

CITY OF STOUGHTON, 381 E. Main Street, Stoughton, WI 53589

RESOLUTION OF THE COMMOM COUNCIL

To approve the Three-Party Agreement relating to the Kettle Park West Development.

File Number: R-102-2015

Date Introduced: July 14, 2015

The City Council of the City of Stoughton, Dane County, Wisconsin, resolves as follows:

RECITALS

WHEREAS, the Kettle Park West LLC (the "Developer") proposes to purchase certain real property described (the "Property"), and intends to undertake commercial development on the Property in accordance with the Planned Development District zoning of the Kettle Park West Commercial Property approved by the City in Ordinance No. 0-23-2013, as the same may be amended;

WHEREAS, the Developer has contracted to sell to Walmart part of the Property (the "Walmart Parcel"), and Walmart intends to develop and operate an approximately 154,000 square foot retail department and grocery store and related improvements on the Walmart Parcel;

WHEREAS, the City and Developer entered into that certain Second Amended and Restated Agreement to Undertake Development dated as of June 9, 2015, as clarified by the Memorandum of Understanding between the City and Developer dated as of June 9, 2015 (collectively the "Second Amended Agreement").

WHEREAS, the City, Developer and Walmart wish to provide for certain duties, responsibilities and rights of the Developer, the City and Walmart relating to the development the Property and the Walmart Parcel as described in the Three Party Agreement attached hereto.

RESOLUTION

The Three Party Agreement attached as Exhibit A to this Resolution, is approved, and the Mayor and City Clerk are hereby authorized to execute the Agreement on the City's behalf.

The foregoing Resolution was adopted by the Common Council of the City of Stoughton at a meeting held on July 14, 2015.

APPROVED:

Donna Olson, Mayor

ATTEST:

Lana Kropf, City Clerk

Posted _____

Published _____

Exhibit A
Three Party Agreement

THREE-PARTY AGREEMENT

THIS THREE-PARTY AGREEMENT is made and entered into as of the ____ day of _____, 2015, by and among Kettle Park West, LLC, a Wisconsin limited liability company (the "Developer"), the City of Stoughton, a Wisconsin municipal corporation (the "City"), and Wal-Mart Real Estate Business Trust, a Delaware statutory trust ("Walmart").

RECITALS:

WHEREAS, the Developer proposes to purchase the real property described on Exhibit A attached hereto (the "Property"), and intends to undertake commercial development on the Property in accordance with the Planned Development District zoning of the Kettle Park West Commercial Property approved by the City in Ordinance No. 0-23-2013, as the same may be amended;

WHEREAS, the Developer has contracted to sell to Walmart that portion of the Property legally described on Exhibit B attached hereto (the "Walmart Parcel"), and Walmart intends to develop and operate an approximately 154,000 square foot retail department and grocery store and related improvements on the Walmart Parcel;

WHEREAS, the City and Developer entered into an Agreement to Undertake Development dated as of January 28, 2014 (the "Development Agreement"), which was amended pursuant to that certain Amendment to Agreement to Undertake Development dated as of November 13, 2014 (the "First Amended Agreement"), and which was further amended by that certain Second Amended and Restated Agreement to Undertake Development dated as of June ____, 2015, as clarified by the Memorandum of Understanding between the City and Developer dated as of June 9, 2015 (collectively the "Second Amended Agreement"). A copy of the Second Amended Agreement is attached hereto as Exhibit C. Capitalized terms not otherwise defined herein shall have the meanings set forth in the Second Amended Agreement;

WHEREAS, this Three-Party Agreement provides for certain duties, responsibilities and rights of the Developer, the City and Walmart relating to the development the Property and the Walmart Parcel as described herein; and

WHEREAS, the City has determined that the development of the Property pursuant to the Development Agreement and this Three-Party Agreement and the fulfillment generally of such agreements by the parties thereto will promote the orderly development of the Property in accordance with the master land use plan for growth and development adopted by the City and are in accord with the public purposes and conditions of the applicable state and local laws and requirements.

AGREEMENT

NOW, THEREFORE, in consideration of the Recitals, the covenants and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

SECTION I. UNDERTAKINGS OF THE DEVELOPER

A. Performance of Obligations Under Development Agreement. Developer, at its cost and expense, shall perform all undertakings and obligations of Developer under the Second Amended Agreement.

