

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

DEPARTMENT: **Engineering**

AGENDA DATE: **June 1, 2010**

CONTACT PERSON/PHONE: **R. Alan Shubert, City Engineer**

DISTRICT AFFECTED: **6**

SUBJECT:

Item is to request approval of a resolution authorizing the City Manager to execute, on behalf of the City of El Paso, a contract of sale for the purchase of portions of two adjoining, commercially-zoned parcels to be used as right-of-way for the *Roseway Street & Drainage Improvement Project*.

BACKGROUND / DISCUSSION:

This project consists of street and drainage improvements on the eastern portion of Roseway between Zaragoza and Carnes Road. Improvements will include curb & gutter, sidewalks, underground drainage, street widening, re-paving and the construction of a stormwater retention pond. The contract of sale being presented for consideration today is for \$130,000.00, a negotiated settlement value. The owners are prepared to move forward immediately to closing.

PRIOR COUNCIL ACTION:

Mayor and Council have previously approved 14 parcels prior to this action.

AMOUNT AND SOURCE OF FUNDING:

This expenditure is funded through general obligation bonds approved by the voters as part of the February 2004 Bond Election. No budgetary adjustments are required. Funding source is as follows:

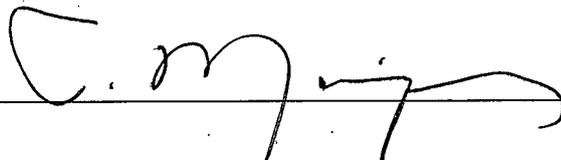
<u>Project</u>	<u>Fund</u>	<u>Department</u>	<u>Account</u>
PBE04ST127	29142	14200403	508000

BOARD / COMMISSION ACTION:

(N/A)

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

DEPARTMENT HEAD: _____



Informational 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 Contract of Sale between the **CITY OF EL PASO** and **D & L LAND PARTNERSHIP, L.P.** for the purchase of the following property for the Roseway Street Drainage Improvement Project for **ONE HUNDRED THIRTY THOUSAND and 00/100 DOLLARS (\$130,000.00):**

- Parcel 3: A portion of Tract 12T, Block 46, YSLETA GRANT, in the City of El Paso, El Paso County, Texas, according to the resurveyed of said YSLETA GRANT made by El Paso County Texas for tax purposes and being more particularly described by metes and bounds in Exhibit "A-1" attached hereto and made a part hereof for all purposes; and
- Parcel 4: A portion of Tract 12A, Block 46, YSLETA GRANT, in the City of El Paso, El Paso County, Texas, according to the resurveyed of said YSLETA GRANT made by El Paso County Texas for tax purposes and being more particularly described by metes and bounds in Exhibit "A-2" attached hereto and made a part hereof for all purposes

ADOPTED this _____ day of _____, 2010.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

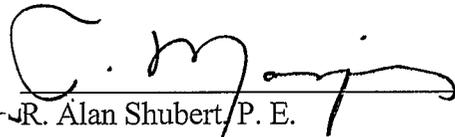
Richarda D. Momsen, City Clerk

APPROVED AS TO FORM:



Mark Shoesmith
Assistant City Attorney

APPROVED AS TO CONTENT:



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

PROPERTY DESCRIPTION
2,570 Square Feet

Being a portion of Tract 12T, Block 46, Ysleta Grant, City of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING FOR REFERENCE at the city monument at the intersection of Onate Way and Candelaria Street and the city monument at the intersection of said Candelaria Street and Benito Way bears, South 23°00'49" West, 285.62 feet;

THENCE, North 21°32'33" West, a distance of 443.66 feet to a set ½ inch rebar with cap marked (Tx2027) in the South line of said Tract 12T (book 1776, page 866) and POINT OF BEGINNING for the herein described tract;

THENCE, leaving said South line, North 45°09'19" West, a distance of 142.21 feet to a set ½ inch rebar with cap marked (Tx2027) in the North line of Tract 12T;

THENCE, along the north line of said Tract 12T, North 20°57'00" East, a distance of 19.24 feet to the Northeast corner of said Tract 12T in the West right-of-way line of Roseway Drive (30 feet wide);

THENCE, along said right-of-way line, South 45°09'00" East, a distance of 150.00 feet to the Southeast corner of said Tract 12T;

THENCE, leaving said right-of-way line and along the South line of said Tract 12T, South 44°51'00" West, a distance of 17.58 feet to the POINT OF BEGINNING and containing 2,570 square feet of land.

