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**OPTION TO PURCHASE REAL ESTATE AGREEMENT**

**BETWEEN**

**CITY OF WICHITA, KANSAS**

**AND**

**DSW BROADVIEW, LLC**

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## **OPTION TO PURCHASE REAL ESTATE AGREEMENT**

THIS OPTION TO PURCHASE REAL ESTATE AGREEMENT ("Option Agreement") is made and entered into this 7th day of October, 2008 (the "Effective Date"), by the CITY OF WICHITA, KANSAS, a corporate body politic and political subdivision of the State of Kansas (the "City" or "Seller"), and DSW Broadview, LLC, a Missouri limited liability company ("DSW" or "Buyer").

### **Option to Purchase**

1. In consideration of the sum of \$100.00 paid to Seller (the "Option Payment"), and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Seller hereby grants to Buyer the exclusive right to purchase (the "Option"), upon the terms and conditions hereinafter set forth, the approximately 1.13 acre tract of land located at 132 N. Waco, in the City of Wichita, County of Sedgwick, Kansas, more particularly described on Exhibit A, attached hereto and incorporated herein by this reference, together with all and singular, any interest of Seller in any strips or gores adjoining the land, in any easements benefiting the land, and in any easements, rights of way, highway or street, open or proposed, located on, in front of, abutting or adjoining the land, together with all improvements, buildings, fixtures and equipment thereon (the "Property"). Buyer shall have the right to assign the Option with Seller's prior written consent, in Seller's absolute discretion; provided, however, that Seller's consent shall not be required if the Option is assigned to an affiliate of DSW. In the event the Option is properly exercised and closing occurs, the Option Payment shall be applied against the Purchase Price (as hereinafter defined). In the event the Option is not exercised or closing does not occur through no fault of Seller, the Option Payment shall be retained by Seller.

2. The purchase price of the Property is Eight Hundred Thousand Dollars and 00/100 (\$800,000.00) (the "Purchase Price"), the total sum due to be paid to Seller in cash upon delivery of the Special Warranty Deed (as hereinafter defined) conveying the Property to Buyer or to its assignee, and subject to all closing prorations pursuant to this Option Agreement.

3. Buyer may exercise the Option at any time beginning on the earlier of (i) the fifth anniversary of the Effective Date of this Option Agreement or (ii) the first calendar date of the first calendar year in which the City received notice of adverse decision concerning assessment of property tax on the Property, and expiring on the expiration date of the Parking Garage Management Contract, concurrently executed by the parties with this Option Agreement ("Garage Contract") (such time period being referred to herein as the "Term").

### **Right of First Offer**

4. If, at any time during the Term of this Option Agreement, all or any portion of the Property (the "ROFO Property") is or will become available for purchase by third parties, and in the event the City desires to sell the ROFO Property to third parties, City shall, prior to offering to sell the ROFO Property to any third party, notify DSW of the terms and conditions upon which the ROFO Property will be sold (the "ROFO Notice"). DSW shall have a one-time right of first offer to purchase the ROFO Property ("Right of First Offer") on the same terms and conditions upon which the City desires to sell the ROFO Property, except that DSW shall pay the Purchase Price for the ROFO Property.

5. In order to exercise the Right of First Offer, DSW shall give written notice to the City, within fifteen (15) days after receipt of the ROFO Notice, that it elects to exercise its Right of First Offer. If DSW duly exercises the Right of First Offer, DSW shall be obligated to purchase the Property on the same terms and conditions as stated in the ROFO Notice, except that DSW shall pay the Purchase Price for the Property. If the Right of First Offer is not so exercised, DSW will be deemed to have waived its right to exercise its Right of First Offer and the City shall be permitted to sell the Property to any third party on the same terms and conditions as stated in the ROFO Notice. In the event any material changes shall be made to the terms and conditions contained in the ROFO Notice, the City must first resubmit a revised offer to DSW prior to the revised Right of First Offer being exercised by a third party. In the event the sale of the ROFO Property fails to close with such third party, then DSW's Right of First Offer shall be reinstated. Upon consummation of the sale of the ROFO Property to a third party, both the Right of First Offer and the Garage Contract shall automatically terminate.

#### Memorandum of Rights

6. The City and DSW will cooperate to memorialize this Option Agreement in an instrument to be filed in the real estate records of Sedgwick County, Kansas.

