

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

**DEPARTMENT:** Engineering Department, Traffic Division

**AGENDA DATE:** Consent Agenda 05/04/2010

**CONTACT PERSON NAME AND PHONE NUMBER:** Ted Marquez, 541-4035

**DISTRICT(S) AFFECTED:** District 5

**SUBJECT: RESOLUTION**

That the City Manager be authorized to sign a Developer Participation Agreement between the City and Wal-Mart Real Estate Business Trust (the "Developer") for the purpose of allowing the Developer to construct traffic signal lights at the intersection of Montana Avenue and Tierra Este Road, El Paso, Texas. Developer will pay all costs of design and construction. Design and construction are subject to TxDOT specifications and the approval of the City.

**BACKGROUND / DISCUSSION:**

This resolution is being created to allow the installation of a traffic signal to be located at the intersection of Montana (US Highway 62/180) and Tierra Este Drive. The traffic signal will alleviate and organize the traffic flow to be generated by new adjacent development (WALMART). The Traffic Engineering Division recommends approval of this resolution.

**PRIOR COUNCIL ACTION:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

N/A

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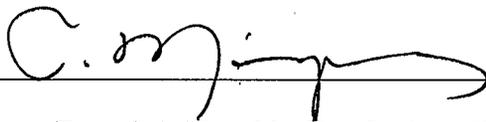
**BOARD / COMMISSION ACTION:**

N/A

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\*\*\*\*\*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**

**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 and Wal-Mart Real Estate Business Trust (the "Developer") for the purpose of allowing the Developer to construct traffic signal lights at the intersection of Montana Avenue and Tierra Este Road, El Paso, Texas. Developer will pay all costs of design and construction. Design and construction are subject to TxDOT specifications and the approval of the City.

**ADOPTED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2010.**

THE CITY OF EL PASO

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

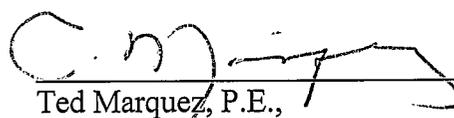
ATTEST:

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

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Mark Shoosmith  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Ted Marquez, P.E.,  
Assistant City Engineer

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 Wal-Mart Real Estate Business Trust, a Delaware statutory trust ("Wal-Mart"), hereinafter referred to as the "Developer."

**WHEREAS**, the City desires to participate in the construction of traffic light signals improvement within the Texas Department of Transportation ("TxDOT") right-of-way, more commonly known as the intersection of Montana Avenue (U.S. Highway 62/180) at Tierra Este Road in the city of El Paso, Texas. The traffic light signals improvement will serve, among other purposes, as entry from Montana to Tierra Este Road which provides access into the proposed Wal-Mart retail center (Store No. 3763-02) to be built in an area at the southwest corner of said intersection on a portion of Tract 1, Section 33, Block 79, Township 2, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas (the "Wal-Mart Site").

**WHEREAS**, the Developer, in conjunction with its design and construction the Wal-Mart Site, desires to proceed with development of the City's Traffic Signal Lights at the Wal-Mart Site ("Traffic Signal Lights") upon approval by the City (the "Project"); and

**WHEREAS**, The 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 Traffic Signal Lights will be an economic benefit to local tax payers, will enhance connectivity to the Wal-Mart 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 Traffic Signal Lights at no costs to the City and the City will review the design and proposed construction at no cost to Developer.

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

**I. Term of The Agreement**

This Agreement shall begin on the date entered above and automatically terminate after (1) the construction of the Traffic Signal Lights, (2) the City Engineer determines in writing that the City and TxDOT specifications for the Traffic Signal Lights as provided to the Developer by the City (the "specifications") have been met (3) the City accepts the traffic signal lights for maintenance and provides such written acceptance to Developer, and (4) TxDOT has no exceptions to the construction of the traffic signal lights, as confirmed in writing by the City. If the City Engineer provides a written determination to Developer that the 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.

**II. Scope of Project**

(a) The Developer agrees to provide all drawings, plans and specifications, according to the applicable TxDOT design standards and policies for the Project and the specifications, as well as accepted engineering principles and practices to provide for the Traffic Signal Lights improvement.

(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 the specifications and are subject to quality control testing by the City.

(c) The Developer shall provide all traffic control for construction. Developer shall have a traffic control plan approved by the City prior to commencing construction of the Traffic Signal Lights. Such traffic control plans shall provide adequate traffic controls designed to cause minimum inconvenience to motorists, pedestrians and adjacent property owners. Developer shall obtain all permits required by the City prior to commencing construction.