This description was prepared from a survey made on the ground on 7-13-04 with a plat of same date.

PREPARED BY:
Cutts Land Surveying, Inc.
El Paso, Texas
December 10, 2004
Job No. 040707-12t

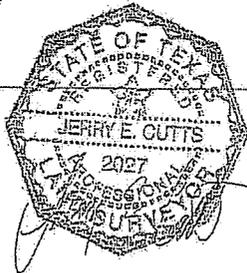


EXHIBIT "A-1"

PROPERTY DESCRIPTION
4,300 Square Feet

Being a portion of Tract 12A, Block 46, Ysleta Grant, City of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING FOR REFERENCE at the city monument at the intersection of Onate Way and Candelaria Street and the city monument at the intersection of said Candelaria Street and Benito Way bears, South 23°00'49" West, 285.62 feet;

THENCE, North 02°50'01" East, a distance of 239.17 feet to a set ½ inch rebar with cap marked (Tx2027) in the South line of said Tract 12A (book 3677, page 136) and POINT OF BEGINNING for the herein described tract;

THENCE, leaving said South line, North 45°09'19" West, a distance of 246.44 feet to a set ½ inch rebar with cap marked (Tx2027) in the North line of Tract 12A;

THENCE, along the north line of said Tract 12A, North 44°51'00" East, a distance of 17.58 feet to the Northeast corner of said Tract 12A in the West right-of-way line of Roseway Drive (30 feet wide);

THENCE, along said right-of-way line, South 45°09'00" East, a distance of 243.40 feet to the Southeast corner of said Tract 12A;

THENCE, leaving said right-of-way line and along the South line of said Tract 12A, South 35°01'00" West, a distance of 17.81 feet to the POINT OF BEGINNING and containing 4,300 square feet of land.

This description was prepared from a survey made on the ground on 7-13-04 with a plat of same date.

PREPARED BY:
Cutts Land Surveying, Inc.
El Paso, Texas
December 10, 2004
Job No. 040707-12a

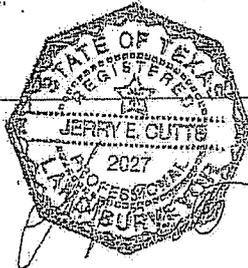


EXHIBIT "A-2"

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

CONTRACT OF SALE

This Agreement is entered into as of the 20th day of May, 2010 by and between the **CITY OF EL PASO**, hereinafter referred to as the "City," and **D & L LAND PARTNERSHIP, LP**, a Texas limited partnership, hereinafter referred to as the "Seller."

NOW, THEREFORE, for and in consideration of the premises and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Description of Property. The Seller hereby agrees to sell and convey and the City hereby agrees to acquire free and clear of any liens or encumbrances, the following real property located in El Paso County, Texas:

Parcel 3: A portion of Tract 12T, Block 46, YSLETA GRANT, in the City of El Paso, El Paso County, Texas, according to the resurveyed of said YSLETA GRANT made by El Paso County Texas for tax purposes and being more particularly described by metes and bounds in Exhibit "A-1" attached hereto and made a part hereof for all purposes; and

Parcel 4: A portion of Tract 12A, Block 46, YSLETA GRANT, in the City of El Paso, El Paso County, Texas, according to the resurveyed of said YSLETA GRANT made by El Paso County Texas for tax purposes and being more particularly described by metes and bounds in Exhibit "A-2" attached hereto and made a part hereof for all purposes;

together with any interest of the Seller in (i) all improvements, if any, except chain link fencing on Parcels 3 and 4, and (ii) all right, title and interest of the Seller in and to any easements, appurtenances, and rights-of-way, and all interests in, on or to, any land, highway, street or alley, in, on, across, in front of, abutting, or adjoining any such real property, all of such property, hereinafter collectively referred to as the "Property."