#### Proceeds of Sale

7. If DSW acquires the Property by exercise of either the Option to Purchase or the Right of First Offer, DSW will not use revenue bonds issued pursuant to K.S.A. 12-1740 *et seq.*, to purchase the Property.

#### Title Commitment and Survey

8. Upon Buyer's exercise of the Option or Right of First Offer, Buyer shall order, at Buyer's expense, a current title commitment for an ALTA Extended Coverage Owner's Title Insurance Policy issued through a title company (the "Title Company") setting forth the state of title of the Property and all exceptions, including easements, restrictions, rights-of-way, covenants, reservations and other conditions, if any, affecting the Property, together with true, correct and legible copies of all instruments listed as exceptions therein. In the event any exceptions appear in such title commitment that are unacceptable to Buyer, Buyer shall, within twenty (20) days after receipt of such commitment, notify Seller in writing of such objection(s) (the "Title Objections"). Seller shall undertake to eliminate or modify such unacceptable exceptions to the reasonable satisfaction of Buyer within fifteen (15) days of receiving the Title Objections. In the event Seller is unable or unwilling to do so, Buyer may terminate the exercise of the Option or Right of First Offer by delivering written notice to Seller prior to Closing (as hereinafter defined), or may accept such title as Seller can deliver. In the event Seller is unable to convey title to the Property in accordance with Paragraph 17(a) below and Buyer elects to terminate the exercise of the Option, the Option Payment shall be returned to Buyer and thereafter Seller and Buyer shall have no further obligations or liabilities to one another as to the Property. In the event Buyer does not give notice to Seller of Buyer's Title Objections within the time provided herein, all title exceptions shall be deemed to have been satisfied or waived by Buyer.

9. Upon exercise of the Option or the Right of First Offer, Buyer shall obtain a current boundary line survey of the Property certified to ALTA requirements, to be prepared at

Buyer's cost and expense by a duly licensed Kansas land surveyor (the "Survey"). The Survey shall show the location of all improvements, set-back lines, utility lines, highways, streets, roads (proposed or otherwise), easements, rights-of-way on or adjacent to the Property, railroads, rivers, creeks or other waterways, fences, and shall set forth the total acreage. The Survey shall also contain the surveyor's certification that (i) there are no encroachments or protrusions on the Property, (ii) the Property has access to and from an adjacent public road, (iii) none of the Property is situated within the 100 year Flood Plain as shown on the current Federal Emergency Management Agency map, and (iv) the Survey is true and correct. In the event the metes and bounds description of the Property as reflected in the Survey differs from the description provided on Exhibit A attached hereto, the Special Warranty Deed to be delivered by Seller to Buyer shall follow the metes and bounds description of the Property reflected in the Survey. The Survey shall also show the location and size of the water lines, sanitary sewer lines and utility lines which service the Property.

### Closing

10. Closing shall take place no later than sixty (60) days after DSW's exercise of the Option or Right of First Offer ("Closing"). At Closing, Seller shall convey to Buyer or Buyer's approved assignee by Special Warranty Deed (the "Special Warranty Deed") good and indefeasible title to the Property in fee simple, free and clear of any and all liens and encumbrances except: (a) general real estate taxes for the year of closing and subsequent years not yet due and payable, if any, (b) such other liens, encumbrances, easements and restrictions as are approved by Buyer, and (c) a restriction against the Property being used for the purpose of housing any multigame, casino-style gambling. Possession of the Property shall be delivered to Buyer at Closing.

11. At Closing, Seller shall pay (a) recording fees for all releases of liens or encumbrances arising by or under Seller (b) one-half (1/2) of the closing fees charged by the Title Company, and (c) all of Seller's attorney's fees. At Closing, Buyer shall pay (a) the cost of the Survey, (b) recording fees for the Special Warranty Deed, (c) the premiums and search fees for Buyer's title insurance policy (including endorsements thereto), (d) one-half (1/2) of the closing fees charged by the Title Company, and (e) all of Buyer's attorney's fees.

12. At Closing, all real estate and ad valorem taxes, assessments, charges and other similar matters levied against the Property for or during the calendar year of Closing shall be prorated between Seller and Buyer based upon the respective period of time Seller and Buyer owned the Property during the calendar year of Closing. A subsequent adjustment to such items shall be made when the rate and assessed values for the calendar year of Closing are fixed. The obligations of Buyer and Seller set forth in this Section 12 shall survive Closing.

