

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

**DEPARTMENT:**           **Engineering Traffic Division**

**AGENDA DATE:**       **Introduction: April 27, 2010; Public Hearing: May 4, 2010**

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

**DISTRICT(S) AFFECTED:**   **8**

**SUBJECT:**

An Ordinance terminating the Special Privilege License granted in Ordinance No. 016107 to Great Vibe L.L.C. for use of certain City right-of-way for a sidewalk café located at 209 South El Paso Street. SP-05014 (District 8).

**BACKGROUND / DISCUSSION:**

Great Vibe L.L.C. was granted a Special Privilege License for a term of five years on August 2, 2005. The grantees were sent notification of default of two sections of the special privilege agreement on October 7, 2009. The letter was returned unclaimed to the City on November 15, 2009. The grantees are in default for non payment of \$1,200.00 (four years consideration at \$300.00 per year) and not maintaining the General Liability Insurance of \$250,000.00 for injury or death to one person, \$500,000.00 for injury or death to two or more people, and \$100,000.00 for property damage with the City listed as additionally insured.

The sidewalk café appears to not be in use and the City right-of-way is not being utilized at this time.

**PRIOR COUNCIL ACTION:**

The special privilege was approved by Ordinance No. 016107 on August 2, 2005.

**AMOUNT AND SOURCE OF FUNDING:**

N/A

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**BOARD / COMMISSION ACTION:**

N/A

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\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:** \_\_\_\_\_

*Information copy to appropriate Deputy City Manager*

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE TERMINATING THE SPECIAL PRIVILEGE LICENSE GRANTED IN ORDINANCE NO. 016107 TO GREAT VIBE, L.L.C. FOR USE OF CERTAIN CITY RIGHT-OF-WAY FOR A SIDEWALK CAFÉ LOCATED AT 209 SOUTH EL PASO STREET.**

**WHEREAS**, Ordinance No. 016107 granted Great Vibe, L.L.C. a special privilege license to use a portion of City right-of-way adjacent to 209 South El Paso Street (Exhibit “A”); and

**WHEREAS**, Great Vibe, L.L.C. is in default of Section 3 (Consideration) and Section 8 (Liability Insurance) of Exhibit “A” of Ordinance No. 016107; and

**WHEREAS**, The City of El Paso sent written notification of the default (Exhibit “B”) to Great Vibe, L.L.C. in accordance with Section 9 (Cancellation) of Exhibit “A” of Ordinance No. 016107; and

**WHEREAS**, The City of El Paso now requests the Special Privilege License granted in Ordinance No. 016107 be terminated.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the Special Privilege License granted to Great Vibe, L.L.C in Ordinance No. 016107 shall be and hereby is terminated.

**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 Shosmith  
Assistant City Attorney

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

ORDINANCE NO. 16107

**AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO GREAT VIBE, L.L.C. PERMITTING THE ENCROACHMENT OF A SIDEWALK CAFE' ONTO A PORTION OF PUBLIC RIGHT-OF-WAY LOCATED AT 209 SOUTH EL PASO STREET.**

**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 Great Vibe, LLC (hereinafter referred to as "Grantee"), for the property located at 209 South El Paso Street:

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 on Lot B, Block 15, Mills Addition, City and County of El Paso, Texas and more commonly known as 209 South El Paso Street, to encroach onto a portion of public right-of-way with one (1) sidewalk café (hereinafter called "café"), as more particularly shown in the attached and incorporated Exhibit "B";
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 2<sup>nd</sup> day of August, 2005.

**ATTEST:**

*for* Laura Prine  
Richarda Duffy Momsen  
City Clerk

**THE CITY OF EL PASO**

John F. Cook  
John F. Cook  
Mayor

**APPROVED AS TO FORM:**

Matt Watson  
Matt Watson  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

George Sarmiento  
George Sarmiento, AICP, Director of  
Planning, Research and Development  
Department



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 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 in the form of a cashier's check payable to "The City of El Paso" and delivered to the City Planning, Research and Development Department for remittance to the Office of the City Comptroller. If the Special Privilege is disapproved by the El Paso City Council, the Office of the City Comptroller 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 accessibility ramps, awnings, signs and outdoor cafés 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 City Planning, Research & Development 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 Building Permits and Inspections 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 115 Durango 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 209 South El Paso 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: 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, 2<sup>nd</sup> Floor  
El Paso, Texas 79901-1196

and: Great Vibe, LLC  
Attn: Vince Johnson  
209 South El Paso Street  
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 Building Permits and Inspections 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 Building Permits and Inspections or designee.

**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 City Planning, Research & Development 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  
Joyce Wilson  
City Manager

APPROVED AS TO FORM:

Matt Watson  
Matt Watson  
Assistant City Attorney  
Doc No. 13999

APPROVED AS TO CONTENT:

George Sarmiento  
George Sarmiento, AICP, Director of  
Planning, Research & Development  
Department

ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this  
30th day of June, 2005.

