU standards, the realigned Fambrough Drive and related improvements; KU will grant HERE temporary access to limited areas of the KU Property for purposes of building the realigned Fambrough Drive and other improvements; the City will vacate its Right of Way in the abandoned portion of Fambrough Drive and KU will convey to the City a Right of Way in the newly-aligned Fambrough Drive, and the abandoned Right of Way will be divided between the University and KUEA and the KUEA portion will become part of the Leased Parking Area.

## **TERMS**

**NOW THEREFORE**, in light of the mutual promises and obligations contained herein, and in exchange for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by each of the parties, the parties agree as follows:

### **A. Terms Relevant to Constructing New Fambrough Drive**

- 1. **Public Improvement Plan.** HERE agrees to submit to the City Engineer, for approval, a Public Improvement Plan, setting forth in detail its plan for constructing the realignment of Fambrough Drive. HERE further agrees that no work shall be commenced on the realignment of Fambrough Drive until the City Engineer approves HERE's Public Improvement Plan. KU and City agree to work

collaboratively to review the Public Improvement Plan and that the City will only approve the Public Improvement Plan with KU's written approval, which shall not be unreasonably withheld.

2. **Construction.** HERE agrees to complete the Project for public use at its sole cost and expense, in a good and workmanlike manner, and in accordance with the approved Public Improvement Plan and City requirements. HERE agrees that the work on the Project shall be completed to KU's and the City's reasonable satisfaction.
3. **Construction Start and Completion Dates.** Construction of the Project shall not begin until Monday, May 14, 2018, and shall be complete on or before Friday, August 3, 2018.
4. **Financial Security.** HERE shall furnish financial security for the Public Improvement Plan in accordance with City requirements. The City shall require sufficient financial security from HERE to cover the full cost of the Project, including improvements done on KU Property. Further, the City shall not approve distribution of funds for progress of the work done on KU Property nor release retainage without KU's approval, which shall not be unreasonably withheld.
5. **Indemnification.** HERE shall indemnify, defend, save, and hold harmless KU and the City, and their respective officers, commissioners, agents, employees, grantees, and assigns, from and against all claims, actions, liabilities, damages, costs, expenses, and judgments, including attorneys' fees, which relate to or arise out of its construction of the Project on account of any injury to persons or damage to property. This paragraph shall not apply to any injury or damage caused by the negligence or willful conduct of the City or KU or their respective employees or agents acting in the course and scope of their employment.

## **B. Terms Relevant to Access to KU Property During Construction**

6. **Access to KU Property.** HERE and its employees, agents, contractors and subcontractors approved in writing by KU shall be provided access to the KU Property for purposes of completing the Project. Such access shall be subject to each and all of the following conditions:
  - (a) Access to the KU Property shall be solely for the purpose of completing the Project. Access is granted solely for the period of time between the Construction Start and Completion Dates set forth herein.
  - (b) KU will not interfere with HERE's performance of the Services or undertake any actions regarding the use of the KU Property that would endanger the

- health, safety, or welfare of HERE's employees, agents, or subcontractors, or damage their equipment, materials, or property.
- (c) Upon completion of the Project, HERE will remove all unused or waste materials and all equipment utilized by HERE from the KU Property.
  - (d) HERE will access the KU Property along existing access drives shown on Exhibit A or as otherwise approved by KU and the City.
  - (e) HERE shall not, without KU's prior written consent, make any alteration to the KU Property or use the KU Property for any purpose other than to complete the Project.
  - (f) HERE shall be solely responsible for any injury and liability resulting from any activity related to the Project permitted by this Agreement.
  - (g) HERE shall provide no less than twenty-four (24) hours' notice to KU, prior to the disruption of utility services for the purposes of reconnection of any utility services to the Property.
  - (h) HERE shall upon completion of the Project provide KU with as-built elevations and specifications for KU's records.
  - (i) HERE will at all times maintain access to the surface parking lot adjacent to the stadium and the access drive as shown on Exhibit B.
  - (j) HERE will use fencing, barricades, signs, and other means as appropriate to maintain the safety of pedestrian, mobility device user, bicycle, and vehicular traffic during the Project.
  - (k) HERE at all times shall enforce strict discipline and good order among the HERE employees, agents, contractors, and other persons carrying out work on the Project. In addition, if HERE receives notice from KU complaining about any contractor, subcontractor, or employee or anyone who is a hindrance to proper or timely execution of the Project or who engages in sexually harassing or otherwise discriminatory behavior or other misconduct (as determined solely by KU), HERE shall remedy such complaint without delay to the Project. This provision shall be included in all contracts and subcontracts for the Project. HERE shall not employ or permit the employment of any registered sex offender to carry out any of the work performed on KU Property.
  - (l) HERE shall confine operations at the site to construction limits acceptable to KU and permitted by applicable laws, statutes, ordinances, codes, rules and regulations, and shall not unreasonably encumber the site with materials or

