# CITY OF EL PASO, TEXAS
# AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM

**DEPARTMENT:** **Engineering & Construction Management**

**AGENDA DATE:** **April 12, 2011**

**CONTACT PERSON/PHONE:** **R. Alan Shubert, City Engineer**

**DISTRICT AFFECTED: 1**

**SUBJECT:**

Item is to request approval of a resolution authorizing the City Manager to execute, on behalf of the City of El Paso, a contract of sale for the acquisition of a 15,788 s.f. parcel of land (a portion of Tract 3A, Nellie Mundy Survey No. 240) to be used as right-of-way for the widening and extension of Isela Rubalcaba Street, adjacent to the Westside Sports Complex.

**BACKGROUND / DISCUSSION:**

The referenced project consists of the street widening and improvement of a 2,008 linear ft. section of Isela Rubalcaba Street, between Desert Boulevard East and the future Spur 276. The City currently owns the northern 35 ft. wide portion of Isela Rubalcaba. This proposed acquisition will be one of two southern portions required to widen the street to a 70 ft. minor arterial as designated in our *Major Thoroughfare Plan.*

Improvements will include paving, curb & gutter, sidewalks, parkways, and raised medians. The seller has agreed to convey the property to the City in consideration for the City funding 100% of the roadway construction. Seller is prepared to move forward immediately to closing.

**PRIOR COUNCIL ACTION:**

Mayor and Council have not previously considered this item.

**SOURCE OF FUNDING:**

| | |
|---|---|
| Design: | 2006 CO's: |
| Construction: | TxDOT funding |
| Project: | PCP06ST022E |

**BOARD / COMMISSION ACTION:**

(N/A)

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**********REQUIRED AUTHORIZATION**********

DEPARTMENT HEAD: Irene Ng

*Informational copy to Deputy City Manager, Health & Safety*

RCAIselaRubalcabaParcelOne

**RESOLUTION**

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

THAT the City Manager be authorized to sign the Contract of Sale by and between the **CITY OF EL PASO** and **PHILIP GADDY AND GLENNA GADDY** for the acquisition of property by the City for use as public right of way in connection with the Isela Rubalcaba Extension Project, and that the City Manager be authorized to sign any and all other documents approved by the City Attorney or his designee, which are necessary and proper to consummate the sale.

**ADOPTED this _____ day of _____ 2011.**

THE CITY OF EL PASO

_____
John F. Cook
Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

_____
Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
for R. Alan Shubert, P.E.
City Engineer

Doc # 63084 Resolution Contract of Sale Rubalcaba Drive / Gaddy
COSB

**STATE OF TEXAS** §
§ **CONTRACT OF SALE**
**COUNTY OF EL PASO** §

This Agreement is entered into as of the _____ day of _____, 2011 by and between the **CITY OF EL PASO,** hereinafter referred to as the "City," and **PHILIP GADDY AND GLENNA GADDY**, hereinafter referred to as the "Seller."

**NOW, THEREFORE**, for and in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Description of Property. The Seller hereby agrees to sell and convey and the City hereby agrees to acquire free and clear of any liens or encumbrances, the following real property located in El Paso County, Texas:

> A 0.363 acre parcel of land out of Tract 3-A, NELLIE D. MUNDY SURVEY NO. 240, in the City of El Paso, El Paso County, Texas, being more particularly described by metes and bounds in Exhibit "A" attached hereto and made a part hereof for all purposes; and

together with any interest of the Seller in (i) all improvements, if any, and (ii) all right, title and interest of the Seller in and to any easements, appurtenances, and rights-of-way, and all interests in, on or to, any land, highway, street or alley, in, on, across, in front of, abutting, or adjoining any such real property, all of such property, hereinafter collectively referred to as the "Property."

2. Consideration. Seller agrees to convey the Property in fee title to the City for and in consideration of the City's agreement to have the Property used as public roadway as part of the extension of Rubalcaba Drive, and to have the grading, compaction, paving, and curbing of the right of way improved at the City's cost.

3. Conditions to City's Obligations. The obligations of the Seller hereunder to consummate the transaction contemplated herein are subject to the satisfaction of each of the following conditions, any of which may be waived, in whole or in part, in writing by the City, at or prior to Closing.

