

Dedicated to Outstanding Customer Service for a Better Community

**SERVICE SOLUTIONS SUCCESS**



**DEPARTMENT:** Development Services Department, Planning Division

**AGENDA DATE:** Consent Item; Public Hearing 1/19/10

**CONTACT PERSON/PHONE:** Raul Garcia, 541-4935

**DISTRICT(S) AFFECTED:** 4

**SUBJECT:**

That the City Manager be authorized to sign a Developer Participation Agreement between the City of El Paso and **EPT LAND ASSETS, LP**, to allow the City to participate in the cost of construction of improvements within a 30' wide pedestrian ROW located in Sandstone Ranch Estates Unit Five subdivision, in an amount not to exceed **TWELVE THOUSAND NINE HUNDRED NINETY SEVEN AND 82/100 (\$12,997.82)**, pursuant to Texas Local Government Code, Chapter 212, Subchapter C, Section 212.071, and with Section 19.10.040 of the City Subdivision Code.

**BACKGROUND / DISCUSSION:**

N/A

**PRIOR COUNCIL ACTION:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

N/A

**BOARD / COMMISSION ACTION:**

Development Coordinating Committee (DCC) – N/A  
City Plan Commission (CPC) – N/A

\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**LEGAL:** (if required) N/A

**FINANCE:** (if required) N/A

**DEPARTMENT HEAD:** Victor Q. Torres  
Director, Development Services

**APPROVED FOR AGENDA:**

**CITY MANAGER:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

Mayor  
John F. Cook

**City Council**

*District 1*  
Ann Morgan Lilly

*District 2*  
Susie Byrd

*District 3*  
Emma Acosta

*District 4*  
Carl L. Robinson

*District 5*  
Rachel Quintana

*District 6*  
Eddie Holguin Jr.

*District 7*  
Steve Ortega

*District 8*  
Beto O'Rourke

City Manager  
Joyce A. Wilson

**Development Services Department**  
Victor Q. Torres – Director

## RESOLUTION

### BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign a Developer Participation Agreement between the City of El Paso and EPT LAND ASSETS, LP, to allow the City to participate in the cost of construction of improvements within a 30' wide pedestrian ROW located in Sandstone Ranch Estates Unit Five subdivision, in an amount not to exceed TWELVE THOUSAND NINE HUNDRED NINETY SEVEN AND 82/100 (\$12,997.82), pursuant to Texas Local Government Code, Chapter 212, Subchapter C, Section 212.071, and with Section 19.10.040 of the City Subdivision Code.

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

### THE CITY OF EL PASO

\_\_\_\_\_  
John F. Cook  
Mayor

### ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

### APPROVED AS TO CONTENT

  
\_\_\_\_\_  
Nanette Smejkal, Director  
Parks and Recreation Department

### APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Mathew McElroy, Deputy Director—Planning  
Development Services Department

### APPROVED AS TO FORM:

  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

STATE OF TEXAS            )  
   )  
 COUNTY OF EL PASO        )            **DEVELOPER PARTICIPATION AGREEMENT**

This Agreement is made this \_\_\_\_\_ day of \_\_\_\_\_ 2010, by and between the **CITY OF EL PASO**, hereinafter referred to as the “City”, and **EPT LAND ASSETS, LP**, a Texas limited partnership, hereinafter referred to as the “Developer.”

**WITNESSETH:**

**WHEREAS**, the City desires to participate in the construction of improvements within a 30’ pedestrian right-of-way, described as Lot 7, Block 16, Sandstone Ranch Unit Five; and more particularly described by metes and bounds in Exhibit “A” attached hereto for all purposes.