B. Developer Work. By way of explanation and not limitation, Developer acknowledges and reiterates that, under Section B of the Second Amended Agreement, Developer is obligated, at its sole cost and expense, to construct the Public Improvements described in the Second Amended Agreement.

C. Letter of Credit. By way of explanation and not limitation or expansion, Developer further acknowledges that Developer is obligated, at its sole cost and expense, (i) to deliver to the City and keep in full force and effect, an irrevocable Letter of Credit pursuant to Section B(1)(m) of the Second Amended Agreement (the "Letter of Credit"), (ii) to secure Developer's construction of the Public Improvements and Developer's guarantee of the Public Improvements, and (iii) to complete work under an Agreement for Disposition of Available Borrow Material attached hereto as Exhibit D (the "Borrow Agreement"). The Letter of Credit shall be held by the City at the notice address for the City set forth in Section VIII(F) below, provided that any proceeds drawn from the Letter of Credit shall be used solely to fund the Public Improvements and for completing work under the Borrow Agreement, as and only to the extent required under the Second Amended Agreement.

SECTION II. CITY PERFORMANCE IN THE EVENT OF A DEVELOPER DEFAULT

In the event that Developer fails to timely complete the Public Improvements or any part thereof (or if Walmart and the City reasonably believe that any Public Improvements could, but will not, be timely completed) pursuant to the terms of the Second Amended Agreement, the City shall be obligated to pursue prompt completion of the Public Improvements using all resources available under the Second Amended Agreement, including, without limitation, (i) enforcement of the construction contract(s) to be awarded under Section B.1.(c) thereunder and the statutory bid bonds, performance bonds and payment bonds required in connection with such contract(s); (ii) the Letter of Credit; and (iii) the proceeds from the City Borrowing. In no event shall the City be required to spend funds in excess of those contemplated in the Second Amended Agreement, including but not limited to, those funds available under the Letter of Credit and proceeds from the City Borrowing.

SECTION III. WALMART'S AGREEMENT TO DEVELOP THE WALMART PARCEL

Subject to the other parties' performance of their respective obligations under the Second Amended Agreement and this Three-Party Agreement, Walmart covenants to the City that it shall (a) complete construction of an approximately 154,000 square foot department store and real estate improvements on the Walmart Parcel, conforming to a General Development Plan and Specific Implementation Plan approved by the City and open the store for business for at least

one (1) day by not later than December 31, 2017, and (b) develop the Walmart Parcel such that the assessed value of the Walmart Parcel for property tax purposes is not less than \$12,000,000.00 as of January 1, 2018.

If the City has performed its obligations under the Second Amended Agreement and this Three-Party Agreement, in any year commencing in 2018 and continuing through the year in which the City Borrowing is retired, Walmart shall pay the City the difference (the "Difference") between (a) the amount of property taxes on the Walmart Parcel actually received by the City for the year and (b) the amount of property taxes on the Walmart Parcel that the City would have received for the year if the Walmart Parcel had been assessed at \$12,000,000.00 under the following paragraph. The City may send Walmart an invoice for the Difference; one-half of which shall be due on January 31 of the year of the notice and one-half of which shall be due on July 31 of the year of the notice. Each payment shall be deemed made when actually received by the City. Any payment made by check shall not be deemed made until the check has cleared all banks. Any amount due that is not paid on time shall bear interest in the same manner and at the same rate as provided by law for unpaid property taxes.

Commencing on January 1, 2018, and continuing through the year in which the City Borrowing is retired, if it becomes necessary to calculate the amount of the Difference because the assessed value of the Walmart Parcel is less than \$12,000,000.00, the Difference shall be calculated as follows: (a) \$12,000,000.00 shall be multiplied by the mil rate at which taxable property in the City is taxed to levy taxes for all taxing jurisdictions to which the Walmart Parcel is subject for the year, and (b) the amount determined in (a) shall be reduced by the amount of property taxes on the Walmart Parcel actually received by the City for the year.

Walmart's liability to pay any Difference shall be the City's sole and exclusive remedy against Walmart under this Section. Developer shall have no rights and/or remedies against Walmart in connection with any failure of Walmart to perform under this Section. Notwithstanding anything herein to the contrary, it is expressly agreed that nothing containing in this Three-Party Agreement shall be construed to contain a covenant, either express or implied, to obligate Walmart to continuously operate a business on the Walmart Parcel. The parties waive and release Walmart from any legal action for damages or for equitable relief which might be available because of cessation of business activity by Walmart.

