

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

DEPARTMENT: **Engineering, Traffic Division**

AGENDA DATE: **Introduction: May 4, 2010
Public Hearing: May 11, 2010**

CONTACT PERSON NAME AND PHONE NUMBER: **Mirian Spencer, 915-541-4482, spencermd2@elpasotexas.gov**

DISTRICT(S) AFFECTED: 8

SUBJECT:

An Ordinance granting a Special Privilege to Kelbor Enterprises, Inc. doing business as Coconuts, permitting the encroachment of an outdoor patio café onto a portion of City right-of-way located at 816 Piedras Street and allowing the sale and service of alcoholic beverages as a permissible activity within the outdoor patio café area. SPL09-00035 (District 8).

BACKGROUND / DISCUSSION:

The applicants are requesting to install an outdoor patio café adjacent the property located at 816 Piedras Street. This requires City Council action because the property is located outside the established Union Plaza Entertainment District.

The Special Privilege is for a term of five years, with two additional renewable terms. The applicants will pay an annual consideration of \$300.00 for the special privilege and will be required to provide general liability insurance with the City listed as additionally insured in the amount of \$250,000 for injury to one person, \$500,000 for injury to two or more people and \$100,000 for property damage. They will also be required to maintain an active TABC mixed beverage license as well as provide an additional liquor liability insurance policy of \$1,000,000.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

The Development Coordinating Committee (DCC) recommended approval on January 6, 2010.

*****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

ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO KELBOR ENTERPRISES, INC. DOING BUSINESS AS COCONUTS, PERMITTING THE ENCROACHMENT OF AN OUTDOOR PATIO CAFE´ ONTO A PORTION OF CITY RIGHT-OF-WAY LOCATED AT 816 PIEDRAS STREET AND ALLOWING THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES AS A PERMISSABLE ACTIVITY WITHIN THE OUTDOOR PATIO CAFÉ AREA.

WHEREAS, Grantee has requested to install one (1) outdoor patio café with tables and chairs within a portion of City right-of-way in front of the property commonly known as 816 North Piedras Street; and

WHEREAS, The City may grant a Special Privilege License for use of city right-of-way for specified uses; and

WHEREAS, the City Council finds that the grant of a Special Privilege License upon the terms and conditions hereinafter set forth is not inconsistent with and will not unreasonably impair the public use of the right-of-way.

WHEREAS, the City Engineer has received a favorable recommendation from the Development Coordinating Committee on January 6, 2010 regarding the request to install the encroachments;

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

The City of El Paso (hereinafter called "City") hereby grants to Kelbor Enterprises, Inc. a Texas Corporation, doing business as Coconuts, (hereinafter referred to as "Grantee") a Special Privilege License (the "License" or "Special Privilege") for use of City right-of-way as follows:

1. DESCRIPTION. This License is granted to Kelbor Enterprises, Inc. doing business as Coconuts to encroach onto portions of City right-of-way abutting the property commonly known as 816 North Piedras Street as shown in Exhibit "A" which is attached hereto and made a part hereof for all purposes, and which is hereinafter referred to as "Premises."

2. TERM. The term of this Special Privilege shall be for five (5) years from the date of execution of this agreement. The City shall have the sole option to renew this Special Privilege upon the request of the Grantee for up to two (2) additional five (5) year terms. If the Grantee desires that the City re-new this Special Privilege for an additional five (5) year term, Grantee shall submit a request in writing to the City no later than three (3) months prior to the expiration date of this Special Privilege or any previously granted extension thereto.

This Special Privilege shall expire without notice at the end of such expiration period unless a request for renewal is submitted in writing to the City by the Grantee as herein required. Grantee understands, agrees, and accepts that the City may require that the terms, conditions, and provisions of this Special Privilege be modified as a condition for renewing the grant of the

encroachment upon or through public rights-of-way as permitted 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 the use of City right-of-way. The annual fee shall be due the first day of the month in which the License is granted by the El Paso City Council. The annual fee shall remain the same for a period of one year from the date the License is granted, and are subject to change after each one year period the License remains in effect. 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. The City shall notify the Grantee of any proposed changes in fees as prescribed in Paragraph 14.E (Notice) of this License. This License is granted on the condition the grantee pays for all costs associated with the outdoor patio café, as well as all costs for the restoration of the Premises upon the termination of the License.

The first annual fee shall be due prior to execution of this Special Privilege by the El Paso City Council. The advance payment shall be in the form of a business or cashier's check payable to the "City of El Paso" and delivered to Engineering Traffic Division. 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.

4. USE OF PROPERTY. This Special Privilege is granted solely for the encroachment onto City right-of-way of an outdoor patio café. As an express condition of this Special Privilege, and not as a mere covenant, Grantee agrees that the outdoor patio 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 City right-of-way in a clean and orderly condition at all times when not in use as a outdoor patio café. The Premises may be fenced using the materials and methods approved by the concurrence of the Engineering and Fire Departments in accordance with Texas Alcoholic Beverage Commission standards with a minimum clearance width of six (6) 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 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 License.

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 City Engineer.

6. REPAIRS. Grantee shall keep the outdoor patio café and Premises in good repair during the term of the License. Grantee shall repair any damage to the Premises regardless of the cause of such damage, at Grantee's sole expense.

