

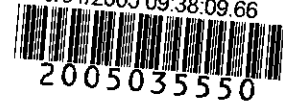


MISC 2005035550



MAR 31 2005 09:38 P 14

Received - DIANE L. BATTIATO
Register of Deeds, Douglas County, NE
3/31/2005 09:38:09.66



2005035550

EASEMENT AND DECLARATION OF RESTRICTIONS

THIS EASEMENT AND DECLARATION OF RESTRICTIONS ("Easement") is made as of the ^{30th} day of March, 2005 by and between EATON HYDRAULICS INC., a Delaware corporation ("Grantee") and KDI OMAHA, L.P., a Nebraska limited partnership ("Grantor"):

WHEREAS, Grantee has contemporaneously herewith conveyed to Grantor certain real property and improvements situated in the County of Douglas, City of Omaha and State of Nebraska and more fully described on Exhibit A ("Property");

WHEREAS, Grantor desires to grant to Grantee a non-exclusive easement over and across the Property to enable certain environmental monitoring and remediation efforts to continue on the Property and other properties in the general area;

NOW, THEREFORE, the parties hereby agree as follows:

1. **Grant.** Grantor does hereby give, grant, sell and convey to Grantee, subject to the terms and conditions hereinafter set forth and those matters of record that do not materially and adversely affect the rights granted hereby ("Permitted Encumbrances"), the following easement:

a fully paid, royalty-free and non-exclusive easement on and over the Property ("Easement Area"), to permit Grantee, its agents, employees, and independent contractors to conduct Remediation on the Easement Area at any time and from time to time. For purposes of this Easement, "Remediation" shall mean any response, removal or corrective action, activity to clean up, investigate, monitor, detoxify, decontaminate, contain or otherwise remediate any hazardous or toxic waste, material or substance, by Grantee alone or in collaboration with other entities, consistent with that certain Administrative Order on Consent issued by the Environmental Protection Agency to Vickers, Incorporated dated April, 1999, as the same may be amended from time to time ("AOC").

Grantee agrees to use the Easement Area in a manner that minimizes interference with the use and enjoyment of the Property by Grantor and its tenants, invitees, licensees, subtenants and other permittees of the Property.

11064751.1

S

Misc 78.00
14
16
FEE _____ FB _____
BKP _____ C/O _____ COMP _____
DEL _____ SCAN _____ FV _____

T-0360377

-41-

2. **Restriction.** As an inducement for Grantee to convey the Property to Grantor, Grantor hereby imposes upon the Property the following activity and use restrictions and limitations, which shall continue until amended or terminated pursuant to the terms of this Easement:

- (a) The Easement Area is hereby restricted to commercial or industrial use only (and for the avoidance of doubt, specifically excluding residential or other similar uses); and
- (b) No person shall extract the ground water located at or underlying the Easement Area for any purpose, potable or otherwise, except for investigation or remediation of the ground water.

3. **No Abandonment.** The non-use of the Easement Area by Grantee shall not terminate the rights herein granted.

4. **No Merger.** In no event shall there be a merger of the rights created by this instrument in the fee simple title to the Property, even though such properties may be owned at the same time by the same owner. This instrument and the rights granted hereunder shall continue in full force and effect at all times as to each then existing property, including subsequent to a conveyance of any property.

5. **No Waiver.** No delay or omission of any party in the exercise of any right accruing after any default of any other party shall impair any such right or be construed to be a waiver thereof. A waiver by any party of a breach or a default of any of the terms and conditions of this Easement by any other party shall not be construed to be a waiver of any subsequent breach or default of the same or any other provisions hereof. Except as otherwise herein provided, no remedy provided in this Easement shall be exclusive, but each shall be cumulative with all other remedies herein and at law or in equity and may be exercised at one time or at different times.

6. **Limitation of Remedies.** It is expressly agreed that no breach of the provisions of this instrument shall entitle any party to cancel, rescind or otherwise terminate this Easement, but such limitation shall not affect, in any manner, any other rights or remedies which any party may have hereunder by reason of any breach of the provisions of this Easement.

