

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

DEPARTMENT: Development Services Department/Planning Division

AGENDA DATE: Introduction 04-15-08; Public Hearing 04-22-08

CONTACT PERSON/PHONE: Esther Guerrero, Planner – 541-4720

DISTRICT(S) AFFECTED: #8

SUBJECT:

An ordinance granting a Special Privilege to ONIHC, L.L.C. permitting the encroachment of a sidewalk café onto a portion of public right-of-way located at 504 West San Antonio Avenue. SPL07-00018, District 8

BACKGROUND / DISCUSSION:

See attached information.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

On January 30, 2008 the Development Coordinating Committee recommended approval.

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: *Madeline for Patricia Abanto*

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

CITY CLERK DEPT.
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ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO ONIHC, L.L.C. PERMITTING THE ENCROACHMENT OF A SIDEWALK CAFE' ONTO A PORTION OF PUBLIC RIGHT-OF-WAY LOCATED AT 504 WEST SAN ANTONIO AVENUE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign, on behalf of the City of El Paso, a Special Privilege upon the following terms to ONIHC, L.L.C. (hereinafter referred to as "Grantee"), for the property located at 504 W. San Antonio Avenue:

1. This Special Privilege shall be in a form, which is attached hereto and incorporated as Exhibit "A;"
2. The Special Privilege is to permit the owner of property located at 504 W. San Antonio Avenue, as more particularly described by metes and bounds in the attached Exhibit "B", to encroach onto a portion of public right-of-way with one (1) sidewalk café, as more particularly shown in the attached and incorporated Exhibit "C";
3. As consideration for this Special Privilege, Grantee shall pay the City of El Paso the sum set forth in Section 3 of Exhibit "A," subject to the terms and conditions of this ordinance and Special Privilege; and
4. This Special Privilege shall be for a term of five (5) years with two renewal options, each for an additional five (5) year period.

PASSED AND APPROVED this _____ day of _____, 2008.

THE CITY OF EL PASO

ATTEST:

John F. Cook
Mayor

Richarda Duffy-Momsen
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Lupe Cuellar
Assistant City Attorney

Patricia D. Adauto
Patricia D. Adauto, Deputy City Manager
Development and Infrastructure Services

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by this Special Privilege.

3. CONSIDERATION. As consideration for this Special Privilege, Grantee shall pay to the City the fee of Three Hundred and No/100 Dollars (\$300.00) per year for a five (5) year total of One Thousand Five Hundred and No/100 Dollars (\$1,500.00); the annual fee shall be due prior to execution of this Special Privilege by the El Paso City Council. The advance payment shall be payable to the "City of El Paso" and delivered to the Development Services Department. If the Special Privilege is disapproved by the El Paso City Council, the City shall make full refund of the advance payment within fifteen (15) days of the denial action.

Grantee expressly accepts and agrees that the fee set forth herein is subject to any and all future amendments to Section 15.08.120 of the El Paso Municipal Code. Grantee expressly agrees to pay any additional amounts as consideration for this Special Privilege, which could result from a re-computation or assessment of fees pursuant to enactment of future amendments to 15.08.120. This Special Privilege is granted on the condition that Grantee shall pay for all costs associated with the outdoor café and as well as all costs for the restoration of the Premises.

4. USE OF PROPERTY. This Special Privilege is granted solely for the encroachment onto public right-of-way of a sidewalk café. As an express condition of this Special Privilege, and not as a mere covenant, Grantee agrees that the sidewalk café must contain removable chairs and related appurtenances, and further agrees to restore the Premises to its original state upon removal of any of the encroachments stated herein. This Special Privilege shall not be construed to waive any City permit requirements. Grantee shall be responsible for all maintenance. Grantee, at no cost to the City, shall clean up all litter and debris within the Premises, leaving the public right-of-way in a clean and orderly condition at all times when not in use as a sidewalk café. The Premises shall be temporarily fenced using the materials and methods approved by the concurrence of the Engineering and Fire Departments with a minimum clearance width of five (5) feet of unobstructed sidewalk for pedestrian traffic. Nothing contained herein shall grant or be construed to grant any real property interest to the Grantee, nor shall it give rise to any vested right in the Grantee, his assigns or successors in interest who shall not have a cause of action for damages upon revocation of this Special Privilege.

Nothing contained herein shall be construed to imply that the City is involved in

the design, construction, maintenance or repair of the encroachments provided for herein.

5. **IMPROPER USE.** This Special Privilege shall not permit or be construed to permit any other private use of the City's right-of-way, which impairs its function as a right-of-way. Grantee shall not construct any additional improvements, or make any additions or alterations on or over the City right-of-way, without the prior written consent of the El Paso City Council.

6. **REPAIRS.** Grantee shall keep the property, Structure, and Premises in good condition and repair and in a clean, orderly and attractive condition during the term of this Special Privilege. Grantee shall be responsible for all maintenance of the Structure and Premises and shall repair any damage to the Premises regardless of the cause of such damage, at Grantee's sole expense.

7. **INDEMNITY.** As a condition of the Special Privilege, Grantee shall indemnify, defend and hold harmless the City, its officers, agents, servants and employees from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation for injury or death of any person, or for damage to any property, arising out of or in connection with Grantee's use of the public right-of-way, regardless of whether such injuries, death, or damages are caused in whole or in part by the negligence of the City.

8. **LIABILITY INSURANCE.** Grantee shall provide public liability insurance for personal injuries and death growing out of any one accident or other cause in a minimum amount of Two Hundred Fifty Thousand and No/100 Dollars (\$250,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one accident or other cause. These amounts are not a limitation upon the Grantee's agreement to indemnify and hold the City harmless.

Grantee shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and

Grantee, his officers, agents, servants or employees. All policies shall name the City of El Paso, its officers, agents, servants and employees as additional insureds to the full amount of the policy limits.

No special privilege license shall be granted by El Paso City Council until Grantee files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Development Services Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the term of the Special Privilege shall be grounds for cancellation of this Special Privilege.

9. CANCELLATION. Should the City at any time or for any reason decide that the right-of-way onto which any of the encroachments are needed for public use, the City may upon thirty days (30) written notice, cancel this Special Privilege at no cost to the City and may take possession of the public right-of-way. All rights of the Grantee in the Premises shall then be terminated. Grantee may cancel this Special Privilege, for any reason, upon thirty days (30) prior written notice to the City, and all rights of the Grantee shall then be terminated.

In addition, if, for a period of six (6) months, Grantee ceases to use or occupy the property for the purposes herein contemplated, or if Grantee defaults in any of his obligations under this Special Privilege and fail to correct such defaults within thirty days (30) after written notice to do so; the City may cancel this Special Privilege and take possession. All rights of the Grantee on the City right-of-way shall then terminate.

Any waiver by the City of any breach of any of Grantee's obligations shall not be deemed a continuing waiver, and shall not prevent the City from exercising any remedy it may have for any succeeding breach of the same or another obligation of the Grantee.

Upon termination of this Special Privilege for whatever reason, all encroachments shall become the property of the City and shall, at the option of the City, be removed by the Grantee without cost to the City.

10. LIENS AND ENCUMBRANCES. Grantee shall defend and indemnify the City against any liability and loss of any type arising from any lien or encumbrance on the property that arises or is alleged to have arisen from Grantee's use of the Premises.

11. ASSIGNMENT. Grantee shall not assign this Special Privilege without

prior written consent of the El Paso City Council.

12. MISCELLANEOUS.

- a. SIGNS: This Special Privilege does not grant any permission to erect signage, but, rather, only authorizes an encroachment upon public right-of-way as described herein. Permission to erect signage must be obtained by Grantee pursuant to applicable City Code and ordinance provisions and subject to the restrictions and requirements contained therein.
- b. RIGHT OF ENTRY AND INSPECTION: The City's authorized representative shall have the right to enter upon the property at all reasonable times for the purpose of inspecting the same and determining compliance with the terms of this Special Privilege.
- c. LAWS AND ORDINANCES: Grantee shall comply with all statutes, laws, codes and ordinances applicable to Grantee's construction, maintenance and use of the Premises, except as specifically provided by the grant of this Special Privilege. This Special Privilege shall not grant permission for Grantee to erect the Premises without first having obtained any required building permits from the City Development Services Department. In addition, Grantee shall obtain any and all other required permits and inspections and shall pay the necessary permit fees.
- d. SUCCESSORS AND ASSIGNS: All of the terms, provisions, covenants and conditions of this Special Privilege shall inure to the benefit and be binding upon the parties, their successors and assigns. This Special Privilege is a restriction, condition and covenant running with the property known as 504 W. San Antonio Avenue and a charge and servitude thereon, and shall bind the Grantee and his successors in title. Any further lease or conveyance of this property known as 504 W. San Antonio Avenue shall contain this restriction, condition and covenant and shall embody this Special Privilege by express reference.
- e. NOTICES: All notices provided for herein shall be sufficient if sent

by certified or registered mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

City of El Paso
Attn: Joyce Wilson, City Manager
#2 Civic Center Plaza, 10th Floor
El Paso, Texas 79901-1196

with copy to: City of El Paso
Attn: City Clerk
#2 Civic Center Plaza, 2nd Floor
El Paso, Texas 79901-1196

and: ONIHC, L.L.C.
Attn: Jose Adan Fong
504 W. San Antonio, Suite A
El Paso, Texas 79901

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

- f. ENTIRE AGREEMENT: This document contains all of the agreements between the parties and may not be modified, except by an agreement in writing signed by both parties.
- g. SEVERABILITY: Every provision of this Special Privilege is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Special Privilege.
- h. LAW GOVERNING: The laws of the State of Texas shall govern the validity, performances and enforcement of this Special Privilege and if legal action is necessary to enforce it, exclusive venue shall be in El Paso County, Texas.
- i. The Director of Development Services or that person's designee is the principal City official responsible for the administration of this Special Privilege and Grantee recognizes that questions regarding the interpretation or application of this ordinance shall be referred to the Director of Development Services or designee.

13. RESTRICTIONS AND RESERVATIONS. This Special Privilege is subject

13. **RESTRICTIONS AND RESERVATIONS.** This Special Privilege is subject to all rights-of-way, easements, dedications, restrictions, reservations and other encumbrances of record and running with the land. If, at any time during the initial term of this Special Privilege, or any extension thereof, any such rights-of-way, easements, dedications, restrictions, reservations and other encumbrances of record and running with the land, preclude, interrupt or interfere with Grantee's use of the Premises, Grantee shall have the right to terminate this Special Privilege upon giving the City prior written notice of its intention to do so.

14. **EFFECTIVE DATE.** This Special Privilege shall not take effect unless Grantee files his written acceptance with the Development Services Department prior to its passage and approval by the El Paso City Council. If Grantee accepts the terms and conditions of this Special Privilege as a corporation, each of the persons accepting on behalf of such Grantee warrant to the City that the corporate Grantee is a duly authorized and existing corporation, that the corporate Grantee is qualified to do business in the State of Texas, that the corporate Grantee has full right and authority to accept the terms and conditions of this Special Privilege and that each and every person signing on behalf of the corporate Grantee is authorized to do so. Upon the City's request, the corporate Grantee will provide evidence satisfactory to the City confirming these representations.

WITNESS THE FOLLOWING SIGNATURES AND SEALS:

THE CITY OF EL PASO

Joyce Wilson
City Manager

APPROVED AS TO FORM:

Lupe Cuellar
Assistant City Attorney

APPROVED AS TO CONTENT:

Patricia D. Adauto
Patricia D. Adauto, Deputy City Manager
Development and Infrastructure Services

(Signatures continue on following page)

CITY CLERK DEPT.
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ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this 2ND day of April, 2008.

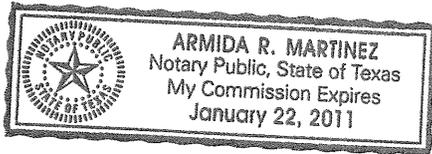
GRANTEE: ONIHC, L.L.C.

By: *Jose Fong*
Jose Adan Fong, MEMBER
(Printed Name and Title)

ACKNOWLEDGEMENT

THE STATE OF TEXAS)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this 2ND day of April, 2008, by Jose Fong as Member, on behalf of ONIHC, L.L.C.



Armida R. Martinez
Notary Public, State of Texas

ARMIDA R. MARTINEZ
Notary's Printed or Typed Name:

January 22, 2011
My Commission Expires:

CITY CLERK DEPT.
08 APR -2 PM 3:05

BARRAGAN & ASSOCIATES

Land Planning & Land Surveying

10950 Pellicano Drive, Building "F", El Paso, Texas 79935

Ph. (915) 591-5709
Fax (915) 591-5706

DESCRIPTION

Description of a parcel of land being a portion of Durango Street right-of-way in front of Block 160, Campbell Addition (recorded in Book 2, page 68, Plat Records of El Paso, County, Texas), an Addition to The City of El Paso, El Paso, County, Texas, and being more particularly described as follows:

Commencing for reference at a point of intersection of the southerly line of West San Antonio avenue and the westerly line of Durango Street, said point being the northeasterly corner for said Block 160; **THENCE**, S 00°00'00" E, along the westerly line of Durango Street, a distance of 8.67 feet to the **Point of Beginning** of this **Description**;

THENCE, N 90°00'00" E, a distance of 11.00 feet to a point for corner ;

THENCE, S 00°00'00" E, a distance of 77.83 feet to a point for corner,

THENCE, N 90°00'00" W, a distance of 11.00 feet to a point for corner on the westerly right-of-way line of Durango Street;

THENCE, N 00°00'00" E, along said westerly line, a distance of 77.83 feet to the **POINT OF BEGINNING** of the herein parcel being described, containing 856 square feet or 0.0197 acres of land more less.

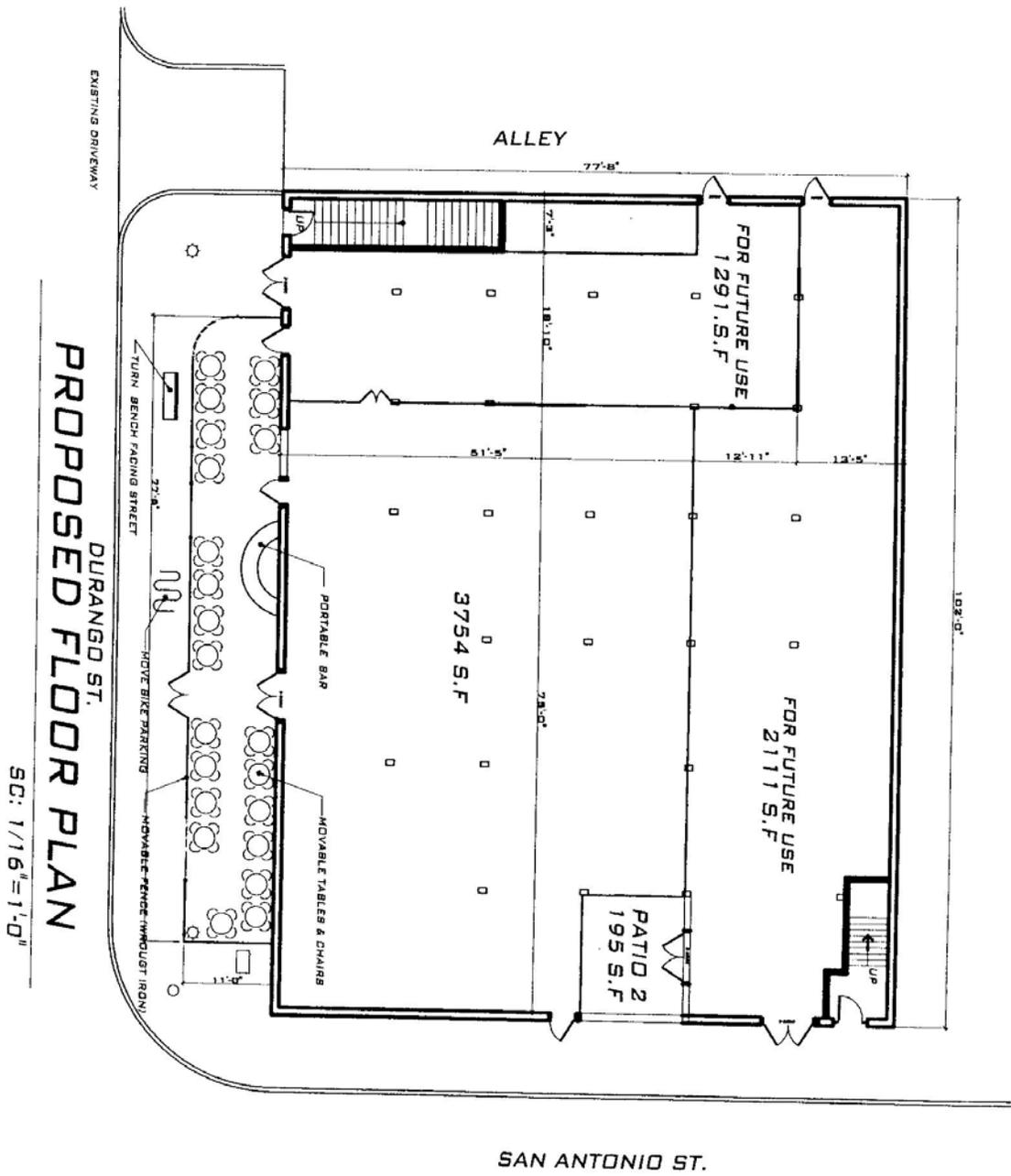
NOTES:

1. Not a ground Survey.
2. Bearings recited herein are based on assumed north for Durango Street.

Benito Barragan T&R.P.L.S. 5615
Durango st-row

12/24/07





GENERAL INFORMATION:

SUBJECT: Special Privilege SPL07-00018

The Special Privilege will permit the encroachment of a sidewalk cafe onto a portion of public right-of-way located at 504 W. San Antonio Avenue.

The Development Coordinating Committee recommends approval based on and subject to the following:

- Sidewalk café must contain removable chairs and related appurtenances;
- Temporary fencing using the materials and methods approved by the concurrence of the Engineering and Fire Departments with a minimum clearance width of five (5) feet of unobstructed sidewalk for pedestrian traffic;
- A five (5) year term with the City having the option to renew for two (2) additional five (5) year terms upon the request of the Grantee;
- Re-locate bus bench and bike stand using methods approved by the concurrence with Sun Metro, Streets and Traffic Departments;
- Annual consideration of \$300.00; and
- Providing liability insurance throughout the term of the license agreement.

Letter from Applicant

Who I Am

I would like to take this opportunity to introduce myself. My name is Jose Adan Fong. I moved to San Antonio seven years ago where I formed Lion Wireless, a strong and stable cell phone company that served the San Antonio, San Marcos, and Austin markets with outlets in prominent and highly visible locations in these cities. Under my direction, Lion Wireless earned a reputation for excellence in service, commitment to quality, and customer satisfaction.

I have since relocated to West Texas and wish to expand my business interests in the El Paso area. Recently, my paramount priority has been to become a tenant of the Union Plaza District for purposes of renovation and conversion of the premises to a fashionable restaurant & lounge.

What Will Be Done to the Selected Location

The location will be transformed into a fine dining restaurant & lounge. It will be a combination of modernity and elegance. The conceptual design will be different and will distinguish itself from any other lounge in Greater El Paso. The lounge will become a landmark for the Union Plaza area. I intend to spend a significant amount of money making this lounge spring to life. Nothing will be spared from top to bottom, ceiling to floor.

What I Am Requesting

I am seeking permission to erect a customized wrought iron fence that measures 4 feet in height and extends 78 feet in length and 11 feet in width for a sidewalk cafe patio. The patio will be first used in January of 2008 and I am requesting a 10-year lease. The patio will have an entrance and an exit at the center. The patio faces Durango Street and is adjacent to the Union Plaza Terminal Parking Facility. The right-of-way where the proposed patio will be situated is 20 feet wide and will continue to have 9 feet remaining for pedestrians and patrons to utilize. The patio will be non-permanent, as it can be removed; however, for security and safety purposes, I am requesting permission to bolt it to the bricks on the floor so that it can withstand ongoing customer utilization. Bolting will prevent injury or harm due to structural failure. I am willing to cover the cost of replacing the bricks if the patio is ever removed. The far less suitable alternative, i.e. use of sand bags to secure it, would have a negative presentation for a fine dining restaurant, which will feature valet parking as well. For the record, all of the adjacent businesses have their patios secured to the floor.

What Currently Exists

The following items are located on the right-of-way where the proposed patio will be positioned: two trees, one bench, one bike stand, and one electrical box. The bench and bike stand are never used and additional ones are located on the side of the building facing San Antonio Street. I am not requesting to remove the bench nor the bike stand, but rather just reverse the position of the bench and move the bike stand one foot up.

Why I Need A Patio

- I would like to offer a safe and secure area for patrons to be able to legally smoke due to the 2002 Smoking Ordinance; as opposed to smoking in the alley of the building or too close to the street.

- I want to offer customers the choice of drinking and dining on the patio and being able to enjoy the fresh air and view.
- I need the patio to be able to compete against the other businesses, as every establishment on the adjacent street already has a patio accessible for their customers.

Assurances

- Security considerations will be granted the utmost priority. At all times, I will have a minimum of two trained and certified security personnel on the patio.
- A video monitoring system will also be installed for security purposes.
- Insurance will definitely be carried.

Conclusion

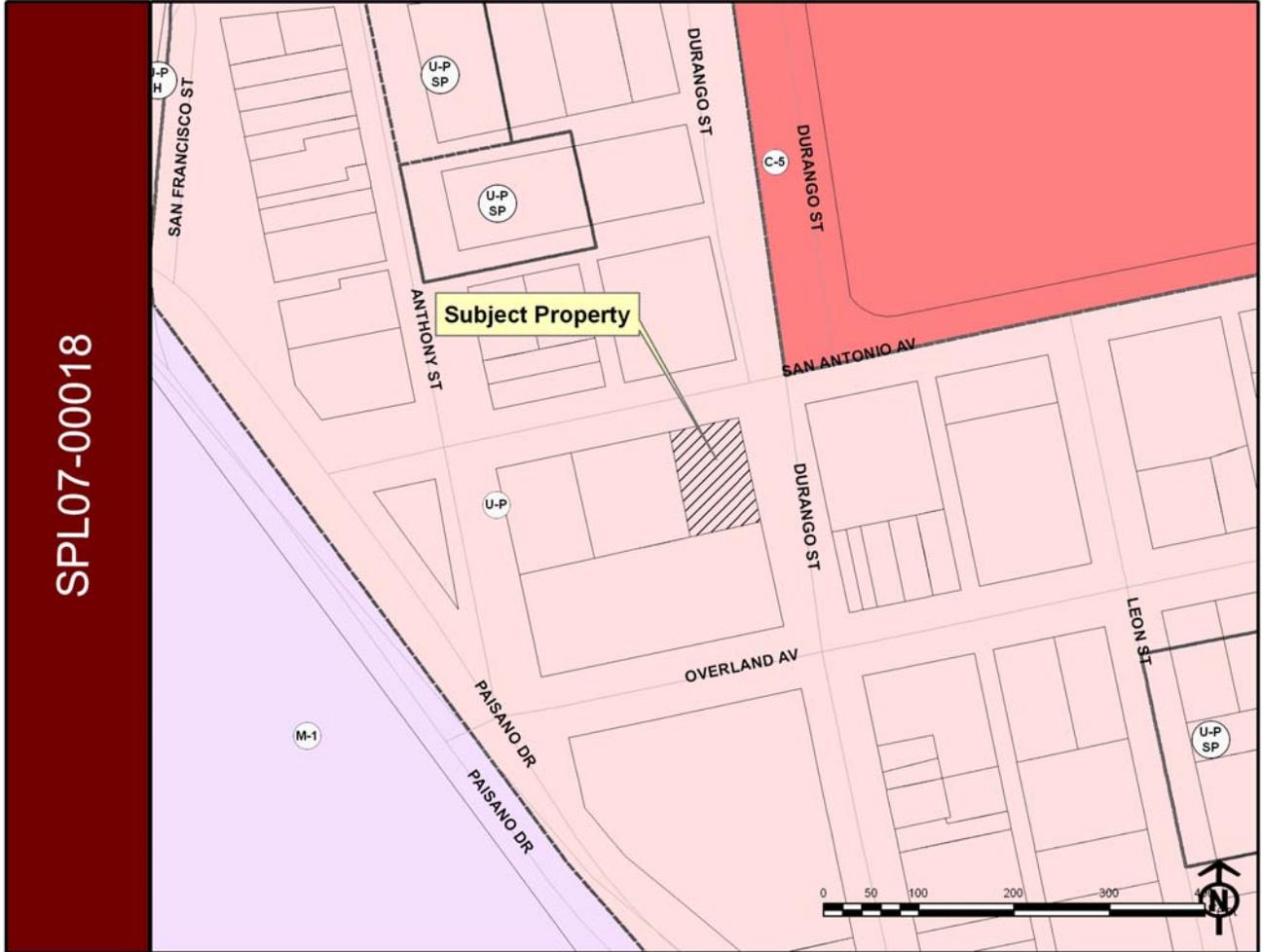
Thank you for taking the time to read this proposal. Considering my intentions, ideas and character, I feel confident that I have much to contribute to the economic growth and development in the Union Plaza District area. I hope to receive your permission for this patio in the days ahead, as it will bring new life to a part of the city that has tremendous potential. I anxiously await the opportunity to proceed and look forward to commencement of a mutually beneficial relationship between the City of El Paso and myself.

Respectfully,



Jose Adan Fong
915.740.0709

Location Map



SPL07-00018

Aerial

SPL07-00018



Site Plan