(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 and in accordance with TxDOT specifications.

(e) 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 by the City or by TxDOT. The City shall provide written notice of approval to Developer when it approves the Project plans.

(f) All Project construction shall be completed by the Developer within one (1) year after the approval of said plans by TxDOT and the City and notice to Developer of said approval

(as stated above), 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 (as stated above).

(g) 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.

(h) In the event that Developer fails to complete the Project pursuant to the terms of this Agreement, the City shall have the right to demand that the surety issuing the bond under section X of this Agreement complete the project at its own costs. Should the Surety fail to complete the construction and installation of the Project, the City shall have the right to complete the Project and assess the costs of completion incurred by the City to the Developer for payment. Cost of completion shall include actual costs for design professionals, construction and construction administration. The right of the City to complete the Project pursuant to this paragraph shall in no way diminish or extinguish the surety's responsibilities under the bond required in Section X.

### **III. WAIVER OF CAUSE OF ACTION, LIABILITY RELEASE and INDEMNIFICATION:**

(a) **WAIVER OF CAUSE OF ACTION** 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.

(b) **LIABILITY RELEASE** The City shall not be liable for any damages that may occur if the Project is not approved by the City or TxDOT, 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.

(c) **INDEMNIFICATION:** the Developer shall 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.

**IV. WARRANTY** 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; provided, however, if a lien is filed, Developer shall cause the lien to be satisfied or shall bond around the lien in compliance with the Texas Real Property Code. 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 a requirement of the Developer's warranty of the Project for a period of one (1) year from the date of the City's written acceptance of the Project.

#### **V. Project Funding**

The Developer agrees that Developer shall pay all Project costs and that the City shall not be responsible for any of the costs related to the Project. The City shall provide its review of plans and its coordination with TxDOT, as provided in this Agreement, at no cost to Developer. Developer shall pay all fees for permits required by the City for construction of the Project.

#### **VI. Termination**

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

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

Developer hereby acknowledges the ownership rights of TxDOT 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 to complete the Project. After acceptance of the Project by the City, this right of access shall include the right to use or modify any Developer installed equipment or facilities as deemed necessary by the City. In the event that additional authorization is required, Developer agrees to promptly execute the required documents at the request of the City. Upon written acceptance by the City, the Project shall

become the property of the City, provided that such transfer of ownership shall not diminish or extinguish the warranty requirements set forth in Section IV of this Agreement.

### **VIII. Relationship of the Parties**

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

### **VIX. Insurance**

Developer agrees to obtain or have its construction contractor/installer 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 bodily injury liability for each person and **FIVE HUNDRED THOUSAND AND 00/100 DOLLARS (\$500,000.00)** in the aggregate and **ONE HUNDRED THOUSAND DOLLARS AND 00/100 (\$100,000.00)** for property damage for each occurrence and **ONE HUNDRED THOUSAND DOLLARS AND 00/100 (\$100,000.00)** in the aggregate. All insurance policies shall remain in effect until completion of the Project. Developer shall furnish City with certificates showing the type and amount of coverage and effective and expiration dates of the insurance coverage. The certificate of insurance or a rider to the insurance policy shall be provided to the City and shall contain a statement that substantially provides that the insurance provided shall not be cancelled or materially altered except after thirty consecutive calendar days written notice by certified mail to the City of the intent to cancel or materially alter the insurance. Ten days notice may be given for cancellation due to non-payment of insurance policy premiums.

### **X. Bond Required**

The Developer agrees to execute a performance bond for one hundred percent (100%) of the Project costs to secure fulfillment of all 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.

#### **XI. Increased Costs**

Developer agrees that the Developer will be solely responsible for payment of all increased costs in the construction of the Traffic Signal Lights, regardless of the cause.

#### **XII. INDEMNIFICATION**

Except in the event of the City's or the City's agents and employees negligence or willful misconduct, Developer will INDEMNIFY, DEFEND AND HOLD the City and TxDOT, 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.