equipment. HERE shall keep areas outside the construction limits free from all construction debris, building materials and equipment likely to cause hazardous conditions. HERE acknowledges that the Project is to be built on an active university campus and agrees to restrict access by students, faculty, and others to the area within the construction limits and minimize construction traffic and other interference with activities outside the construction limits. HERE shall not permit any workers to use any existing facilities at the site, including, without limitation, lavatories, toilets, entrances, and parking areas other than those designated by KU.

(m) Work on the Project shall only take place between the hours of 7:00 a.m. and 7:00 p.m. Monday thru Friday, and between the hours of 9:00 a.m. and 6:00 p.m. on Saturday and Sunday unless otherwise approved, in writing, by KU. Such approval may only be granted by KU's Director or Deputy Director of the Office of Design and Construction Management.

(n) HERE and its contractor and subcontractors will cooperate with KU in construction and installation work being performed by KU or its contractors on the KU Property so that all work may be efficiently performed. KU's work will include the installation of pedestrian lighting and wayfinding signs along the new alignment of Fambrough Drive between Mississippi and Illinois.

## **7. Expiration of Right of Access.**

(a) HERE's right to access KU Property shall commence on the Start Date at 9:00 a.m. It shall expire on the Completion Date at 5:00 p.m. Central Daylight Savings Time or upon completion of the Project, whichever shall first occur (the "Expiration Date"). KU, however, shall have the right to immediately terminate the access provided by this Agreement at KU's sole and absolute discretion in the event of any breach of this Agreement by HERE. Upon the termination of this Agreement by KU, KU shall have the right to order HERE to immediately cease all activities on the KU Property.

(b) Liquidated Damages. The University and the City will suffer financial loss that will be difficult if not impossible to ascertain if the Project is not complete on or before the Completion Date. HERE shall be liable for and shall pay to both the University and the City the sum of \$ 1,500 per day as liquidated damages (and not as penalty) for each calendar day after the Completion Date until the Project is complete.

**8. Representations and Warranties.**

- (a) KU makes no representations or warranties of any kind with respect to the KU Property, including without limitation as to the condition of the KU Property or the fitness of the KU Property for the permitted use. HERE agrees that it shall have access to the KU Property as set forth here "as is" with all faults.
- (b) HERE hereby guarantees that the Project will be completed in a first class workmanlike manner and guarantees each portion of the Project against defects in workmanship for a period of one (1) year from the date of substantial completion of the work. Unless otherwise specified and irrespective of time limitations stated in any manufacturer's warranty or guarantee, all contractor and subcontractor and supplier warranties and guarantees shall begin with the date of substantial completion of the entire Project. All guarantees or warranties of equipment or materials furnished to HERE or its Contractor or any Subcontractor by any manufacturer or supplier shall be deemed to run for the benefit of KU and the City, and in the event the City or KU seek enforcement thereof, HERE irrevocably and absolutely assigns to them, individually and collectively, all its rights and remedies under all such guarantees and warranties.