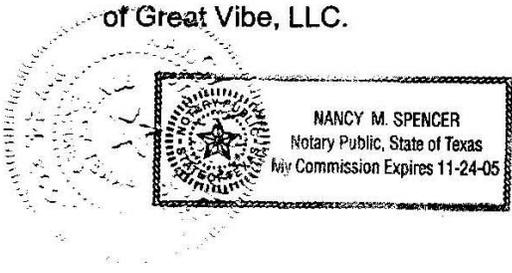
GRANTEE: GREAT VIBE, LLC

By: Vincent R. Johnson  
VINCENT R. JOHNSON - PRESIDENT  
Printed Name and Title

ACKNOWLEDGEMENT

THE STATE OF TEXAS )  
COUNTY OF EL PASO )

This instrument is acknowledged before me on this 30th day of June,  
2005, by Vincent R. Johnson as President, on behalf  
of Great Vibe, LLC.



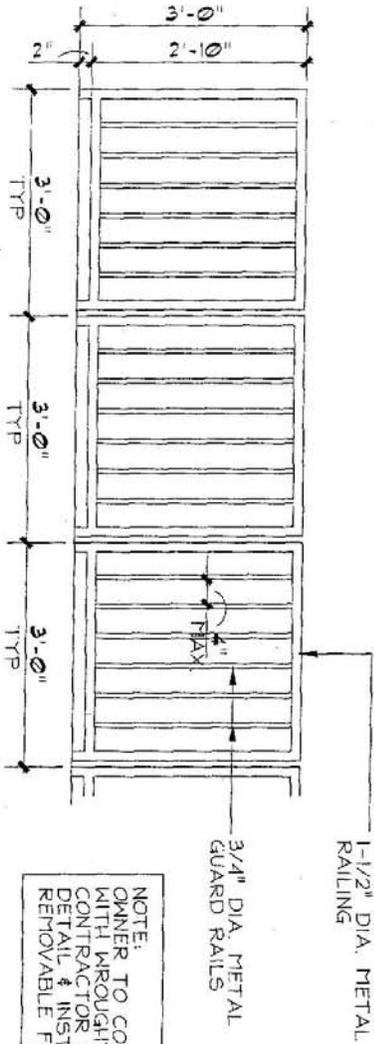
Nancy M. Spencer  
Notary Public, State of Texas

Nancy M. Spencer  
Notary's Printed or Typed Name:

11-24-05  
My Commission Expires:

# 02 ELEVATION

TYP. ELEVATION

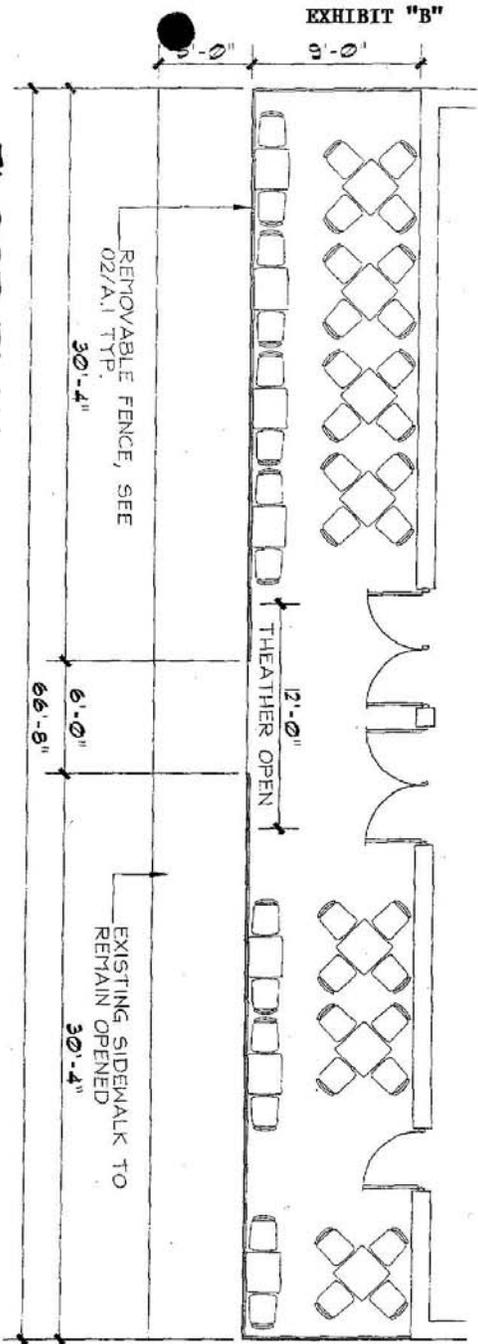


NOTE:  
OWNER TO COORDINATE  
WITH WROUGHT IRON  
CONTRACTOR CONSTRUCTION  
DETAIL & INSTALLATION OF  
REMOVABLE FENCE

SCALE: 1/2" = 1'-0"