3.1 Simultaneous Closing. There must be a simultaneous closing on the property described on Exhibit "B" owned by Tropicana Development, Inc.

3.2 Title Insurance. Within ten (10) working days after the date of execution of this Agreement, the City at its expense will order a title commitment ("Commitment"), accompanied by copies of all recorded documents affecting the Property for the issuance of an Owner's Policy of Title Insurance with respect to the Property, in an amount to be decided by the City ("Owner's Policy").

3.3 Title Issues. The City must be satisfied with the title to the Property, that Seller has the authority to execute the Special Warranty Deed of conveyance free of any restrictions, obligation or cloud on the title in the legal judgment of the City's attorney. The Seller must either (i)

promptly eliminate or modify all unacceptable matters to the reasonable satisfaction of the City; or (ii) notify City in writing of any of the objections raised by City that Seller cannot or will not cure. If Seller notifies City in writing that Seller cannot cure the objection, City shall have 30 days from receipt of the written notice within which to terminate this Contract or City will be deemed to have waived its objections to title except for those objections relating to outstanding liens against the Property. The City has no obligation under this paragraph or elsewhere in this Agreement to object to any monetary liens on the Property, and the City has no obligation to close unless such liens are removed in their entirety as a condition to the Closing.

4. Representations and Warranties of Seller. The Seller hereby represents, covenants, and warrants to the City, as follows:

4.1 Parties in Possession. There are no parties in possession of any portion of the Property as lessees, tenants at sufferance, or otherwise.

4.2 Restrictions and Obligations. Any Declaration of Covenants, Contracts or amendments to Contracts, and Ordinances that exist of record or otherwise effect the Property will either be satisfied by Seller to the satisfaction of the City's legal counsel, or released by Seller 10 days prior to Closing.

4.3 Legal and Authorized Transactions. No person or persons own an interest in the fee title in the Property other than the Seller and that the joinder of no other third party shall be required to consummate this transaction.

4.4 Mechanic's Lien. To the best of Seller's knowledge and belief, no action has been taken, suffered or permitted by or on behalf of the Seller, the effect of which would be to establish or cause the inception or priority of any mechanic's or materialmen's lien, statutory, constitutional or otherwise, or other lien, charge or encumbrance upon the Property or any part thereof or interest therein. Except as expressly disclosed in the documents relating to this transaction, the Seller has not entered into any contracts or agreements relating to the use of ownership of the Property or by which any person or entity agreed to provide labor, services or materials in regard to the Property or the business of the Seller.

4.5 Litigation. To the best of Seller's knowledge and belief, there is no pending litigation or litigation contemplated by Seller before or by any court of law pertaining to the Property or which involve incidents occurring on the Property including, but not limited to, claims of damage to persons or property and no third party has threatened any such litigation.

4.6 Bills Paid. At closing, there will be no unpaid bills or claims in connection with any repair or operation of the Property.

4.7 Compliance With Law. To the best of Seller's knowledge and belief, the Property is in compliance with all applicable laws, ordinances, rules and regulations of any Government or any agency, body or subdivision, including any environmental issues related to the Seller's activities thereof.

4.8 Taxes. No state or municipal taxes are due with respect to the Property and no liens for such taxes are in effect against the Property, except as set forth on the Title Commitment.

4.9 Pre-Closing Claims. To the best of Seller's knowledge and belief, there are no pending or threatened claims being made by any third person or entity against Seller arising from or connected with the use of the Property or its present or past condition.

(a) The Seller agrees that the City's acceptance of title to the Property under the conveyance documents should not create any liability on the City's part to third parties that have claims of any kind against the Seller in connection with the Property. The City hereby expressly disclaims any and all liability to third parties that have any claims against the Seller. The City will not assume or agree to discharge any liabilities pertaining to the Property that occurred or accrued prior to the date of Closing.