**WHEREAS**, the Developer, in conjunction with its design and construction of Phase I park improvements within a residential subdivision known as Sandstone Ranch Estates Unit Five, desires to proceed with development of the City’s aforementioned pedestrian right-of-way upon approval by the City of the park improvement plan (the “Project”); and

**WHEREAS**, Texas Local Government Code 212.071 authorizes a municipality with 5,000 or more inhabitants to enter into a contract with a developer of a non-building public improvement to construct such improvements, without a competitive bidding procedure; and

**WHEREAS**, Texas Local Government Code 212.072 allows the municipality to participate in the construction cost, in an amount not to exceed thirty (30%) percent of the total contract price without complying with the competitive sealed bidding procedure of Texas Local Government Code Chapter 252; and

**WHEREAS**, the Developer’s construction of the pedestrian right-of-way improvements will be an economic benefit to local tax payers, will enhance connectivity to the future park and school site and therefore, this Agreement is in the best interest of the citizens of the City; and

**WHEREAS**, the Developer and the City agree that the Developer shall construct the pedestrian right-of-way and park improvements and the City will participate in the construction of the improvements to the pedestrian right-of-way; and

**NOW, THEREFORE**, in consideration of the promises and of the mutual covenants and agreements of the parties hereto, the City and Developer do agree as follows:

**I. Term Of The Agreement**

This Agreement shall automatically terminate after the construction of the pedestrian right-of-way is completed, the City Engineer has inspected the pedestrian right-of-way to assure that City right-of-way specifications have been met, the City has paid the City’s share to the

Developer, and the City has accepted the pedestrian right-of-way for maintenance. If the City Engineer determines that the City's specifications have not been met, Developer shall be responsible for any necessary corrections and alterations and all costs associated with any necessary corrections and alterations. The City shall not be responsible nor participate in any costs accrued in such instance. In addition, Developer agrees to give a warranty on its work in accordance with the requirements of the City Code.

## **II. Scope of Project**

(a) The Developer agrees to provide all necessary drawings, plans and specifications, according to the applicable City design standards and policies for the Project, as well as accepted engineering principles and practices to provide for the right-of-way improvements. The Project shall be constructed in accordance with the grading plans and building plans approved by the City.

(b) The Developer agrees that all Project construction and materials shall be subject to inspection and approval by the City. All Project materials must conform to City specifications and are subject to quality control testing by the City.

(c) Additionally, the Developer shall provide all traffic control for construction. The Developer agrees to provide adequate traffic controls designed to cause minimum inconvenience to motorists, pedestrians and adjacent property owners.

(d) The Developer acknowledges that all site preparation, including but not limited to right-of-way improvements must be completed in accordance with plans approved by the City prior to the issuance of a building permit for the Project. The City will use its best efforts to cause the Project to be approved by the City as soon as reasonably possible. However, the City does not guarantee that approval will be granted. **The City shall not be liable for any damages which may occur if the Project is not approved or if the Project is abandoned for any reason because of the conduct of third parties or any other factors, and the Developer hereby releases the City from any such liability.**

(e) All Project construction shall be completed by the Developer within one (1) year after the approval of said plans and notice to Developer of said approval, unless otherwise extended by written amendment and approval by the City. It is hereby understood and mutually agreed, by the Developer and the City that the date of beginning and the time for completion of the Project are **ESSENTIAL CONDITIONS** in the Agreement. It is further mutually understood and agreed that the construction on the project shall begin upon the plan approval and communicated notice of that approval to Developer.

(f) The Developer agrees that said work shall be pursued regularly, diligently, and uninterrupted at such a rate of progress as shall ensure completion of the Project within the time specified. It is expressly understood and agreed, by the Developer and the City, that the time for the completion of the Project is a reasonable time for completion.

**(g) If the Developer shall neglect, fail or refuse to complete the Project within the time herein specified, or any proper extension granted by the City or to maintain the Project during the time period in which the Developer is constructing the project, and such neglect, failure, or refusal to complete or maintain the Project results in any safety issue to persons or property as reasonably identified by the City Engineer or his designee, the Developer agrees that the City may issue a stop work order for any work in progress under any issued building permit for the Project, and the Developer waives any and all causes of action it may have against the City arising from the City's stop work order. Additionally, the Developer will defend, indemnify and hold the City harmless from any and all causes of action any third party may have against the City arising from the City's stop work order.**

(h) In the event that Developer fails to complete the project, the City reserves the right to complete the construction and assess the costs of completion to the Developer for payment.