7. **Amendment and Termination of Easement.** Provisions of this Easement may be abrogated, modified, rescinded, terminated or amended in whole or in part only by a written instrument, in recordable form, executed by the then fee simple owner(s) of the Property and Grantee and duly recorded in the office of the county recorder of Douglas County, Nebraska. In no event shall the consent or approval of any tenant, licensee, concessionaire, customer, employee or business invitee be required with respect to any abrogation, modification, rescission, termination or amendment of this Easement. The terms, conditions and restrictions contained in this Easement may only be amended or terminated by written agreement between

Grantee, its successors and assigns, and the then owner of the Property; except that the terms, conditions and restrictions contained in this Easement shall automatically expire ninety (90) days following the date, if any, when the Environmental Protection Authority notifies Grantee and the then owner of the Property that all obligations and responsibilities under the AOC have been fully and finally satisfied and discharged, or that the Property is no longer the subject of the AOC. Upon such a termination and request of the then-owner of the Property, Grantee shall execute a termination of this Easement in recordable form which such owner shall be permitted to record in the records of Douglas County, Nebraska. Upon such a termination, all monitoring and remediation equipment at or above grade shall be removed by Grantee, in accordance with all applicable laws, at Grantee's expense, and all monitoring and remediation equipment below grade shall either be removed from the Property or plugged, filled or capped in a workmanlike manner and in accordance with all applicable laws, at Grantee's expense and election, and the surface restored to a commercially reasonable condition.

8. **Reservation of Rights by Grantor.** Grantor reserves the right, provided the same shall not prevent or unreasonably interfere with the reasonable use and enjoyment of the rights granted herein by Grantee, to use the Easement Area, for any and all lawful purposes not inconsistent with the Restrictions set forth above.

9. **Warranties of Title.** Grantor does hereby covenant with Grantee that Grantor is well seized of the Property, has good and indefeasible estate in fee simple and has good right to bargain and grant the easements in the manner and form as above written, and the Grantor will warrant and defend same to the Grantee against all lawful claims and demands whatsoever for the purpose herein described except for the Permitted Encumbrances.

10. **Running of Benefits; Parties.** All provisions of this Agreement, including the benefits and burdens shall, however, run with the land and shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns. The term "Grantee" as used in this Agreement shall refer to and include Grantee, its employees, agents and contractors, and the terms "Grantor and "Grantee" shall also include their respective successors and assigns. Each and every covenant, easement and right made and granted by Grantor pursuant to the terms of this Easement shall be an equitable servitude on the tract(s) owned by Grantor for the benefit of Grantee. If the Property is hereafter divided into two or more parts by separation of ownership, each such divided part shall be burdened by the easements granted herein.

11. **Notice.** All notices permitted or required hereunder shall be in writing (other than in the case of an emergency, which may be telephonic to an individual, promptly followed by confirming notice) and shall be given (i) by hand delivery; (ii) by a recognized overnight carrier; or (iii) by registered or certified mail, postage prepaid, return receipt requested which notice shall be addressed to the parties at the following addresses: If to Grantor to KDI Omaha, L.P., c/o Kimco Realty Corporation, 3333 New Hyde Park Road, New Hyde Park, New York 11042; and if to Grantee to Eaton Hydraulics Inc., 1111 Superior Avenue, 22nd Floor, Cleveland, Ohio 44114, Attention: Real Estate Department or such other address as either party

may provide from time to time. Notice shall be deemed effective and received (i) if by hand, upon receipt; (ii) if by overnight courier, upon delivery or the first business day after dispatch, whichever is earlier; and (iii) if by registered or certified mail, upon the third calendar day after dispatch.

12. **Indemnification.** Grantee shall indemnify, defend and hold Grantor, its officers, directors, affiliates, shareholders, members, partners, agents and employees (collectively, the "Indemnitees") harmless from and against any claims or demands, including any action or proceeding brought thereon, and all damages, liability, actions, costs, penalties and expenses, foreseen or unforeseen (including, without limitation, attorneys' fees in a reasonable amount and costs of suit) in connection with any loss of life, personal injury and/or damage to property, including, without limitation, environmental liability and/or cleanup costs (but specifically excluding lost profits and consequential damages) resulting directly or indirectly, wholly or partly, or arising from or out of Grantor's (or any party claiming by, through or under Grantor) use of the Easement Area under this Easement; provided, however, that this indemnity shall not apply to the extent such liability arises in connection with the negligence or willful misconduct of any Indemnitees or their agents, employees, contractors and/or licensees.