#### **XIII. 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.

**XIV. 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: Engineering Department  
Traffic Control Division  
2 Civic Center Plaza, 6<sup>th</sup> Floor  
El Paso, Texas 79901-1196

DEVELOPER: Wal-Mart Real Estate Business Trust  
2001 Southeast 10th Street  
Bentonville AK 72716-0550  
Attn: Real Estate Manager (Texas Store #3763-02)

Copy to: Wal-Mart Real Estate Business Trust  
2001 Southeast 10th Street  
Bentonville AK 72716-0550  
Attn: Legal Department (Texas Store #3763-02)

Copy to: Dunaway Associates, L.P.  
1501 Merrimac Circle, Suite 100  
Fort Worth TX 76107-6572  
Attn: Chris Biggers

Copy to: Haynes and Boone, LLP  
2323 Victory Avenue, Suite 700  
Dallas, Texas 75219-7673  
Attention: Brenda A. Lazenby  
Store No. 3763-02

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

**XV. 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.

**XVI. 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.

**XVII. 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.

**XVIII. Future Maintenance Work**

The City shall be responsible for any maintenance or repairs of the traffic light signals improvement. 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.

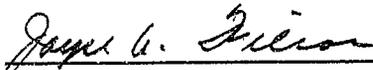
**XIX. Entire Agreement**

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.

**XX. 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.

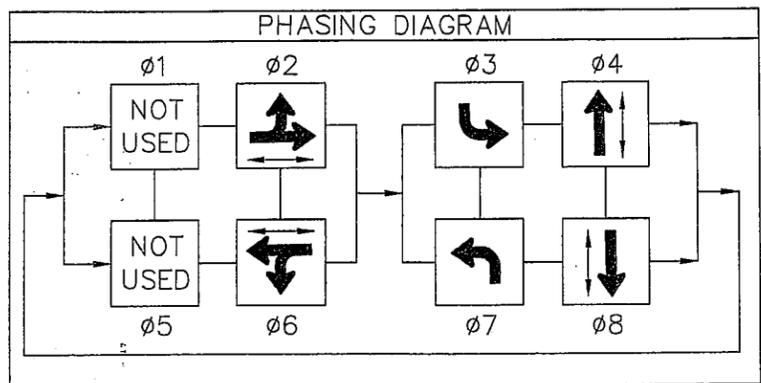
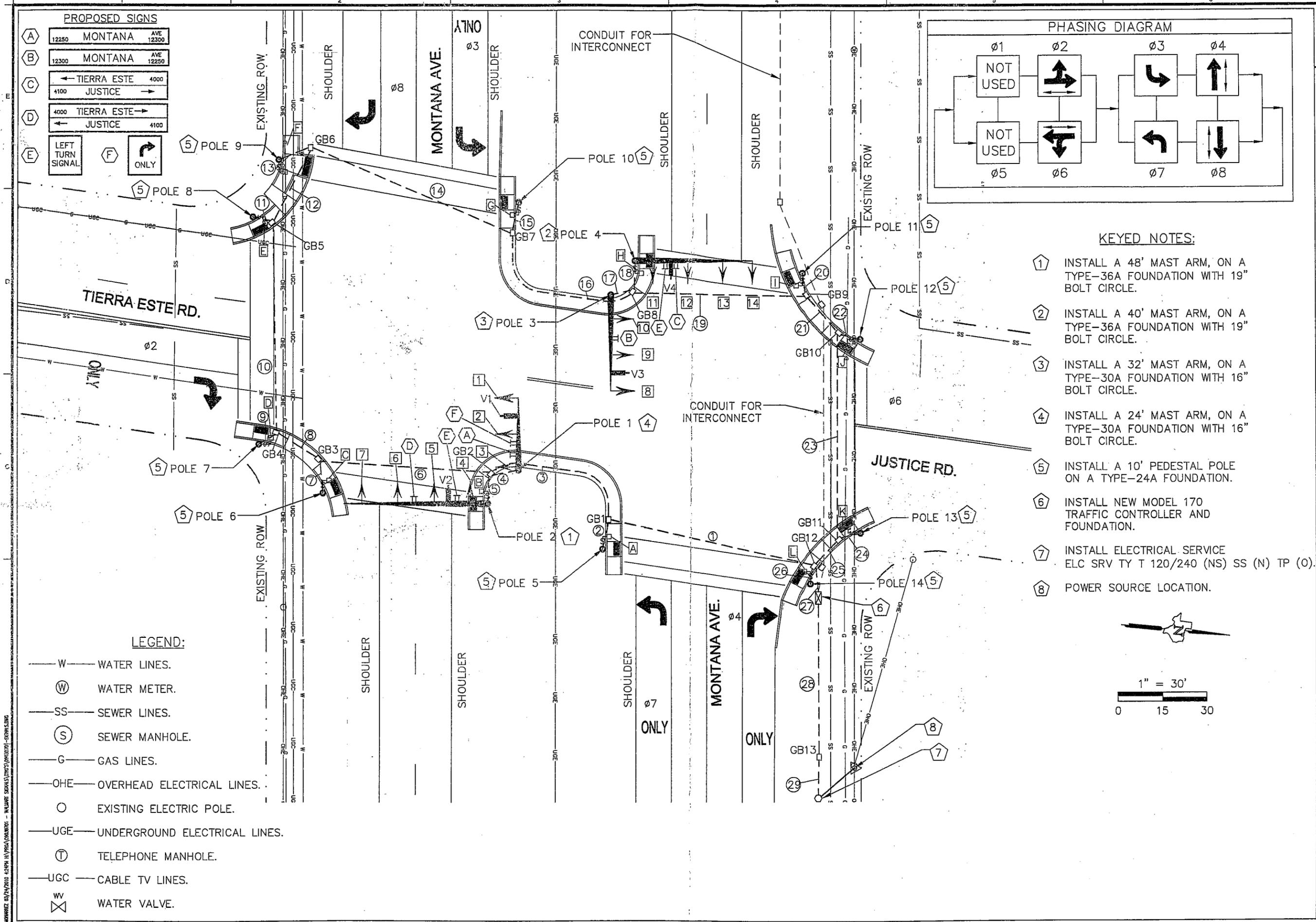
**THE CITY OF EL PASO:**