(b) The Seller agrees to indemnify and hold the City harmless from and against any and all claims, injuries, liabilities, losses, damages, or expenses, including attorneys fees and court costs, pertaining to claims arising out of the Property that accrued prior to and arising from events that occurred prior to the date of Closing, and of which Seller has actual knowledge as of the date of Closing, including those arising from any of the following: (i) testing or inspection obligations required by federal or state environmental agencies, including without limitation any required after the date of Closing; (ii) pending environmental investigations or cases by the Texas Commission on Environmental Quality known to the Seller; or (iii) the acts or omissions of the Seller on the Property. The Seller and the City each agree to promptly inform other party of any correspondence, directive, inquiry, demand, request, or similar communication from any federal or state environmental agency relating to the Property, to reasonably cooperate with the other party on the response to and handling of such communication and any related proceeding, and allow the reasonable participation of the other party in connection with the same.

4.10 Authority. The Seller has full right, power and authority to convey the Property to the City and to consummate this transaction as provided in this Contract without the joinder of any other person or entity.

4.11 Title. The Seller has good and indefeasible title to a fee simple estate in the Property, subject to no liens, charges, encumbrances or exceptions other than those shown on the Title Commitment.

4.12 Condition of Property Prior to Closing. Prior to Closing, the Seller shall not create or permit to be created any easement or other encumbrance on the Property without the prior written consent of the City.

4.13 Knowing Misrepresentation. The Seller shall indemnify and hold the City harmless from and against any losses, damages, costs or expenses (including attorneys' fees) incurred by the City as a direct or indirect result of (i) a knowing breach of any representation or warranty of the Seller contained in this document, or (ii) any breach or default by the Seller under

any of the covenants or agreements contained in this document to be performed by the Seller, all of which shall survive the Closing hereof.

4.14 Survival. All representations, warranties, covenants and agreements of the Seller made in this document, including without limitation any indemnity obligations, shall survive the execution and delivery hereof and of the Special Warranty Deed as well as the Closing hereunder, until such time as all of the obligations of the signatories hereto shall have lapsed in accordance with their respective terms, if and as applicable, or shall have been discharged in full.

5. Closing. The closing of this transaction ("Closing") shall take place at the offices of Lawyers Title of El Paso, Inc., 301 E. Yandell, El Paso, Texas 79902, or another Title Company of City's choosing (the "Title Company"). The Closing shall occur on or before ten (10) days after the City Council has approved this Agreement, unless more time is needed to obtain clear title, in which case the City may unilaterally extend the Closing for an additional ninety (90) days.

5.1 Real Property Taxes. The Seller agrees to pay any past due taxes on the Property. Seller agrees to pay the taxes due on the Property for the year 2011, prorated through the day of closing. In the event that for any reason the 2011 taxes cannot be separately split out and paid on the Property, Seller agrees to execute an agreement with City binding Seller to pay all of the 2011 taxes on the Property.

5.2 Closing Costs.

(a) All recording fees arising from the recordation of documents necessary to show good title to the Property shall be paid by the City.

(b) Premiums and other charges for the issuance of the Owner's Policy of Title Insurance for the Property shall be paid by the City.

(c) Escrow fees, if any, shall be paid by the City.

5.3 Seller's Obligations. At Closing, the Seller shall deliver to the City a duly executed and acknowledged Special Warranty Deed to the Property, free and clear of any and all liens, encumbrances, conditions, easements, assessments, and restrictions, except for (i) ad valorem taxes for the year of Closing which shall be prorated to the date of Closing, and (ii) exceptions set forth in the Title Policy which the City has expressly approved.

5.4 Other Obligations. Each party shall do all other acts, or deliver any other instruments or documents required or helpful to be done or delivered, in order to consummate this transaction.

5.5 Special Provisions. Seller shall remove Seller's personal property, if any, from the Property before closing.

6. Post-Closing Construction: Water stub-outs. After the Closing but before the roadway is paved, the City agrees to give Seller the opportunity upon 3 working days notice to

install at Seller's expense and with Seller's contractor, up to 3 stub-outs for water along the frontage of Seller's remaining property. The City shall have the right to recommence its work on the street improvements including the paving within 7 working days from the date of its notice to Seller, even if Seller has not completed the installation of the stub-outs.