13. **Counterparts.** This Easement may be executed in any number of counterparts each of which shall be deemed an original. The signatures to this Easement may be executed and notarized on separate pages and when attached to this Easement shall constitute one instrument.

IN WITNESS WHEREOF, the parties hereto have made and entered into this Easement as of March 30th, 2005.

KDI OMAHA, L.P., a Nebraska limited partnership

By: _____

Title: _____

EATON HYDRAULICS INC., a Delaware corporation

By: *R. E. Parmenter*
Robert E. Parmenter, Vice President and Treasurer

And: *Earl R. Franklin*
Earl R. Franklin, Vice President and Secretary

STATE OF _____)
)SS:
COUNTY OF _____)

Before me, a Notary Public in and for said County and State, personally appeared the above-named KDI Omaha, L.P., a Nebraska limited partnership, by _____, its _____, who acknowledged that being duly authorized to do so, executed the foregoing instrument on behalf of said corporation, and that the same is the free act and deed of said corporation and his free act and deed individually as such officer.

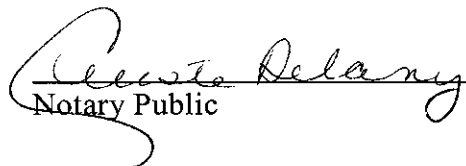
IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of _____, 2005.

Notary Public

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Before me, a Notary Public in and for said County and State, personally appeared the above-named Robert E. Parmenter and Earl R. Franklin, the Vice President and Treasurer and Vice President and Secretary, respectively, of Eaton Hydraulics Inc., a Delaware corporation, who acknowledged that being duly authorized to do so, each executed the foregoing instrument on behalf of said corporation, and that the same is the free act and deed of said corporation and their free act and deed individually and as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, at Cleveland, Ohio, this 14 day of March, 2005.



Notary Public

THIS INSTRUMENT PREPARED BY:

David W. Salisbury, Esq.
Thompson Hine LLP
3900 Key Center, 127 Public Square
Cleveland, Ohio 44114

CELESTE DELANEY
Notary Public
State of Ohio
My Commission Expires 7/31/05

EXHIBIT A

to Deed

Legal Description

Lots 1 through 14, inclusive, and Outlots A and B, Sorensen Park Plaza, a cluster subdivision, as surveyed, platted and recorded in Omaha, Douglas County, Nebraska.

EASEMENT AND DECLARATION OF RESTRICTIONS

THIS EASEMENT AND DECLARATION OF RESTRICTIONS (“Easement”) is made as of the 30th day of March, 2005 by and between EATON HYDRAULICS INC., a Delaware corporation (“Grantee”) and KDI OMAHA, L.P., a Nebraska limited partnership (“Grantor”):

WHEREAS, Grantee has contemporaneously herewith conveyed to Grantor certain real property and improvements situated in the County of Douglas, City of Omaha and State of Nebraska and more fully described on Exhibit A (“Property”);

WHEREAS, Grantor desires to grant to Grantee a non-exclusive easement over and across the Property to enable certain environmental monitoring and remediation efforts to continue on the Property and other properties in the general area;

NOW, THEREFORE, the parties hereby agree as follows:

1. **Grant.** Grantor does hereby give, grant, sell and convey to Grantee, subject to the terms and conditions hereinafter set forth and those matters of record that do not materially and adversely affect the rights granted hereby (“Permitted Encumbrances”), the following easement:

a fully paid, royalty-free and non-exclusive easement on and over the Property (“Easement Area”), to permit Grantee, its agents, employees, and independent contractors to conduct Remediation on the Easement Area at any time and from time to time. For purposes of this Easement, “Remediation” shall mean any response, removal or corrective action, activity to clean up, investigate, monitor, detoxify, decontaminate, contain or otherwise remediate any hazardous or toxic waste, material or substance, by Grantee alone or in collaboration with other entities, consistent with that certain Administrative Order on Consent issued by the Environmental Protection Agency to Vickers, Incorporated dated April, 1999, as the same may be amended from time to time (“AOC”).

Grantee agrees to use the Easement Area in a manner that minimizes interference with the use and enjoyment of the Property by Grantor and its tenants, invitees, licensees, subtenants and other permittees of the Property.