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

DEVELOPER: WAL-MART REAL  
ESTATE BUSINESS TRUST

  
By: \_\_\_\_\_  
Regional Vice President



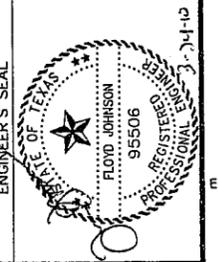
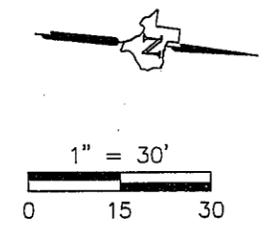


**KEYED NOTES:**

- ① INSTALL A 48' MAST ARM, ON A TYPE-36A FOUNDATION WITH 19" BOLT CIRCLE.
- ② INSTALL A 40' MAST ARM, ON A TYPE-36A FOUNDATION WITH 19" BOLT CIRCLE.
- ③ INSTALL A 32' MAST ARM, ON A TYPE-30A FOUNDATION WITH 16" BOLT CIRCLE.
- ④ INSTALL A 24' MAST ARM, ON A TYPE-30A FOUNDATION WITH 16" BOLT CIRCLE.
- ⑤ INSTALL A 10' PEDESTAL POLE ON A TYPE-24A FOUNDATION.
- ⑥ INSTALL NEW MODEL 170 TRAFFIC CONTROLLER AND FOUNDATION.
- ⑦ INSTALL ELECTRICAL SERVICE ELC SRV TY T 120/240 (NS) SS (N) TP (O).
- ⑧ POWER SOURCE LOCATION.

**LEGEND:**

- W — WATER LINES.
- ⊙ W WATER METER.
- SS — SEWER LINES.
- ⊙ S SEWER MANHOLE.
- G — GAS LINES.
- OHE — OVERHEAD ELECTRICAL LINES.
- EXISTING ELECTRIC POLE.
- UGE — UNDERGROUND ELECTRICAL LINES.
- ⊙ T TELEPHONE MANHOLE.
- UGC — CABLE TV LINES.
- ⊗ W WATER VALVE.



SCALE: 1" = 30'

DATE: 2/24/10

DESIGN BY: JZ

DRAWN BY: JZ

APP. BY: JZ

DATE: Mar 24, 2010

PLOT SCALE: 1:1

**PROJECT NAME**

**MONTANA AVE./ TIERRA ESTERD. TRAFFIC SIGNALS**

**DUNAWAY ASSOCIATES, L.P.**

550 SALLEY AVENUE, SUITE 400  
 FORT WORTH, TEXAS 76107  
 (817) 335-1121/FAX (817) 335-7437  
 WWW.DUNAWAYASSOCIATES.COM

**HUIT-ZOLLARS INC.**

ENGINEERING / SURVEYING  
 6522 CROMBIE DRIVE, SUITE 210  
 FORT WORTH, TEXAS 76116  
 (817) 507-1335 / FAX (817) 507-9247  
 FIRM REGISTRATION F-781

**CITY OF EL PASO**

**ENGINEERING DEPARTMENT**

**TRAFFIC ENGINEERING DIVISION**

SHEET TITLE

TRAFFIC SIGNAL PLAN

SHEET 3 OF 62

FILE No. 2366