13. The Special Warranty Deed shall be delivered and the transactions contemplated herein closed at a mutually acceptable time and place within the time period set forth herein, provided that if title is not acceptable at that time, the date of Closing shall be extended and the transactions contemplated herein shall be closed within five (5) days after title is accepted by Buyer.

### Right of Inspection

14. From the Effective Date of this Option Agreement, and continuing to the date of Closing or earlier termination of this Option Agreement, Buyer and its authorized representatives

and professional consultants shall have the right and permission at all reasonable times and from time to time to enter upon the Property, at Buyer's sole cost and expense, to investigate all aspects of the Property as Buyer may desire, including, without limitation, making all soil, drainage, traffic, environmental, topographical and other tests desired by Buyer and to otherwise evaluate the suitability of the Property for Buyer's needs. If Buyer's inspections or investigations cause any damage to the Property, Buyer shall restore or cause to be restored the surface of the Property or any improvements located thereon to as near the condition thereof existing prior to any entry by Buyer. Buyer shall indemnify and hold harmless Seller from and against any mechanic's liens or claims that may be filed or asserted against the Property or Seller by the contractors, subcontractors or materialmen performing such work for Buyer, or from any property damage caused to the Property by Buyer or its agents or representatives as a result of Buyer's, or Buyer's agents' or representatives', inspection of the Property.

#### Delivery of Inspection Documents

15. Within ten (10) days after the Effective Date, Seller shall deliver or make available to Buyer, at Seller's expense, true and complete copies of all documents pertaining to the Property reasonably available to or in Seller's possession, including, without limitation, the following: current operating agreement(s) or lease(s); the most recent real estate and property tax bills and notices of assessed valuation; environmental notices, studies, certificates, reports, and soils reports; tax bills, receipts, notices of appraised value, notice of protest or other contested proceedings; flood plain and drainage information; zoning, restrictive covenants and architectural guidelines; title examinations, surveys, engineering studies, and utility commitments; and all other documents material to the condition, maintenance or operation of the Property.

#### Notice

16. Buyer's exercise of the Option or Right of First Offer, as well as any notice, request, approval, demand, instruction or other communication to be given to either party hereunder, unless specifically stated otherwise herein, shall be in writing and shall be conclusively deemed to be delivered (a) when personally delivered, (b) when deposited in the U.S. mail, sent by certified mail return receipt requested, (c) when sent by overnight courier, or (d) when sent by telefax with a confirmed receipt, but in all cases addressed to the parties as follows:

If to DSW: Drury Southwest, Inc.  
101 S. Farrar Dr.  
Cape Girardeau, MO 63701  
Phone: 573 335-3134  
FAX: 573-335-5125  
Attn: Carolyn F. Bohnert

If to City: City of Wichita  
City Hall, 13<sup>th</sup> Floor  
455 N. Main  
Wichita, KS 67202-1667  
Phone: 316-268-4681  
FAX: 316-268-4335  
Attn: City Attorney

### Deliveries at or Before Closing

17. The City shall deliver to Buyer (or to the Title Company, as necessary) at or before Closing:

- (a) Duly executed Special Warranty Deed in a form substantially similar to that attached hereto as Exhibit B;
- (b) Executed Owner's Affidavit in a form substantially similar to the form attached hereto as Exhibit C;
- (c) Such other and further documents as may be required by the Title Company.

18. Buyer shall deliver to the City (or to the Title Company, as necessary) at or before Closing:

- (a) The Purchase Price as provided in Section 2;
- (b) Certificate of Good Standing or other similar document evidencing that DSW is a duly incorporated entity and is authorized to do business in Kansas;
- (c) Evidence that the person(s) acting on behalf of DSW are authorized to do so; and
- (d) Such other and further documents as may be required by the Title Company.

### Miscellaneous Provisions

19. The City shall not enter into any lease of the Property, or any portion thereof, for a term which exceeds six (6) months without the prior written consent of DSW.

20. Time is of the essence in the performance of this Option Agreement, and both parties agree to diligently proceed with their respective obligations upon Buyer's exercise of the Option or Right of First Offer.

21. If Closing occurs, Buyer agrees to impose upon the Property at Closing in a manner acceptable to the Seller, a deed restriction in recordable form providing that so long as the Property is used as a parking garage, the parking garage shall be open to the public at all reasonable times, consistent with the terms of the Garage Contract. The City shall have all legal rights to enforce such deed restriction.

22. This Option Agreement shall be binding upon, and inure to the benefit of the parties hereto, their respective heirs, personal representatives, successors and assigns.