Notwithstanding anything herein to the contrary, in no event shall Walmart be liable to pay any Difference under this Section if Walmart is unwilling and/or unable to complete construction of an approximately 154,000-square-foot department store and real estate improvements or open for business on the Walmart Parcel due to the City's failure to complete construction of the Public Improvements. Similarly, Walmart's sole and exclusive remedy for the City's failure to timely complete construction of the Public Improvements shall be day for day delays in incurrence of Walmart's obligations under this section, including but not limited to, day for day delays in Walmart's liability to pay any Difference. Walmart may only seek equitable relief (not monetary relief) from the City for the City's failure to timely complete construction of the Public Improvements.

SECTION IV. INDEMNIFICATIONS

Developer will indemnify, defend and hold the City harmless, its governing body members, Walmart and its and their respective officers, agents, including its independent contractors, consultants and legal counsel, servants and employees (hereinafter, for purposes of this paragraph collectively referred to as the "Indemnified Parties") against any loss or damage to property or any injury to or death of any person occurring at or about the Property or resulting from any breach of any warranty, covenant or agreement of Developer under the Second Amended Agreement or this Three-Party Agreement; provided that the foregoing indemnification shall not be effective for any willful acts of the Indemnified Parties. Except for any willful misrepresentation or any willful misconduct of the Indemnified Parties, Developer will indemnify, protect and defend the Indemnified Parties from any claim, demand, suit, action or other proceeding whatsoever by any person or entity whatsoever arising or purportedly arising from a default by Developer under the Second Amended Agreement or this Three-Party Agreement. All covenants, stipulations, promises, agreements and obligations of the City contained herein shall be deemed to be covenants, stipulations, promises, agreements and obligations of the City and not of any governing body, member, officer, agent, servant or employee or the City. All covenants, stipulations, promises, agreements and obligations of Developer contained herein shall be deemed to be covenants, stipulations, promises, agreements and obligations of Developer and not of any of its officers, owners, agents, servants or employees. All covenants, stipulations, promises, agreements and obligations of Walmart contained herein shall be deemed to be covenants, stipulations, promises, agreements and obligations of Walmart and not of any of its officers, owners, agents, servants or employees.

SECTION V. DEFAULT/REMEDIES

A. Events of Default. An event of default ("Event of Default") shall be any of the following:

1. A failure by Developer to cause timely completion of the Public Improvements or any part thereof to occur pursuant to the terms, conditions and limitations of the Second Amended Agreement or this Three-Party Agreement; a failure of any party to perform or observe any and all covenants, conditions, obligations or agreements on its part to be observed or performed when and as required under such agreements within thirty (30) days of written notice of said failure to the defaulting party specifying in detail the scope of the defect;
2. Any party becomes insolvent or is the subject of bankruptcy, receivership or insolvency proceedings of any kind not dismissed within sixty (60) days from commencement; or
3. The dissolution or liquidation of any party, or the commencement of any proceedings therefore not dismissed within sixty (60) days from commencement.

B. Remedies on Default. Whenever an Event of Default occurs and is continuing, in addition to exercising its rights under this Three-Party Agreement but subject to any express

limitations herein (including but not limited to Section III above), any non-breaching party may take any one or more of the following actions without waiving any rights or remedies available to it and except that Developer shall have no rights and/or remedies against Walmart for any failure of Walmart to perform under Section III of this Agreement:

1. Commence legal or administrative action, in law or in equity, which may appear necessary or desirable to enforce performance and observance of any obligation, agreement or covenant of the breaching party under this Three-Party Agreement.

2. Perform or have performed all necessary work in the event the non-breaching party determines that any Event of Default may pose an imminent threat to the public health or safety, without any requirement of any notice whatsoever.

3. Perform or have performed work to complete the Public Improvements if the Public Improvements are not reasonably progressing after 30 days prior written notice and 60 days to cure.