# 01 FLOOR PLAN

SCALE: 1/8" = 1'-0"



16107

Supplementary Drawing No. _____				Project: _____		Sheet No.	
Change Order No. _____ Item. _____				Drawing Title:		A1	
Addendum No. _____ Page. _____ Per. _____				FLOOR PLAN AND DETAILS			
Date: JUNE 2005		Drawn By: MR		Checked By: FJ		Wright & Dalbin Architects Inc. 2112 Murchison Dr., El Paso, Texas 79930 915/ 533-3771 Fax 915/ 532-7733	

Dedicated to Outstanding Customer Service for a Better Community

**S E R V I C E   S O L U T I O N S   S U C C E S S**

October 7, 2009

**CERTIFIED MAIL**  
7005-1160-0004-6074-5048

Great Vibe, LLC  
Attn: Vince Johnson  
209 South El Paso St.  
El Paso, Texas 79901

Re: Notice of Termination for Special Privilege (SP-05014)

Dear Mr. Johnson:

This letter is to provide you notice that you are in default of the above contract and failure to correct the default within 30 days will result in termination of the special privilege. Pursuant to Section 9 of the August 2, 2005 special privilege agreement (Ordinance No. 16107). "If, for a period of six (6) months, Grantee defaults in any of his obligations under this Special Privilege and fail to correct such defaults within thirty (30) days 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." Under the contract, you are required to pay an annual fee and provide liability insurance. Our records indicate that we have not received a payment since August 1, 2005 and do not have a Certificate of Insurance on file.

**Section 3, entitled Consideration.** of the same agreement states, "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)." Also, **Section 8, entitled Liability Insurance,** of the same agreement. 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 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...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."

**FINANCIAL SERVICES**  
CAPITAL ASSETS DIVISION

2 Civic Center Plaza, 7th Floor, El Paso, Texas 79901 915 541-4074 Facsimile 915 541-4347 www.elpasotexas.gov



Mayor  
John F. Cook

City Council

*District 1*  
Ann Morgan Lilly

*District 2*  
Susie Byrd

*District 3*  
Emma Acosta

*District 4*  
Carl L. Robinson

*District 5*  
Rachel Quintana

*District 6*  
Eddie Holguin Jr.

*District 7*  
Steve Ortega

*District 8*  
Beto O'Rourke

City Manager  
Joyce A. Wilson

**Exhibit B**  
**Pg. 1 of 3**

Billings sent to you have been returned as undeliverable and attempts to reach you via telephone have been unsuccessful. It is our opinion that you have been given ample opportunity to correct the default, but have failed to do so.

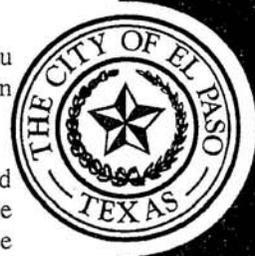
Please contact our office to make arrangement for immediate payment and provide the certificate of insurance to this office within 30 days. As stated before if we do not hear from you within 30 days, action will be taken to terminate the Special Privilege. If you have any questions, please feel to call me at (915) 541-4235 to discuss this further or to provide additional information.

Respectfully,



Shirley S. Kaiser  
Administrative Analyst

Cc: Liza Ramirez-Tobias, Capital Assets Manager  
Mirian Spencer, Engineering Department-Traffic Division Planner  
Mark Shoesmith, Assistant City Attorney  
File



**Mayor**  
John F. Cook

**City Council**

*District 1*  
Ann Morgan Lilly

*District 2*  
Susie Byrd

*District 3*  
Emma Acosta

*District 4*  
Carl L. Robinson

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Rachel Quintana

*District 6*  
Eddie Holguin Jr.

*District 7*  
Steve Ortega

*District 8*  
Beto O'Rourke

**City Manager**  
Joyce A. Wilson

**FINANCIAL SERVICES**  
CAPITAL ASSETS DIVISION

2 Civic Center Plaza, 7<sup>th</sup> Floor El Paso, Texas 79901/915 541-4074/Facsimile 915 541-4347/www.elpasotexas.gov

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Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$



Sent To  
Street,  
or PO B  
City, St

Great Vibe, LLC  
Attn: Vince Johnson  
209 South El Paso St.  
El Paso, Texas 7990

PS Form 3849, June 2008

UNITED STATES POSTAGE  
FIRST CLASS  
\$05.54  
02 PM  
3004265245 OCT 13 2009  
MAILED FROM ZIP CODE 79901



Great Vibe, LLC  
Attn: Vince Johnson  
209 South El Paso St.  
El Paso, Texas 7990

799 SE 1 70 11/18/09  
NIXIE  
RETURN TO SENDER  
UNCLAIMED  
UNABLE TO FORWARD  
EC: 7990119699 \*1710-07286-13-99