23. Seller and Buyer each agree to utilize their respective best efforts to perform all acts and satisfy all conditions contemplated by this Option Agreement.

24. The parties agree to negotiate in good faith in an effort to resolve any dispute related to this Option Agreement that may arise. This Option Agreement shall be governed by and construed under the laws of the State of Kansas. Any action or suit arising under or in connection with this Option Agreement shall be brought only in the state and county where the Property is located, without regard to its conflicts of laws provisions.

25. The parties represent and warrant to each other that no commissions are owing, or claimed, for the sale of the Property pursuant to this Option Agreement. Each party agrees to indemnify the other against any claim for broker commission arising through or under each such party.

IN WITNESS WHEREOF, this Option Agreement has been executed by the parties effective as of the date set forth above.

CITY:

THE CITY OF WICHITA:

Date of execution

\_\_\_\_\_

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

Carl Brewer, Mayor

Attest:

\_\_\_\_\_

Karen Sublett, City Clerk

Approved as to Form

\_\_\_\_\_

Gary Rebenstorf, City Attorney

DSW BROADVIEW, LLC

By: DRURY SOUTHWEST, INC., Its Manager and  
Sole Member

Date of execution:

\_\_\_\_\_

By: Dennis J. Vollink, Its President



## **EXHIBIT A**

### Legal Description of Parking Garage Property:

Beginning at the Northwest corner of Engstrom Second Addition to Wichita, Kansas, thence N 00°00'00" E along the West line of said Addition, said line also being the East of Waco Avenue, a distance of 264.30 feet; thence N 45°20'52" E, along the South Right-of-Way line of the former Missouri Pacific Railroad Right-of-Way, a distance of 81.98 feet; thence N 89°46'54" E, a distance of 99.88 feet; thence S 00°38'11" W, a distance of 152.52 feet; thence N 89°53'39" E, a distance of 1.65; thence S 00°00'05" E, along the West line of Civic Center Place, a distance of 169.48 feet to the Northeast corner of said Addition; thence S 89°53'39" W along the North line of said Addition, a distance of 158.15 feet to the Point of Beginning.

## **EXHIBIT B**

### **Special Warranty Deed**

This Indenture, made this \_\_\_\_ day of \_\_\_\_\_, 20\_\_, by and between the CITY OF WICHITA, KANSAS, a municipal corporation of Sedgwick County, in the State of Kansas, party of the first part ("Grantor") and DSW Broadview, LLC, a Missouri limited liability company, party of the second part ("Grantee").

WITNESSETH, that Grantor, in consideration of the sum of \_\_\_\_\_ DOLLARS to it duly paid, the receipt of which is hereby acknowledged, does by these presents, grant, bargain, sell and convey unto the Grantee, its successors and assigns, with special warranty covenant, all the party of the first part's interest in the real property, situated in the County of Sedgwick, State of Kansas, described as follows:

Beginning at the Northwest corner of Engstrom Second Addition to Wichita, Kansas, thence N 00°00'00" E along the West line of said Addition, said line also being the East of Waco Avenue, a distance of 264.30 feet; thence N 45°20'52" E, along the South Right-of-Way line of the former Missouri Pacific Railroad Right-of-Way, a distance of 81.98 feet; thence N 89°46'54" E, a distance of 99.88 feet; thence S 00°38'11" W, a distance of 152.52 feet; thence N 89°53'39" E, a distance of 1.65; thence S 00°00'05" E, along the West line of Civic Center Place, a distance of 169.48 feet to the Northeast corner of said Addition; thence S 89°53'39" W along the North line of said Addition, a distance of 158.15 feet to the Point of Beginning.

SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations, and liabilities as may appear of record, and the restriction that no existing building nor any building which is constructed or placed upon the property, either temporarily or permanently, shall be used for the purpose of housing the operation of any multi-game, casino-style gambling on the premises.

TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenaments, hereditaments and appurtenances thereto belonging or in any wise appertaining, forever. And Grantor, for itself, its successors and assigns, does hereby covenant, promise and agreed to and with Grantee, that it will warrant and forever defend the same unto Grantee, its successors and assigns, against said Grantor, its successors, and all and every person or persons whomsoever

lawfully claiming or to claim the same, or any part thereof, by, through or under said Grantor and its successors.

IN WITNESS WHEREOF, GRANTOR HAS hereunto set its hand and seal the day and year first above written.