7. MAINTENANCE. Grantee shall maintain the outdoor patio café and the Premises in good condition, in a clean, orderly, and attractive condition for the duration of the License. Grantee shall be responsible for all maintenance of the outdoor patio café and Premises.

8. INDEMNITY. **As a condition of the Special Privilege, the Grantee or its insurer shall INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, its officers, agents, servants and employees HARMLESS FOR AND AGAINST ANY AND ALL CLAIMS, CAUSES OF ACTION, LIABILITY, DAMAGES OR EXPESE, (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 the Grantee every demand, notice, summons, or other process received by the City in any claim or legal proceeding contemplated herein. The Grantee 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 Grantee 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 on because of such injuries or damages. The Grantee shall pay all judgments in actions defended by the Grantee pursuant to this section along with all attorney's fees and costs incurred by the City including interest accruing to the date of the payment by the Grantee, and premiums on any appeal bonds. The City, at its election will have the right to participate in any such negotiations or legal proceedings to the extent of its interest. The City will not be responsible for any loss or of damage to the Grantee's property from any cause.

9. 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.

In addition to the insurance required above, Grantee shall obtain and maintain a liquor liability insurance policy, or the equivalent thereof, in the amount of One Million and NO/100 Dollars (\$1,000,000.00) and provide a certificate of insurance as required for other insurance policies in this Section and name the City as an additional insured. This amount is 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 Engineering – Traffic Division and Financial Services – Capital Assets Division. 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.

10. TABC LICENSE. Licensee shall provide the city at all times during the term of this License the current copy of the annual mixed-beverage permit, beverage cartage permit, and mixed beverage late hours permit issued by the Texas Alcoholic Beverage Commission for the sale and service of alcoholic beverages.

11. 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 (30) calendar days written notice, cancel this Special Privilege at no cost to the City and may take possession of the City right-of-way. All rights of the Grantee in the Premises shall then be terminated. If the City Cancels the License, the Grantee may receive a refund of the paid annual consideration for the months remaining in the special privilege license year (the twelve month period beginning on the effective date of the License) in the amount of TWENTY-FIVE AND NO/100 DOLLARS (\$25.00) per month. If the City cancels the License due to Grantee's

failure to cure any default under this License or if Grantee abandons the Premises as described hereafter, Grantee shall not be entitled to any refund of its annual consideration it has paid to the City.

Grantee may cancel this License, for any reason, upon thirty (30) calendar days prior written notice to the City, and all rights of the Grantee shall then be terminated. If the License is cancelled by the Grantee, Grantee shall not be entitled to any refund of the annual consideration for the License year. 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 fifteen (15) calendar days after written notice to do so; the City may cancel this License and take possession. All rights of the Grantee on the City right-of-way shall then terminate.

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. The City may require the Grantee to restore the Premises, to include removal of the outdoor patio café, tables, chairs, and any applicable fencing at the expense of the Grantee.

12. 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.

13. ASSIGNMENT. Grantee shall not assign this Special Privilege without prior written consent of the City Engineer.

14. MISCELLANEOUS.

A. SIGNS: This Special Privilege does not grant any permission to erect signage, but, rather, only authorizes an encroachment upon City 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 License.

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 License. This License shall not grant permission for Grantee to erect the outdoor patio café

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 816 N. Piedras Street 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 816 N. Piedras Street 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: Assistant City Engineer
Engineering – Traffic Division
#2 Civic Center Plaza, 6th Floor
El Paso, Texas 79901-1196

with copy to: City of El Paso
Attn: Financial Services – Capital Assets Division
#2 Civic Center Plaza, 7th Floor
El Paso, Texas 79901-1196

and: KELBOR ENTERPRISES, INC.
Attn: Kelly Boren and Jessica Ward
809 Tony Lama Street
El Paso, Texas 79915-1345

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 License 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 License.
- 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. **ADMINISTRATION.** The City Engineer is the principal City official responsible for the administration of this License and Grantee recognizes that questions regarding the interpretation or application of this ordinance shall be referred to the City Engineer.

15. RESTRICTIONS AND RESERVATIONS. This License 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 License upon giving the City prior written notice of its intention to do so.

16. NO WAIVER. 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.

17. WARRANTY OF CAPACITY TO EXECUTE CONTRACT. If Grantee accepts the terms and conditions of this License, 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 License and 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. This License is effective as of the last date entered below

18. EFFECTIVE DATE. This Special Privilege shall not take effect unless Grantee files his written acceptance with the Engineering Traffic Division prior to its passage and approval by the El Paso City Council. The effective date shall be the date last entered below.

PASSED AND APPROVED this _____ day of _____ 2010.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

Richarda Duffy-Momsen
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Mark Shoesmith
Assistant City Attorney

Ted Marquez, P.E.
Assistant City Engineer

ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this
_____ day of _____ 2010.

GRANTEE: KELBOR ENTERPRISES, INC.

By: _____

(Printed Name and Title)

ACKNOWLEDGEMENT

THE STATE OF TEXAS)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this ____ day of _____ 2010,
by _____ as _____, on behalf of KELBOR
ENTERPRISES, INC.

Notary Public, State of Texas

Notary's Printed or Typed Name:

My Commission Expires:

EXHIBIT A