7. Default.

7.1 Breach by Seller. In the event that the Seller shall fail to fully and timely perform any of Seller's obligations under this Agreement, or shall fail to consummate the sale of the Property for any reason, except the City's default, or the termination of this Agreement in accordance with its terms, the City may enforce specific performance of this Agreement, and recover its reasonable attorney's fees in enforcing specific performance, as its sole and exclusive remedy. Notwithstanding the foregoing, this limitation of liability does not apply to Seller's breach of Seller's representations under paragraph 4.13 above.

7.2 Breach by City. Except because of the Seller's default, or the termination of this Agreement in accordance with its terms, in the event that City shall fail to fully and timely perform any of its obligations under this Agreement, the following shall apply. Due to the difficulty of assessing the Seller's actual damages as a result of such breach by City, the Seller shall have a right to receive $500.00 as independent consideration, such sum being agreed upon as liquidated damages for the failure of the City to perform the duties, liabilities and obligations imposed upon it by the terms and provisions of this Agreement, and the Seller agrees to accept and take such cash payment as Seller's total, reasonable damages and relief and as the Seller's sole, exclusive remedy hereunder in such event.

8. Miscellaneous.

8.1 Notice. Any notice, demand, direction, request, or other instrument authorized or required by this Agreement to be given to or filed with either party, shall be deemed to have been sufficiently given or filed for all purposes, if and when personally delivered or sent by certified mail, postage prepaid, return receipt requested, to the address specified below or at such other address as may be designated in writing by the parties:

| | | |
|---|---|---|
| Seller: | Phil Gaddy<br>2025 San Pedro Drive NE<br>Albuquerque, NM 87110 | |
| City: | City Manager<br>City of El Paso<br>2 Civic Center Plaza<br>El Paso, Texas 79901-1196 | Copy to: Risher S. Gilbert<br>201 E. Main Street, Suite 1501<br>El Paso, TX 79902 |

9. Entire Agreement/Governing Law. **This Agreement constitutes the entire agreement between the parties, and supersedes all prior agreements and understandings, written or oral, regarding the subject matter of this Agreement, and may be amended or**

**supplemented only by an instrument in writing, executed by the party against whom enforcement is sought. This Agreement shall be governed in all respects, including validity, interpretation and effect, by and shall be enforceable in accordance with the laws of the State of Texas.**

9.1 Time. Time is of the essence of this Agreement and each and every provision hereof.

9.2 Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portion shall not in any way be affected or impaired.

9.3 Survival of Provisions. The terms contained in this Agreement, including without limitation, representations, warranties, covenants and agreements of the parties, shall survive the Closing and shall not be merged therein. In case any one or more of the provisions contained in this Contract for any reason is held invalid, this invalidity will not affect any other provision of this Contract, which will be construed as if the invalid or unenforceable provision had never existed.

9.4 Binding Effect. This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

9.5 Compliance. In accordance with the requirements of Section 2B of the Texas Real Estate License Act, the City or its representatives is hereby advised that it should be furnished with or obtain a policy of title insurance or have an abstract covering the Property examined by an attorney of its own selection.

**SELLER:**

**Philip Gaddy**

**SELLER:**

**Glenna Gaddy**

**ACKNOWLEDGEMENT**

**STATE OF TEXAS )**
**)**
**COUNTY OF EL PASO )**

This instrument was acknowledged before me on the 25 day of MARCH, 2011 by Philip Gaddy and Glenna Gaddy.

My commission expires:
NOVEMBER 8, 2013

Notary Public, State ~~of Texas~~ NEW MEXICO

**EXECUTED by the City of El Paso to be effective as of the ___ day of _____, 2011.**

**CITY OF EL PASO**

By: _____
Joyce Wilson
City Manager

APPROVED AS TO FORM:

_____
Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
for Alan Shubert
City Engineer
~~Development & Infrastructure Services~~
ENGINEERING & CONSTRUCTION MANAGEMENT

**ACKNOWLEDGEMENT**

**STATE OF TEXAS** )
)
**COUNTY OF EL PASO** )

This instrument was acknowledged before me on the ____ day of _____, 2011 by Joyce Wilson, City Manager of the City of El Paso.