CITY OF WICHITA, STATE OF KANSAS

BY: \_\_\_\_\_  
\_\_\_\_\_, Mayor

ATTEST:

\_\_\_\_\_  
\_\_\_\_\_, City Clerk

(Corporate Seal)

STATE OF KANSAS     )  
                                  ) ss:  
SEDGWICK COUNTY    )

BE IT REMEMBERED, that on this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, before me, the undersigned, a Notary Public in and for the County and State aforesaid, came \_\_\_\_\_, Mayor of the City of Wichita, Kansas, and \_\_\_\_\_, City Clerk of such City, who are personally known to me to be the same persons who executed the foregoing instrument of writing, and duly acknowledged the execution of the same, by and for, and as the free act and deed of such City.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year last above written.

Notary Public

\_\_\_\_\_

My Appointment Expires:

Approved as to Form:

\_\_\_\_\_

\_\_\_\_\_  
Director of Law and  
City Attorney

## **EXHIBIT A TO SPECIAL WARRANTY DEED**

### Legal Description of Parking Garage Property:

Beginning at the Northwest corner of Engstrom Second Addition to Wichita, Kansas, thence N 00°00'00" E along the West line of said Addition, said line also being the East of Waco Avenue, a distance of 264.30 feet; thence N 45°20'52" E, along the South Right-of-Way line of the former Missouri Pacific Railroad Right-of-Way, a distance of 81.98 feet; thence N 89°46'54" E, a distance of 99.88 feet; thence S 00°38'11" W, a distance of 152.52 feet; thence N 89°53'39" E, a distance of 1.65; thence S 00°00'05" E, along the West line of Civic Center Place, a distance of 169.48 feet to the Northeast corner of said Addition; thence S 89°53'39" W along the North line of said Addition, a distance of 158.15 feet to the Point of Beginning.

## **EXHIBIT C**

### **OWNER'S AFFIDAVIT**

ON THIS \_\_ DAY OF \_\_\_\_\_, 2008, before me personally appeared the undersigned, who being duly sworn according to the law and intending to be legally bound, deposes and says:

1. That the statements contained in this affidavit are true to the best of the undersigned's knowledge, information and belief, and that Affiant is authorized to make the within representations on behalf of the City of Wichita, Kansas ("Owner").

2. That there are no purchase money obligations or other financing not already disclosed to the Buyer.

3. a) That there are no leases or parties in possession other than Affiant except as follows: NONE

b) That there are no options, first rights of refusal, or contracts to sell the land except as follows: NONE, except those recorded in the real estate records and disclosed to Buyer.

4. That the Affiant knows of no unrecorded claims against the property, nor any set of facts by reason of which title to the property might be disputed or questioned, and the Owner has/have been in peaceable and undisputed possession of the premises since title was acquired.

5. That, to the best of the undersigned's knowledge, there have not been any construction, repairs, alterations or improvements made, ordered or contracted to be made on or to the premises by the City, nor materials ordered therefor within the last 6 months by the City which have not been paid for; nor are there any fixtures attached to the premises by the City which have not been paid for in full; there are no outstanding or disputed claims for any such work or item; and that there have not been any improvements erected upon the property during the current year subject to any taxes for the current year which may hereafter be assessed or levied by virtue of new construction completed or partially completed during the current year.

6. That to the best of the undersigned's knowledge that there has been no violation of covenants, conditions or restrictions of record affecting the premises and that there are no disputes with any adjoining property owners as to the location of property lines, or the encroachment of any improvements.

7. That the present transaction is not made for the purposes of hindering, delaying or defrauding any creditors of the Owner(s) and does not come within the provisions of the Bankruptcy or Insolvency Acts.

8. That all taxes currently owing on the property, if any, are either paid or due but not yet delinquent. There are no delinquent taxes or tax liens on the property.

This affidavit is made for the purposes of aiding \_\_\_\_\_ Title Company (the "Company") and/or \_\_\_\_\_ Title Guaranty Company in determining the insurability of title to the property, and to induce said Company to issue its policy or policies of title insurance

and the affiant confirms the foregoing statements are true and correct to the best of its knowledge and belief.

IN WITNESS WHEREOF, the undersigned has caused these presents to be signed to be effective as of the date first written above.

THE CITY OF WICHITA:

Date of execution

\_\_\_\_\_

By: \_\_\_\_\_  
\_\_\_\_\_, Mayor

Attest:

\_\_\_\_\_  
\_\_\_\_\_, City Clerk