C. No Remedy Exclusive. Except as expressly set forth herein to the contrary, no remedy or right conferred upon or reserved to a party in this Three-Party Agreement is intended to be exclusive of any other right or remedy, but each and every such right and remedy shall be cumulative and shall be in addition to every other right and remedy given under this Three-Party Agreement now or hereafter existing at law or in equity. No delay or omission to exercise any right or power accruing upon any default shall impair any such right or power or shall be construed to be a waiver thereof, but any such right and power may be exercised from time to time and as often as may be deemed expedient.

D. No Implied Waiver. In the event any warranty, covenant or agreement contained in this Three-Party Agreement should be breached by a party and thereafter waived by another party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other concurrent, previous or subsequent breach hereunder.

E. Agreement to Pay Attorneys' Fees and Expenses. Whenever any Event of Default occurs and a non-breaching party incurs attorney's fees, court costs and other such expenses for the collection of payments due or to become due or for the enforcement or performance or observance of any obligation or agreement on the part of the breaching party herein contained, the breaching party shall reimburse the non-breaching party the actual, reasonable attorney's fees, court costs and other such expenses incurred by such breaching party.

F. Force Majeure. The occurrence of any Event of Default shall be delayed by one day for each day that the performing party's performance is delayed by force majeure. "Force Majeure" means any fire or other extreme casualty, governmental restriction, inability to obtain fuel, strike or lockout (whether legal or illegal), failure of power, explosion, abnormal weather conditions, act of God or other event, occurrence or circumstance beyond the performing party's reasonable control.

SECTION VI. BINDING

This Three-Party Agreement shall be binding upon the parties hereto and their respective representatives, successors and assigns.

SECTION VII. AMENDMENTS

This Three-Party Agreement may only be modified or amended by written agreement duly authorized and signed by the City, Developer, and Walmart.

SECTION VIII. ADDITIONAL PROVISIONS

A. Conflicts of Interest. No member of any governing body or other official of the City ("City Official") shall have any financial interest, direct or indirect, in this Three-Party Agreement, the Property or the Walmart Parcel, or any contract, agreement or other transaction contemplated to occur or be undertaken thereunder or with respect thereto, unless such interest is disclosed to the City and the City Official fully complies with all conflict of interest requirements of the City. No City Official shall participate in any decision relating to this Three-Party Agreement which affects his or her personal interest or the interests of any corporation, partnership or association in which he or she is directly or indirectly interested. No member, official, agent or employee of the City shall be personally liable to any party for any event of default or breach by Developer of any obligations under the terms of this Three-Party Agreement.

B. Incorporation by Reference. All exhibits and other documents attached hereto or referred to herein are hereby incorporated in and shall become a part of this Three-Party Agreement.

C. No Implied Approvals. Nothing herein shall be construed or interpreted in any way to waive any obligation or requirement of the Developer or Walmart to obtain all necessary approvals, licenses and permits required by law from the City in accordance with its usual practices and procedures, nor limit or affect in any way the right and authority of the City to approve or disapprove any and all plans and specifications, or any part thereof, or to impose any limitations, restrictions and requirements on the development, construction and/or use of the Property as a condition of any such approval, license or permit; including, without limitation, requiring any and all other development and similar agreements.

D. Time of the Essence. Time is deemed to be of the essence with regard to all dates and time periods set forth herein or incorporated herein.

E. Headings. Descriptive headings are for convenience only and shall not control or affect the meaning or construction of any provision of this Three-Party Agreement.

F. Notices. All notices given pursuant to this Agreement shall be in writing and shall be given by personal service, by United States mail or by United States express mail or other established express delivery service (such as FedEx), postage or delivery charge prepaid, addressed to the appropriate party at the address set forth below:

To the City:	Laurie Sullivan, Finance Director City of Stoughton 381 East Main Street Stoughton, Wisconsin 53589
With a copy to:	Matthew P. Dregne Stafford Rosenbaum LLP 222 W. Washington Avenue, Suite 900 Madison, Wisconsin 53701-1784
To Developer:	Kettle Park West, LLC 161 Horizon Drive, Suite 101A Verona, Wisconsin 53593 Attention: Dave Jenkins and Dennis Steinkarus
With a copy to:	Michael Best & Friedrich LLP 1 S. Pinckney Street, Suite 700 Madison, Wisconsin 53703 Attention: Dan O'Callaghan
To Walmart:	Wal-Mart Real Estate Business Trust (Store No. #1176-06) 2001 S.E. 10 th Street Bentonville, AR 72716 Attention: Real Estate Legal Department - Wisconsin
With a copy to:	Reinhart Boerner Van Deuren s.c. 1000 North Water Street, Suite 1700 Milwaukee, WI 53202 Attention: Deborah C. Tomczyk

Notices shall be effective upon receipt or refusal.