**9. Indemnification.** HERE agrees to use reasonable care to avoid causing damage to the property and facilities of KU and to be responsible for and to reimburse KU for all damages caused to KU's property and facilities by HERE's agents, officers, employees, contractors, and subcontractors. With respect to all activities permitted under this Agreement, HERE shall at all times conform to the terms, conditions, and provisions of this Agreement. HERE shall indemnify KU, as follows:

- (a) HERE shall indemnify, defend, and hold KU harmless from all liabilities, obligations, damages, penalties, claims, costs, charges, and expenses (including reasonable attorney's fees), of whatsoever kind and nature (collectively, "Claims") for injury, including personal injury or death of any person or persons, and for loss or damage to any property caused by HERE (including its employees, agents, contractors and subcontractors), directly or indirectly, occurring in connection with, or in any way arising out of the use or occupancy of the Property by HERE (including its employees, agents, contractors and subcontractors) or completion of the Project permitted by this Agreement.

(b) HERE shall indemnify, defend, and hold KU harmless from any claims by HERE's employees, agents, contractors, and subcontractors (collectively, agents) that perform any activity within the Property for which claims are directly related to the Project. This Agreement shall not be construed as granting to HERE or any agent of HERE the right to place any lien, mechanic's lien, or any charge on the Property.

(c) If any action or proceeding as described in this Paragraph 9 is brought against KU, upon written notice from KU to HERE, HERE shall, at its sole expense, resist or defend such action or proceeding by counsel approved by KU in writing, such approval not to be unreasonably withheld, but no approval of counsel shall be required where the cause of action is resisted or defended by counsel of any insurance carrier obligated to resist or defend the same.

**10. Insurance.** HERE shall obtain and keep in force and shall require its contractors and subcontractors on the Project to obtain and keep in force through the entirety of the Project, the following insurance coverages and policies:

Automobile Liability

\$1,000,000 combined single limit per occurrence for bodily injury and property damage.

General Liability

\$1,000,000 combined single per occurrence for bodily injury, personal injury and property damage. Policy will include:

- Premises and Operations
- Broad Form Contractual Liability (conceptual must be a typo)
- Personal Injury with employee exclusion deleted
- Products/Completed Operations
- Broad Form Property Damage
- Independent Contractors

Umbrella Liability

\$5,000,000 combined single limit for bodily injury, personal injury, employer's liability and property damage

Workers' Compensation                      Statutory (includes all states endorsement)

Employer's Liability                              \$500,000 each occurrence

The foregoing policies and coverages shall be maintained with an insurance company acceptable to KU and City. These coverages shall be endorsed to include KU and the City as additional insureds. Upon the execution of this Agreement, HERE shall furnish KU with Certificates of Insurance evidencing compliance with all requirements. Certificates shall further provide for thirty (30) days' advance written notice to the other party of any modification, change or cancellation of any of the above insurance coverages.

11. **Compliance with Applicable Laws.** HERE shall comply in all material respects with all applicable federal and state laws and existing regulations promulgated thereunder in its use and activities permitted pursuant to the Agreement.
12. **No Limitation of Remedies.** The various rights and remedies contained in this Agreement and reserved to the parties, except as otherwise provided in this Agreement, shall not be considered as exclusive of any other right or remedy, but shall be construed as cumulative and shall be in addition to every other remedy now or hereafter existing at law, in equity or by statute. No delay or omission of the right to exercise any power or remedy shall impair any such right, power or remedy or be construed as a waiver of any default or non-performance or as acquiescence therein.

### **C. Terms Relevant to Right of Ways**

13. **Right of Way.** Upon completion of the Project or before, KU agrees to dedicate to the City via an appropriate instrument the Right of Way in the realigned Fambrough Drive. Such dedication shall be subject to the review and approval of the Kansas Attorney General.
14. **Vacation.** Upon completion of the Project, the City agrees that the right of way in the abandoned portion of Fambrough drive shall be vacated and full fee ownership of the land shall revert to the owners of the property abutting thereto.