(i) The Developer agrees to warrant to the City that all work in connection with the Project shall be performed in a good and workmanlike manner, strictly in accordance with the approved plans, and as otherwise provided in this Agreement. This warranty shall remain in full force and effect for a period of one (1) year from and after the date of the City's final acceptance of the Project. No mechanics liens shall ever be threatened or filed against the property identified as the Project. It is understood and agreed that, notwithstanding the acceptance of the Project by the City, the Developer remains fully responsible for the repair and maintenance of the Project as such relates to the Developer's warranty of the Project for a period of one (1) year from the date of the City's acceptance of the Project for maintenance.

### **III. Project Funding**

The City agrees to participate in the cost of construction of the improvements in an amount not to exceed thirty (30%) percent of the total estimated construction cost for the Project. The Developer and City agree that the total estimated construction cost for the park improvements is **THREE HUNDRED FORTY THOUSAND FIVE HUNDRED THIRTY AND 00/100 (\$340,530.00)**. Within thirty (30) days of presentation to the City of written statement from Developer certifying that the pedestrian right-of-way has been constructed according to the approved subdivision plans, and the City's inspection and approval of the

constructed improvements, the City will reimburse Developer in an amount not to exceed **TWELVE THOUSAND NINE HUNDRED NINETY SEVEN AND 82/100 (\$12,997.82)** which is less than thirty percent (30%) of the total estimated construction cost for the Project.

#### **IV. Termination**

This Agreement may be terminated by the City, upon thirty (30) days written notice for any reason.

#### **V. Ownership and Right of Access**

Developer hereby acknowledges the ownership rights of the City to its right-of-way, as well as the rights of the City, its agents, contractors and subcontractors to enter upon and construct and install any equipment that may be required, pursuant to the Contract, to complete the Project. This right of access shall include the right to use or modify any Developer equipment or Facilities as deemed necessary by the City. Additionally, in the event that additional authorization is required, Developer agrees to promptly execute the required documents at the request of the City.

#### **VI. Relationship of the Parties**

Developer acknowledges that it is not an agent, servant, or employee of the City and is therefore, responsible for its own actions performed by itself, its agents or employees during the term of the Agreement.

#### **VII. Insurance**

Developer agrees to obtain liability insurance for this project, designating the City of El Paso as an additional insured party. Such insurance policy shall be issued by an insurance company duly authorized to do business in the State of Texas and shall be subject to approval of the City after review by the City Attorney as to form and the City Engineer as to sufficiency, pursuant to the El Paso Municipal Code, Section 13.16.010. The maximum amount recoverable under such policy shall not be less than **TWO HUNDRED FIFTY THOUSAND DOLLARS AND 00/100 (\$250,000.00)** for death or injury to two or more persons in any one accident, and **ONE HUNDRED THOUSAND DOLLARS AND 00/100 (\$100,000.00)** for property damage.

#### **VIII. Bond Required**

The Developer agrees to execute a performance bond for one hundred percent (100%) of the costs of the pedestrian right-of-way improvements, which total **TWELVE THOUSAND NINE HUNDRED NINETY SEVEN AND 82/100 (\$12,997.82)**, to secure fulfillment of the Developer's obligations under this Agreement. The bond will be in a form approved by the

City. The bond must be executed by a corporate surety in accordance with Texas Government Code, Chapter 2253. The bond shall identify the City as Owner and Obligee and shall bind both the Developer and the Surety, their heirs, administrators, executors, successors and assignees, jointly and severally. The bonds shall expressly provide that the Developer shall faithfully render performance under this Agreement and shall remain in full force and effect until all requirements of the Agreement have been performed to the City's satisfaction.

#### **IX. Increased Costs**

This Agreement is a lump sum contract and it is anticipated that additional costs could arise from change, site conditions or latent defects; however, Developer agrees that the Developer will be solely responsible for payment of all increased costs in the construction of the facilities, regardless of the cause.