2. **Restriction.** As an inducement for Grantee to convey the Property to Grantor, Grantor hereby imposes upon the Property the following activity and use restrictions and limitations, which shall continue until amended or terminated pursuant to the terms of this Easement:

- (a) The Easement Area is hereby restricted to commercial or industrial use only (and for the avoidance of doubt, specifically excluding residential or other similar uses); and
- (b) No person shall extract the ground water located at or underlying the Easement Area for any purpose, potable or otherwise, except for investigation or remediation of the ground water.

3. **No Abandonment.** The non-use of the Easement Area by Grantee shall not terminate the rights herein granted.

4. **No Merger.** In no event shall there be a merger of the rights created by this instrument in the fee simple title to the Property, even though such properties may be owned at the same time by the same owner. This instrument and the rights granted hereunder shall continue in full force and effect at all times as to each then existing property, including subsequent to a conveyance of any property.

5. **No Waiver.** No delay or omission of any party in the exercise of any right accruing after any default of any other party shall impair any such right or be construed to be a waiver thereof. A waiver by any party of a breach or a default of any of the terms and conditions of this Easement by any other party shall not be construed to be a waiver of any subsequent breach or default of the same or any other provisions hereof. Except as otherwise herein provided, no remedy provided in this Easement shall be exclusive, but each shall be cumulative with all other remedies herein and at law or in equity and may be exercised at one time or at different times.

6. **Limitation of Remedies.** It is expressly agreed that no breach of the provisions of this instrument shall entitle any party to cancel, rescind or otherwise terminate this Easement, but such limitation shall not affect, in any manner, any other rights or remedies which any party may have hereunder by reason of any breach of the provisions of this Easement.

7. **Amendment and Termination of Easement.** Provisions of this Easement may be abrogated, modified, rescinded, terminated or amended in whole or in part only by a written instrument, in recordable form, executed by the then fee simple owner(s) of the

Property and Grantee and duly recorded in the office of the county recorder of Douglas County, Nebraska. In no event shall the consent or approval of any tenant, licensee, concessionaire, customer, employee or business invitee be required with respect to any abrogation, modification, rescission, termination or amendment of this Easement. The terms, conditions and restrictions contained in this Easement may only be amended or terminated by written agreement between Grantee, its successors and assigns, and the then owner of the Property; except that the terms, conditions and restrictions contained in this Easement shall automatically expire ninety (90) days following the date, if any, when the Environmental Protection Authority notifies Grantee and the then owner of the Property that all obligations and responsibilities under the AOC have been fully and finally satisfied and discharged, or that the Property is no longer the subject of the AOC. Upon such a termination and request of the then-owner of the Property, Grantee shall execute a termination of this Easement in recordable form which such owner shall be permitted to record in the records of Douglas County, Nebraska. Upon such a termination, all monitoring and remediation equipment at or above grade shall be removed by Grantee, in accordance with all applicable laws, at Grantee's expense, and all monitoring and remediation equipment below grade shall either be removed from the Property or plugged, filled or capped in a workmanlike manner and in accordance with all applicable laws, at Grantee's expense and election, and the surface restored to a commercially reasonable condition.

8. **Reservation of Rights by Grantor.** Grantor reserves the right, provided the same shall not prevent or unreasonably interfere with the reasonable use and enjoyment of the rights granted herein by Grantee, to use the Easement Area, for any and all lawful purposes not inconsistent with the Restrictions set forth above.

9. **Warranties of Title.** Grantor does hereby covenant with Grantee that Grantor is well seized of the Property, has good and indefeasible estate in fee simple and has good right to bargain and grant the easements in the manner and form as above written, and the Grantor will warrant and defend same to the Grantee against all lawful claims and demands whatsoever for the purpose herein described except for the Permitted Encumbrances.

10. **Running of Benefits; Parties.** All provisions of this Agreement, including the benefits and burdens shall, however, run with the land and shall be binding upon and inure to the benefit of each of the parties hereto and their respective successors and assigns. The term "Grantee" as used in this Agreement shall refer to and include Grantee, its employees, agents and contractors, and the terms "Grantor and "Grantee" shall also include their respective successors and assigns. Each and every covenant, easement and right made and granted by Grantor pursuant to the terms of this Easement shall be an equitable servitude on the tract(s) owned by Grantor for the benefit of Grantee. If the Property is hereafter divided into two or more parts by separation of ownership, each such divided part shall be burdened by the easements granted herein.