### **D. General Terms**

15. **Authorization.** Each of the persons executing this Agreement, on behalf of their respective parties, represent and warrant that they have the authority to bind the party on behalf of whom they have executed this Agreement, and that all acts requisite to the authorization to enter into and to execute this Agreement have been taken and completed.
16. **Notice.** Notice under this Agreement, including without limitation, denials, revocation, or alteration of site specific approvals, notice to remove equipment,



and any other notice that may be required by this Agreement shall be provided in writing to the parties at the following addresses:

Notice to the City:

City of Lawrence, Kansas  
City Manager's Office  
6 East 6th Street  
P.O. Box 768  
Lawrence, Kansas 66044

Notice to KU:

University of Kansas  
Office of the General Counsel  
1450 Jayhawk Boulevard, Room 245  
Lawrence, Kansas 66045

Notice to HERE:

HERE Lawrence Property Owner, LLC  
130 E. Randolph Street, Suite 2100  
Chicago, Illinois  
Attn: John Kitson,  
VP of Construction Management

17. **Binding Effect.** This Agreement shall, at all times, be binding upon the City, KU, and HERE, and all parties claiming by, through, or under them, and shall run with the land, and shall be for the benefit of and shall oblige all future owners of the KU Property and HERE Property; provided, however, that the rights, duties, and obligations of each owner, as set forth herein, shall cease with the termination of his, her, or its ownership of their respective property, or portion thereof, except for those duties and obligations arising during the period of his, her, or its ownership. HERE may assign any rights or obligations under this Agreement to any third-party with KU's and the City's prior written consent.
18. **Severability.** If any section, sentence, clause, or phrase of this Agreement is found to be invalid by any court of competent jurisdiction, it shall not affect the validity of any remaining provision of this Agreement.
19. **Governing Law.** This Agreement shall be construed and enforced in accordance with and shall be governed by the laws of the State of Kansas.
20. **Adoption of Recitals.** The above-stated recitals are incorporated herein by reference, are hereby made a part of this Agreement, and shall be as effective as if repeated verbatim.

21. **Entire Agreement**. This Agreement constitutes the entire agreement between the parties with respect to the Project, and it expressly supersedes all previous written, email, and oral communication between the parties. No amendment, alteration, or modification of this Agreement shall be valid unless executed in writing by all the parties.

*[SIGNATURES APPEAR ON THE FOLLOWING PAGES]*

**IN WITNESS WHEREOF**, the City, KU, and HERE have executed this Agreement with the full intent to bind themselves and their successors and assigns.

**CITY: CITY OF LAWRENCE,  
KANSAS, a municipal corporation**

\_\_\_\_\_  
THOMAS M. MARKUS  
City Manager

**ACKNOWLEDGMENT**

THE STATE OF KANSAS            )  
  )  
THE COUNTY OF DOUGLAS        )        ss:

**BE IT REMEMBERED**, that on this \_\_\_\_ day of \_\_\_\_\_, 2017, before me the undersigned, a notary public in and for the County and State aforesaid, came Tom Markus, as City Manager of the City of Lawrence, Kansas, who is personally known to me to be the same person who executed this instrument in writing, and said person fully acknowledged this instrument to be the act and deed of the aforementioned entity.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

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

My Appointment Expires:

**KU: THE UNIVERSITY OF KANSAS,  
a State-supported institution of  
higher education, by:**

\_\_\_\_\_  
DOUGLAS A. GIROD  
Chancellor

**ACKNOWLEDGMENT**

THE STATE OF KANSAS            )  
  )     ss:  
THE COUNTY OF DOUGLAS        )

**BE IT REMEMBERED**, that on this \_\_\_\_ day of \_\_\_\_\_, 2017, before me the undersigned, a notary public in and for the County and State aforesaid, came Douglas A. Girod, Chancellor of the University of Kansas, who is personally known to me to be the same person who executed this instrument in writing, and said person fully acknowledged this instrument to be the act and deed of the aforementioned entity.

**IN WITNESS WHEREOF**, I have hereunto set my hand and affixed my notarial seal, the day and year last written above.

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

My Appointment Expires:

