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

DEPARTMENT: **Sun Metro and Engineering and Construction Management**

AGENDA DATE: **April 26, 2011**

CONTACT PERSON NAME AND PHONE NUMBER: **Jay Banasiak, Director, Sun Metro 534-5810 and R. Alan Shubert, P.E., City Engineer 541-4423**

DISTRICT(S) AFFECTED: **All**

SUBJECT:
That the City Manager be authorized to sign a Multiple Use Agreement with the Texas Department of Transportation (TxDOT), substantially in the form submitted, for the purpose of allowing the City access to TxDOT roadways and right-of-way for the installation of new City bus shelters located along and within TxDOT right-of-way.

BACKGROUND / DISCUSSION:
This agreement will allow the City to work within TxDOT right-of-way to improve and install bus shelters, benches, trash receptacles and landscaping.

PRIOR COUNCIL ACTION:
N/A

AMOUNT AND SOURCE OF FUNDING:
N/A

BOARD / COMMISSION ACTION:
N/A

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

DEPARTMENT HEAD: _____

(If Department Head Summary Form is initiated by Purchasing, client department should sign also)

Information copy to appropriate Deputy City Manager

RESOLUTION

WHEREAS, there are existing City of El Paso ("City") bus stops and bus shelters along roadways and right-of-way within the control of the Texas Department of Transportation ("TxDOT"); and

WHEREAS, the City desires to install new bus shelters at various bus stops located along roadways and within right-of-way under the control of TxDOT; and

WHEREAS, the City and TxDOT desire to enter into an agreement allowing the City access to TxDOT roadways and right-of-way for the installation of the new City bus shelters.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL FOR THE CITY OF EL PASO:

That the City Manager be authorized to sign a Multiple Use Agreement with the Texas Department of Transportation (TxDOT), substantially in the form submitted, for the purpose of allowing the City access to TxDOT roadways and right-of-way for the installation of new City bus shelters located along and within TxDOT right-of-way.

PASSED AND APPROVED this _____ day of _____, 2011

THE CITY OF EL PASO

_____
John Cook
Mayor

ATTEST:

_____
Richarda D. Momsen
City Clerk

APPROVED AS TO FORM:

_____
Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:

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

Texas Department of Transportation

Form 2044 (Rev. 01/08)
(GSD-EPC)

MULTIPLE USE AGREEMENT

STATE OF TEXAS §

COUNTY OF TRAVIS §

THIS AGREEMENT made by the State of Texas by and between the Texas Department of Transportation, hereinafter referred to as "State", party of the first part, and the City of El Paso, Texas, hereinafter called the "City", party of the second part, is to become effective when fully executed by both parties.

WITNESSETH

WHEREAS, on the _____ day of _____, 20_____, the governing body for the City, entered into Resolution/Ordinance No. attached hereto, hereinafter identified by reference, authorizing the City's's participation in this agreement with the State; and

WHEREAS, the City has requested the State to permit the construction, maintenance and operation of a public passenger shelters for its Mass Transit System on the highway right of way, (General description of area) for the 67 locations shown in the attached exhibits and any future locations which may be added by the submission of additional exhibits to the El Paso District Office for approval. The 67 locations are shown graphically by the preliminary conceptual site plan in Exhibit "A" and being more specifically described by metes and bounds of Exhibit "B", which are attached and made a part hereof; and

WHEREAS, the State has indicated its willingness to approve the establishment of such facilities and other uses conditioned that the City will enter into agreements with the State for the purpose of determining the respective responsibilities of the City and the State with reference thereto, and conditioned that such uses are in the public interest and will not damage the highway facilities, impair safety, impede maintenance or in any way restrict the operation of the highway facility, all as determined from engineering and traffic investigations conducted by the State.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements of the parties hereto to be by them respectively kept and performed as hereinafter set forth, it is agreed as follows:

1. DESIGN AND CONSTRUCTION

The City _____ will prepare or provide for the construction plans for the facility, and will provide for the construction work as required by said plans at no cost to the State. Said plans shall include the design of the access control, necessary horizontal and vertical clearances for highway structures, adequate landscape treatment, adequate detail to ensure compliance with applicable structural design standards, sufficient traffic control provisions, and general layout. They shall also delineate and define the construction responsibilities of both parties hereto. Completed plans will be submitted to State for review and approval and when approved shall be attached to the agreement and made a part thereof in all respects. Construction shall not commence until plans have been approved by the State. Any future revisions or additions shall be made after prior written approval of the State.

2. INSPECTION

Ingress and egress shall be allowed at all times to such facility for Federal Highway Administration personnel and State Forces and equipment when highway maintenance operations are necessary, and for inspection purposes; and upon request, all parking or other activities for periods required for such operations will be prohibited.

The state auditor may conduct an audit or investigation of any entity receiving funds from the state directly under the contract or indirectly through a subcontract under the contract. Acceptance of funds directly under the contract or indirectly through a subcontract under this contract acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

3. PARKING REGULATIONS

Parking regulations shall be established limiting parking to single unit motor vehicles of size and capacity no greater than prescribed for $1^1/_2$ ton trucks, such vehicles to conform in size and use to governing laws. Parking shall be permitted only in marked spaces.

Parking shall be prohibited when a security threat, as determined by TxDOT, exists.

4. PROHIBITION/SIGNS

Regulations shall be established prohibiting the parking of vehicles transporting flammable or explosive loads and prohibiting use of the area in any manner for peddling, advertising or other purposes not in keeping with the objective of a public facility. The erection of signs other than those required for proper use of the area will be prohibited. All signs shall be approved by the State prior to the actual erection.

5. RESPONSIBILITIES

Maintenance and operation of the facility shall be entirely the responsibility of the City _____. Such responsibility shall not be transferred, assigned or conveyed to a third party without the advanced written approval of the State. Further, such responsibility shall include picking up trash, mowing and otherwise keeping the facility in a clean and sanitary condition, and surveillance by police patrol to eliminate the possible creation of a nuisance or hazard to the public. Hazardous or unreasonably objectionable smoke, fumes, vapor or odors shall not be permitted to rise above the grade line of the highway, nor shall the facility subject the highway to hazardous or unreasonably objectionable dripping, droppings or discharge of any kind, including rain or snow.

6. FEES

Any fees levied for use of the facilities in the area shall be nominal and no more than are sufficient to defray the cost of construction, maintenance and operations thereof, and shall be subject to State approval.

7. TERMINATION UPON NOTICE

This provision is expressly made subject to the rights herein granted to both parties to terminate this agreement upon notice, and upon the exercise of any such right by either party, all obligations herein to make improvements to said facility shall immediately cease and terminate.

8. MODIFICATION/TERMINATION OF AGREEMENT

If in the sole judgment of the State it is found at any future time that traffic conditions have so changed that the existence or use of the facility is impeding maintenance, damaging the highway facility, impairing safety or that the facility is not being properly operated, that it constitutes a nuisance, is abandoned, or if for any other reason it is the State's judgment that such facility is not in the public interest, this agreement under which the facility was constructed may be : (1) modified if corrective measures acceptable to both parties can be applied to eliminate the objectionable features of the facility; or (2) terminated and the use of the area as proposed herein discontinued.

9. PROHIBITION OF STORAGE OF FLAMMABLE MATERIALS

All structures located or constructed within the area covered by the agreement shall be fire resistant. The storage of flammable, explosive or hazardous materials is prohibited. Operations deemed to be a potential fire hazard shall be subject to regulation by the State.

10. RESTORATION OF AREA

The City shall provide written notification to the State that such facility will be discontinued for the purpose defined herein. The City shall, within thirty (30) days from the date of said notification, clear the area of all facilities that were its construction responsibility under this agreement and restore the area to a condition satisfactory to the State.

11. PREVIOUS AGREEMENTS

It is understood that this agreement in no way modifies or supersedes the terms and provisions of any existing agreements between the parties hereto.

12. INDEMNIFICATION

The City acknowledges that it is not an agent, servant or employee of the State, and that it is responsible for its own acts and deeds and for those of its agents or employees during the performance of contract work.

Neither party hereto intends to waive, relinquish, limit or condition its right to avoid any such liability by claiming its governmental immunity.

When notified by the State to do so, the other party hereto shall within thirty (30) days from receipt of the State's written notification pay the State for the full cost of repairing any damages to the highway facility which may result from its construction, maintenance or operation of the facility, and shall promptly reimburse the State for costs of construction and/or repair work made necessary by reason of such damages.

Nothing in this agreement shall be construed as creating any liability in favor of any third party against the State and the City. Additionally, this agreement shall not ever be construed as relieving any third party from any liability against the State and the City, but the City shall become fully subrogated to the State and shall be entitled to maintain any action over and against the third party which may be liable for having caused the City to pay or disburse any sum of money hereunder.

13. INSURANCE

The City _____ shall provide necessary safeguards to protect the public on State maintained highways including adequate insurance for payment of any damages which might result during the construction, maintenance and operation of the facility occupying such airspace or thereafter, and to save the State harmless from damages, to the extent of said insurance coverage and insofar as it can legally do so. Prior to beginning work on the State's right of way, the City 's construction contractor shall submit to the State a completed insurance form (TxDOT Form No. 1560) and shall maintain the required coverage during the construction of the facility.

14. USE OF RIGHT OF WAY

It is understood that the State by execution of this agreement does not impair or relinquish the State's right to use such land for highway purposes when it is required for the construction or re-construction of the traffic facility for which it was acquired, nor shall use of the land under such agreement ever be construed as abandonment by the State of such land acquired for highway purposes, and the State does not purport to grant any interest in the land described herein but merely consents to such use to the extent its authority and title permits.

15. ADDITIONAL CONSENT REQUIRED

The State asserts only that it has sufficient title for highway purposes. The City _____ shall be responsible for obtaining such additional consent, permits or agreement as may be necessary due to this agreement. This includes, but is not limited to, appropriate permits and clearances for environmental, ADA and public utilities.

16. FHWA ADDITIONAL REQUIREMENTS

If the Facility is located on the Federal-Aid Highway System, "ATTACHMENT A", which states additional requirements as set forth in the Federal Highway Administration's Title 23, Code of Federal Regulations, § 710, shall be attached to and become a part of this agreement.

17. CIVIL RIGHTS ASSURANCES

The City , for itself, its personal representatives, successors and interests and assigns, as part of the consideration hereof, does hereby covenant and agree as a covenant running with the land that: (1) no persons, on the grounds of race, color, sex, age, national origin, religion or disabling condition, shall be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination in the use of said facility; (2) that in the construction of any improvements on, over or under such land and the furnishing of services thereon, no person on the ground of race, color, sex, age, national origin, religion or disabling condition, shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination; (3) that the

City shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Non-discrimination in Federally-Assisted programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

That if in the event of any breach of the above non-discrimination covenants, the State shall have the right to terminate the agreement and reenter and repossess said land and the facilities thereon, and hold the same as if said agreement had never been made or issued.

18. AMENDMENTS

Any changes in the time frame, character or responsibilities of the parties hereto shall be enacted by a written amendment executed by both parties hereto.

19. LEGAL CONSTRUCTION

In case one or more of the provisions contained in this agreement shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any provision hereof and this agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in this agreement.

20. NOTICES

All notices required under this agreement shall be mailed or hand delivered to the following respective addresses:

STATE (Mailing Address)	**(Name of other party)** (Mailing Address)
Texas Department of Transportation Maintenance Division 125 East 11th Street Austin, Texas 78701-2483	City of El Paso Director, Mass Transit Department 700-A San Francisco Street El Paso, Texas 79901

21. WARRANTS

The signatories to this agreement warrant that each has the authority to enter into this agreement on behalf of the party represented.

List of Attached Exhibits:

Exhibit A - General Layout
Exhibit B - Metes and Bounds Description
Exhibit C - Approved Construction Plans
Exhibit D - Certificate of Insurance (TxDOT Form 1560)
Exhibit E - Attachment A (FHWA Additional Requirements)

IN WITNESS WHEREOF, the parties have hereunto affixed their signature, the

_____ on the _____ day of _____,

20_____, and the State on the _____ day of _____, 20_____.

City of El Paso, Texas
(Name of other party)

By: City Manager
Title

Joyce A. Wilson
Printed Name

Date

Approved as to Form:

Cynthia Osborn
Assistant City Attorney

Approved as to Content:

R. Alan Shubert, P.E.
City Engineer

STATE OF TEXAS

Executed and approved for the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, and established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By: _____
Director, Maintenance Division

Printed Name

Date

APPROVAL RECOMMENDED:

District Engineer

Printed Name

Date

IN WITNESS WHEREOF, the parties have hereunto affixed their signature, the

_____ on the _____ day of _____,

20_____, and the State on the _____ day of _____, 20_____.

RECOMMENDED BY:

_____
(Name of other party)

By: _____
Title

_____
Printed Name

_____
Date

By: _____
Executive Director
Texas Department of Transportation

_____
Printed Name

_____
Date

Executed for the State of Texas by the State's Chief Executive Officer in accordance with Texas Constitution, Article IV, § 10.

By: _____
Governor of Texas

_____
Printed Name

_____
Date

ATTACHMENT A

Inasmuch as this project is on the Federal-Aid highway system, the following additional requirements as applicable with the Federal Highway Administration's Title 23, Code of Federal Regulations, § 710.

1. Any significant revision in the design or construction of the facility shall receive prior approval by the Texas Department of Transportation subject to concurrency by the FHWA.

2. Any change in the authorized use of airspace shall receive prior approval by the Texas Department of Transportation subject to concurrence by the FHWA.

3. The airspace shall not be transferred, assigned or conveyed to another party without prior Texas Department of Transportation approval subject to concurrence by the FHWA.

4. This agreement will be revocable in the event that the airspace facility ceases to be used or is abandoned.

EXHIBIT E