G. Entire Agreement. This document and all other documents and agreements expressly referred to herein contain the entire agreement among the Developer, the City, and Walmart with respect to the matters set forth herein.

H. Governing Law. This Three-Party Agreement shall be construed in accordance with the internal laws of the State of Wisconsin.

I. Further Assurances. The Developer will at any time, and from time to time at the written request of the City or Walmart, sign and deliver such other documents and

instruments requested by the City or Walmart as may be reasonably necessary or appropriate to give full effect to the terms and conditions of this Three-Party Agreement.

J. Counterparts. This Three-Party Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original.

K. Recording. A memorandum of this Three-Party Agreement may be recorded in the office of the Dane County Register of Deeds.

L. Exhibit List. The Exhibits referred to herein, consist of the following:

Exhibit A – Legal Description of the Property

Exhibit B – Legal Description of the Walmart Parcel

Exhibit C – Second Amended Agreement

Exhibit D – Agreement for Disposition of Available Borrow Materials

[End of text; Signatures appear on following pages]

**SIGNATURE PAGE TO THREE-PARTY AGREEMENT
STOUGHTON, WI (#1176-06)**

THIS THREE-PARTY AGREEMENT shall be binding upon the parties hereto, their administrators, heirs, successors or assigns and can be changed only by written agreement signed by all parties.

IN WITNESS WHEREOF, we have hereunto set our hands and seals on the date and year first above written.

WITNESS:

KETTLE PARK WEST, LLC, a Wisconsin limited liability company

By: _____

Print Name: _____

Its: _____

Date of Execution: _____

STATE OF WISCONSIN)
) ss.
COUNTY OF _____)

Personally came before me this ____ day of _____, 2015 the above-named _____ to me known to be the _____ of the Kettle Park West, LLC, a Wisconsin limited liability company, who executed the foregoing instrument and acknowledged the same.

Notary Public

County, Wisconsin
My Commission Expires: _____
Acting in _____ County, Wisconsin

[Signatures continue on next page]

**SIGNATURE PAGE TO THREE-PARTY AGREEMENT
STOUGHTON, WI (#1176-06)**

IN WITNESS WHEREOF, we have hereunto set our hands and seals on the date and year first above written.

WITNESS:

**WAL-MART REAL ESTATE BUSINESS
TRUST**, a Delaware statutory trust

By: _____

Print Name: L.B. Johnson

Its: Vice President - Real Estate

Date of Execution: _____

STATE OF ARKANSAS)
)
COUNTY OF BENTON) ss.

Personally came before me this ____ day of _____, 2015 the above-named L.B. Johnson, Vice President - Real Estate, for Wal-Mart Real Estate Business Trust, a Delaware statutory trust, on behalf of the trust.

Notary Public
Benton County, Arkansas
My Commission Expires: _____
Acting in Benton County, Arkansas

[Signatures continue on next page]

**SIGNATURE PAGE TO THREE-PARTY AGREEMENT
STOUGHTON, WI (#1176-06)**

IN WITNESS WHEREOF, we have hereunto set our hands and seals on the date and year first above written.

CITY OF STOUGHTON,
a Wisconsin municipal corporation

By: _____

Donna Olson, Mayor

Date of Execution: _____

ATTEST:

Lana C. Kropf, City Clerk

Countersigned:

Laurie Sullivan, Finance Director

STATE OF WISCONSIN)
)
COUNTY OF DANE) ss.

Personally came before me this ____ day of _____, 2015 the above-named Donna Olson, Lana C. Kropf and Laurie Sullivan to me known to be the Mayor, City Clerk and Finance Director, respectively, of the City of Stoughton, Wisconsin, who executed the foregoing instrument and acknowledged the same.

Notary Public
Dane County, Wisconsin
My Commission Expires: _____
Acting in Dane County, Wisconsin

Approved as to Form:

Matthew P. Dregne, City Attorney

Exhibit A

Description of the Property

Exhibit B

Description of Walmart Parcel

Exhibit C

Second Amended Agreement

Exhibit D

Agreement for Disposition of Available Borrow Materials