#### **X. Indemnification**

**Except in the event of the Cities or the Cities, agents and employees negligence or willful misconduct, Developer will INDEMNIFY, DEFEND AND HOLD the City, its officers, agents and employees, HARMLESS FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPENSE, (INCLUDING BUT NOT LIMITED TO ATTORNEY FEES AND COSTS) FOR ANY DAMAGE TO OR LOSS OF ANY PROPERTY, OR ANY ILLNESS, INJURY, PHYSICAL OR MENTAL IMPAIRMENT, LOSS OF SERVICES, OR DEATH TO ANY PERSON ARISING OUT OF OR RELATED TO THIS AGREEMENT. Without modifying the conditions of preserving, asserting or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to Developer every demand, notice, summons or other process received by the City in any claim or legal proceeding contemplated herein. Developer will 1) investigate or cause the investigation of accidents or occurrences involving such injuries or damages; 2) negotiate or cause to be negotiated the claim as the Developer may deem expedient; and 3) defend or cause to be defended on behalf of the City all suits for damages even if groundless, false or fraudulent, brought because of such injuries or damages. Developer will pay all judgments in actions defended by Developer pursuant to this section along with all attorneys' fees and costs incurred by the City including interest accruing to the date of payment by Developer, and premiums on any appeal bonds. The City, at its election will have the right to participate in any such negotiations or legal proceeding to the extent of**

**its interest. The City will not be responsible for any loss of or damage to the Developer's property from any cause.**

**Non-Assignability**

Subject to Article XVII below, the parties hereto agree that the rights of the Developer and the City under this Agreement are not assignable and will survive the sale, rental, gift or devise of any property adjacent to the Project.

**Notice**

All notices provided for herein shall be sufficient if sent by certified mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

CITY:                   The City of El Paso  
                          Attn: City Manager  
                          2 Civic Center Plaza, 10<sup>th</sup> Floor  
                          El Paso, Texas 79901-1196

copy to:               Development Services Department  
                          Attn: Planning Division  
                          2 Civic Center Plaza, 4<sup>th</sup> Floor  
                          El Paso, Texas 79901-1196

DEVELOPER:         EPT Land Assets, LP  
                          444 Executive Center Blvd., Ste. 238  
                          El Paso, 79902

or such other addresses as the parties may designate to each other in writing from time to time.

**XIII. Law Governing Agreement**

The laws of the State of Texas shall govern the validity, performance, interpretation and enforcement of this Agreement. Venue shall be in the courts of El Paso County, Texas.

**XIV. Interpretation**

The City and Developer agree that this Agreement has been freely negotiated by both parties and that in any controversy, dispute or contest over the meaning, interpretation, validity or enforceability of this Agreement, or any of its terms or conditions, there shall be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

**XV. Severability**

If any provision of this Agreement is prohibited by law or otherwise determined to be illegal, invalid or unenforceable in a court of competent jurisdiction, such provision shall not affect the validity of the remaining provisions of this Agreement; instead, the Agreement shall be construed as if it did not contain the illegal, invalid or unenforceable provision(s) and the rights and obligations of the parties shall be construed and enforced accordingly.

**XVI. Future Maintenance Work**

The City shall be responsible for any maintenance or repairs of the pedestrian right-of-way improvements. The City's obligations for such work shall begin upon completion of the Project as defined by the Agreement and upon expiration of Developer's warranty. The City agrees that Developer is not responsible for any maintenance and repair of such work after expiration of Developer's warranty.

**XVII. Entire Agreement**

This Agreement constitutes and expresses the entire agreement between the parties and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement shall not be amended or modified except by written instrument signed by both parties.

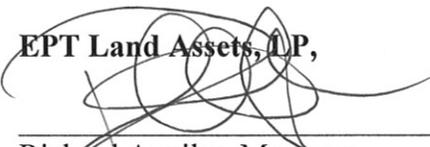
**XVIII. Authority to Contract**

All persons that are signatories to this Agreement represent that they have authority to enter into this Agreement and bind their respective organizations thereto.