11. **Notice.** All notices permitted or required hereunder shall be in writing (other than in the case of an emergency, which may be telephonic to an individual, promptly

followed by confirming notice) and shall be given (i) by hand delivery; (ii) by a recognized overnight carrier; or (iii) by registered or certified mail, postage prepaid, return receipt requested which notice shall be addressed to the parties at the following addresses: If to Grantor to KDI Omaha, L.P., c/o Kimco Realty Corporation, 3333 New Hyde Park Road, New Hyde Park, New York 11042; and if to Grantee to Eaton Hydraulics Inc., 1111 Superior Avenue, 22nd Floor, Cleveland, Ohio 44114, Attention: Real Estate Department or such other address as either party may provide from time to time. Notice shall be deemed effective and received (i) if by hand, upon receipt; (ii) if by overnight courier, upon delivery or the first business day after dispatch, whichever is earlier; and (iii) if by registered or certified mail, upon the third calendar day after dispatch.

12. **Indemnification.** Grantee shall indemnify, defend and hold Grantor, its officers, directors, affiliates, shareholders, members, partners, agents and employees (collectively, the "Indemnitees") harmless from and against any claims or demands, including any action or proceeding brought thereon, and all damages, liability, actions, costs, penalties and expenses, foreseen or unforeseen (including, without limitation, attorneys' fees in a reasonable amount and costs of suit) in connection with any loss of life, personal injury and/or damage to property, including, without limitation, environmental liability and/or cleanup costs (but specifically excluding lost profits and consequential damages) resulting directly or indirectly, wholly or partly, or arising from or out of Grantor's (or any party claiming by, through or under Grantor) use of the Easement Area under this Easement; provided, however, that this indemnity shall not apply to the extent such liability arises in connection with the negligence or willful misconduct of any Indemnitees or their agents, employees, contractors and/or licensees.

13. **Counterparts.** This Easement may be executed in any number of counterparts each of which shall be deemed an original. The signatures to this Easement may be executed and notarized on separate pages and when attached to this Easement shall constitute one instrument.

IN WITNESS WHEREOF, the parties hereto have made and entered into this Easement as of March 30th, 2005.

KDI OMAHA, L.P., a Nebraska limited partnership

By: KD Omaha 1103, Inc.

By: 

Title: BRUCE M. KAUDERER
Vice President

EATON HYDRAULICS INC., a Delaware corporation

By: _____
Robert E. Parmenter, Vice President and Treasurer

And: _____
Earl R. Franklin, Vice President and Secretary

STATE OF New York)
)SS:
COUNTY OF Nassau)

Before me, a Notary Public in and for said County and State, personally appeared the above-named KDI Omaha, L.P., a Nebraska limited partnership, by Bruce M. Kauderer, Vice President of KDI Omaha 1103, Inc., its general partner, who acknowledged that being duly authorized to do so, executed the foregoing instrument on behalf of said corporation, and that the same is the free act and deed of said corporation and his free act and deed individually as such officer.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this 14th day of March, 2005.

Roseanne Dwyer
Notary Public

ROSEANNE DWYER
Notary Public, State of New York
No. 4909302
Qualified in Nassau County 2006
Commission Expires January 11, 2006

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

Before me, a Notary Public in and for said County and State, personally appeared the above-named Robert E. Parmenter and Earl R. Franklin, the Vice President and Treasurer and Vice President and Secretary, respectively, of Eaton Hydraulics Inc., a Delaware corporation, who acknowledged that being duly authorized to do so, each executed the foregoing instrument on behalf of said corporation, and that the same is the free act and deed of said corporation and their free act and deed individually and as such officer.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, at Cleveland, Ohio, this ____ day of March, 2005.

Notary Public

THIS INSTRUMENT PREPARED BY:

David W. Salisbury, Esq.
Thompson Hine LLP
3900 Key Center, 127 Public Square

Cleveland, Ohio 44114

EXHIBIT A

to Deed

Legal Description

Lots 1 through 14, inclusive, and Outlots A and B, Sorensen Park Plaza, a cluster subdivision, as surveyed, platted and recorded in Omaha, Douglas County, Nebraska.