My commission expires:

_____
Notary Public, State of Texas

EXHIBIT "A"

## METES AND BOUNDS DESCRIPTION

**A 0.363 ACRES (15,788 S.F.) OF LAND OUT TRACT 3A OF THE NILLIE D MUNDY SURVEY No. 240, CITY OF EL PASO, EL PASO COUNTY, TEXAS, BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:**

**COMMENCING** at a recovered 1 ¼" pipe at the southwest corner of survey No. 240 **Thence,** North 06°22'18" East, a distance of 2061.57 feet to a recovered 5/8" rebar on the northerly line of Tract 3A (described February 24, 1995, in Book 2857, Page 1803, and the southerly line of the north ½ of Survey 240 described November 14, 1955, in Book 1272, Page 554, Deed Records, El Paso County, Texas) from which a TX Dot brass cap on the proposed easterly right-of-way line of Loop 375, bears South 29°25'48" West, a distance of 456.04 feet, said 5/8" rebar being the **POINT OF BEGINNING** of this description;

**THENCE,** South 89°59'00" East, a distance of 441.27 feet, to a 5/8 inch rebar with an aluminum cap marked "FXS RPLS 2198" set on the westerly boundary line of a certain parcel of land described July 23, 2007, in File Clerk's No. 20070072034, Deed Records, El Paso County, Texas;

**THENCE,** South 00°07'47" West, along said boundary line, a distance of 35.00 feet, to a set 5/8 inch rebar with an aluminum cap marked "FXS RPLS 2198",

**THENCE,** North 89°59'00" West, a distance of 460.93 feet, to a 5/8 inch rebar with an aluminum cap marked "FXS RPLS 2198" set on the easterly Right-of-Way line of proposed Loop 375 (Right-of-Way varies);

**THENCE,** North 29°25'48" East, along the proposed easterly right-of-way of Loop 375 (right-of-way varies) a distance of 40.18 feet, to the **POINT OF BEGINNING,** containing 0.363 Acres (15,788 S.F.) of land, more or less.

EXHIBIT "B"
THE TROPICANA DEVELOPMENT, INC. PROPERTY

**METES AND BOUNDS DESCRIPTION**

**A 0.670 ACRES (29,183 S.F.) OF LAND OUT TRACT 3A2 OF THE NILLIE D MUNDY SURVEY No. 240, CITY OF EL PASO, EL PASO COUNTY, TEXAS, BEING MORE PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:**

**COMMENCING** at a recovered 1 ¼" pipe at the southwest corner of survey No. 240 **Thence**, North 06°22'18" East, a distance of 2061.57 feet to a recovered 5/8" rebar on the northerly line of Tract 3A (described February 24, 1995, in Book 2857, Page 1803, and the southerly line of the north ½ of Survey 240 described November 14, 1955, in Book 1272, Page 554, Deed Records, El Paso County, Texas) from which a TX Dot brass cap on the proposed easterly right-of-way line of Loop 375 bears, South 29°25'48" West, a distance of 456.04 feet, **Thence**, South 89°59'00" East, along common boundary line of Tracts 1 and Tract 3, Nellie D Mundy Survey No. 240, a distance of 441.27 feet to a set 5/8" rebar with aluminum cap marked "FXS RPLS 2198", from which a found 5/8' rebar bears, South 00°07'47" West ~ 1.32 feet, said 5/8" rebar with aluminum cap marked "FXS RPLS 2198" being the **POINT OF BEGINNING** of this description;

**THENCE**, South 89°59'00" East, continuing along said common boundary line, a distance of 833.79 feet, to a 5/8 inch rebar with an aluminum cap marked "FXS RPLS 2198" set on the easterly boundary line of a certain parcel of land described July 23, 2007, File Clerk's No. 20070072034, Deed Records, El Paso County, Texas;

**THENCE**, South 00°07'00" West, a distance of 35.00 feet, to a set 5/8 inch rebar with an aluminum cap marked "FXS RPLS 2198";

**THENCE**, North 89°59'00" West, a distance of 833.80 feet, to a 5/8 inch with an aluminum cap marked "FXS RPLS 2198" rebar set on the westerly boundary line described July 23, 2007, File Clerk's No. 20070072034, Deed Records, El Paso County, Texas.

**THENCE**, North 00°07'47" East, along said boundary line, a distance of 35.00 feet, to the **POINT OF BEGINNING**, containing 0.670 Acres (29,183 S.F.) of land, more or less.