**THE CITY OF EL PASO:**

\_\_\_\_\_  
Joyce A. Wilson  
City Manager

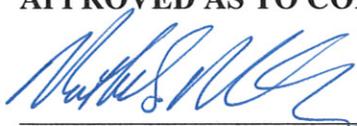
**EPT Land Assets, LP,**

  
\_\_\_\_\_  
Richard Aguilar, Manager  
EPT Land Assets, LP, a Texas limited partnership, by it's General Partner EPT Land Acquisition, LLC, a Texas limited liability company

**APPROVED AS TO FORM:**

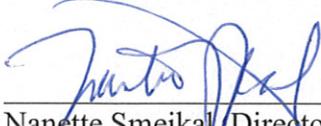
  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Mathew McElroy, Deputy Director  
Development Services Dept.-Planning Division

*(Signatures continued on following pages)*

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Nanette Smejkal, Director  
Parks and Recreation Department

**ACKNOWLEDGMENTS**

STATE OF TEXAS            )  
  )  
COUNTY OF EL PASO        )

This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_, 2010,  
by \_\_\_\_\_ as \_\_\_\_\_ of the **City of El Paso.**

My Commission Expires:

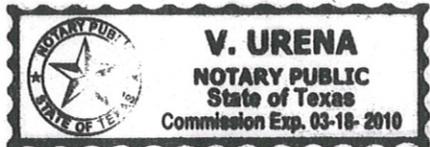
\_\_\_\_\_  
Notary Public, State of Texas  
Notary's Printed or Typed Name:

STATE OF TEXAS            )  
  )  
COUNTY OF EL PASO        )

This instrument was acknowledged before me on the 6<sup>th</sup> day of JANUARY, 2010,  
by Richard Aguilar as Manager of **EPT Land Acquisition, LLC the general partner of EPT Land Assets, LP.**

My Commission Expires:

  
\_\_\_\_\_  
Notary Public, State of Texas  
Notary's Printed or Typed Name: V. URENA



Being a portion of Lot 7, Block 16,  
Sandstone Ranch Estates Unit Five,  
City of El Paso, El Paso County, Texas  
Prepared for: EPT Real Estate  
August 19, 2009  
(30' Pedestrian Easement)

EXHIBIT A

### METES AND BOUNDS DESCRIPTION

Description of a parcel of land being a portion of Lot 7, Block 16, Sandstone Ranch Estates Unit Five as recorded in Clerk's file No. 20090055892, Real Property records City of El Paso, El Paso County, Texas and being more particularly described by metes and bounds as follows:

Commencing for reference at the centerline intersection of Manuel Gameros Dr. and Raphael Serna Ln., Thence along the centerline of Manuel Gameros Ln. South  $54^{\circ}19'07''$  West a distance of 78.35 feet to a point; Thence leaving said centerline South  $35^{\circ}40'53''$  East a distance of 26.00 feet to a point on the southwesterly right of way line of Manuel Gameros Dr. for the "TRUE POINT OF BEGINNING",

Thence leaving said line South  $35^{\circ}40'53''$  East a distance of 104.87 feet to a point on the southwesterly line on lot 7, block 16, Sandstone Ranch Estates Unit Five;

Thence along said line South  $54^{\circ}19'07''$  West a distance of 30.00 feet to a point;

Thence leaving said line North  $35^{\circ}40'53''$  West a distance of 104.87 feet to a point on the southerly right of way line of Manuel Gameros ;

Thence along said line North  $54^{\circ}19'07''$  East a distance of 30.00 feet to the "TRUE POINT OF BEGINNING" and containing 3,146.0055 Sq. Ft. or 0.0722 Acres of land more or less.

Note: Not a ground survey, Bearings based on plat of Sandstone Ranch Estates Unit Five, recorded in clerk's file no. 20090055892, Real property records of El Paso County, Texas

  
Ron R. Conde  
R.P.L.S. No. 5152  
Job No.809-38



# EXHIBIT B

## COST ESTIMATE FOR CONSTRUCTION OF THE PROJECT

ITEM NO.	UNIT OF MEASURE	DESCRIPTION	UNIT PRICE	QUANTITY	INSTALLATION	AMOUNT
1	SQ. FEET	BERMUDA GRASS SOD	\$0.50	219,450	\$21,945.00	\$131,670.00
2	EACH	IRRIGATION SYSTEM	\$59,000.00	1	\$11,800.00	\$70,800.00
3	SQ. FEET	7' CONCRETE SIDEWALK	\$7.50	7155		\$53,663.00
4	EACH	WATER METER	\$2,000.00	1	\$400.00	\$2,400.00
5	EACH	ELECTRIC METER	N/A	1	\$15.00	\$15.00
6	CU. YD.	EARTHWORK	\$5.50	7,731	\$8,504.00	\$51,025.00
					10% CONTINGENCY	\$30,957.00
					<b>TOTAL</b>	<b>\$340,530.00</b>
<b>PEDESTRIAN ROW IMPROVEMENTS</b>						
7	SQ. FEET	12' SIDEWALK	\$20.00	131		\$2,620.00
8	EACH	BOLLARDS	\$100.00	4		\$400.00
9	L.F.	HEADER CURB	\$12.00	220		\$2,640.00
10	EACH	SHRUBS	\$30.00	22	\$132.00	\$792.00
11	EACH	TREES	\$250.00	6	\$300.00	\$1,800.00
12	SQ. FEET	3/4" FRANKLIN RED SCREENING	\$0.26	90	\$50.00	\$73.40
13	EACH	BACKFLOW PREVENTOR	\$1,000.00	1	\$200.00	\$1,200.00
14	EACH	WATER METER	\$1,000.00	1	\$200.00	\$1,200.00
15	EACH	CONTROLLER	\$500.00	1	\$100.00	\$600.00
16	EACH	1" REMOTE CONTROL VALVE	\$200.00	1	\$40.00	\$240.00
17	EACH	PRESSURE REGULATOR	\$20.00	1	\$4.00	\$24.00
18	L. F.	1" PVC CLASS 200	\$0.20	200	\$8.00	\$48.00
19	L. F.	2.5" PVC CLASS 200	\$0.60	15	\$1.80	\$10.80
20	EACH	DRIP EMITTER	\$10.00	14	\$28.00	\$168.00
					SUB TOTAL	\$11,816.20
					10% CONTINGENCY	\$1,181.62
					<b>TOTAL</b>	<b>\$12,997.82</b>

DEVELOPMENT SERVICES DEPARTMENT  
PLANNING DIVISION

MEMORANDUM

**DATE:** January 11, 2010

**TO:** The Honorable Mayor and City Council  
Joyce A. Wilson, City Manager

**FROM:** Raul Garcia, Planner

**SUBJECT:** **Developer Participation Agreement-Pedestrian ROW  
within Sandstone Ranch Estates Unit Five subdivision**

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The City Council on August 4, 2009 authorized the City Manager to sign an Amendment and Partial Release and Satisfaction of Restrictions, Conditions, and Reservation from Exceptions to Conveyance and Warranty removing certain restrictions from the Warranty Deed, dated January 25, 2006, which conveyed property to EPT Land Assets, LP and to sign and accept on behalf of the City a Warranty Deed conveying fee simple from EPT Land Assets, LP to the City certain property which will be used as a 30' wide pedestrian ROW. The Planning Division has **drafted a developer participation agreement** between the City of El Paso and EPT Land Assets, L.P. to allow the City to participate in the cost of construction of improvements within the 30' wide pedestrian ROW located in Sandstone Ranch Estates Unit Five subdivision.

The City Council determined that the Developer Participation Agreement protects the best interest, health, safety and welfare of the public in general; and that the agreement will have no effect on the natural environment, social economic conditions, and property values in the vicinity and the city as a whole.



Mayor  
John F. Cook

**City Council**

*District 1*  
Ann Morgan Lilly

*District 2*  
Susie Byrd

*District 3*  
Emma Acosta

*District 4*  
Carl L. Robinson

*District 5*  
Rachel Quintana

*District 6*  
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City Manager  
Joyce A. Wilson