2. Amount of Payment of Purchase Price and Additional Consideration. The purchase price for the Property shall be a total of ONE HUNDRED THIRTY THOUSAND and 00/100 DOLLARS (\$130,000.00). The consideration recited herein represents a release of all claims, a settlement and compromise by all parties as to the value of the Property herein conveyed in order to avoid litigation and the added expense of litigation. As additional consideration, the City agrees, at its expense, to relocate the chain link fence that is presently located on Parcels 3 and 4 to just within the property belonging to Seller in the remainder of Tract 12T that is contiguous to Parcel 3 and just within the property belonging to Seller in the remainder of Tract 12A that is contiguous to Parcel 4, which fence will be the property of Seller and which thereafter Seller will maintain. However, Seller waives any and all unintentional damage to the fence resulting from the relocation, and agrees that the timing for removing and relocating the fence is at the discretion of the City's contractor, except that the City's contractor shall be required to re-erect the fence on the property of Seller the same day that the fence is taken down from its existing location. Seller further agrees to grant the

City's contractor the right of access onto the remainder of Tracts 12T and 12A for the erection of the fence in its new location.

2.1 Purchase Price. The full amount of the purchase price will be payable in cash at the closing. The parties agree that the City's appraiser has stated that the fair market value of the parts taken from Parcel 4 sometimes known as 9050 Roseway is \$11,180 (4,300 sf x \$2.60), and that the \$18,820 balance of the \$30,000 amount appraised for Parcel 4 is damages. The parties agree that the fair market value of the parts taken from Parcel 3 (9032 Roseway) is \$6,888 and that balance of the \$100,000 amount for Parcel 3 is comprised of damages as appraised by the City's appraiser plus a negotiated amount to reach compromise and settlement with Seller.

3. Conditions to City's Obligations. The obligations of the Seller hereunder to consummate the transaction contemplated herein are subject to the satisfaction of each of the following conditions, any of which may be waived, in whole or in part, in writing by the City, at or prior to Closing.

3.1 Title Insurance. Within ten (10) working days after the date of execution of this Agreement, the City at its expense will order a title commitment ("Commitment"), accompanied by copies of all recorded documents affecting the Property for the issuance of an Owner's Policy of Title Insurance with respect to the Property, in an amount to be decided by the City ("Owner's Policy").

3.2 Title Objections. The City will give the Seller written notice on or before the expiration of ten (10) working days after the City executes this Agreement and receives a current Title Commitment that the condition of the title set forth in the Commitment is or is not satisfactory. In the event the City states that the condition is not satisfactory, the City will specifically set forth in such notice the defect or exception to title that is deemed objectionable. The Seller must either (i) promptly eliminate or modify all unacceptable matters to the reasonable satisfaction of the City; or (ii) notify City in writing of any of the objections raised by City that Seller cannot or will not cure. If Seller notifies City in writing that Seller cannot cure the objection, City shall have 5 days from receipt of the written notice within which to terminate this Contract or City will be deemed to have waived its objections to title except for those objections relating to outstanding liens against the Property. The City has no obligation under this paragraph or elsewhere in this Agreement to object to such liens, and the City has no obligation to close unless such liens are removed in their entirety as a condition to the Closing.

4. Representations and Warranties of Seller. The Seller hereby represents, covenants, and warrants to the City, as follows:

4.1 Parties in Possession. There are no parties in possession of any portion of the Property as lessees, tenants at sufferance, or otherwise.

4.2 Legal and Authorized Transactions. To the best of its knowledge and belief, no person or persons own an interest in the fee title in the Property other than the Seller and that the joinder of no other third party shall be required to consummate this transaction.

4.3 Mechanic's Lien. To the best of its knowledge and belief, (i) No action has been taken, suffered or permitted by or, to the best of Seller's knowledge and belief, on behalf of the Seller, the effect of which would be to establish or cause the inception or priority of any mechanic's or materialmen's lien, statutory, constitutional or otherwise, or other lien, charge or encumbrance upon the Property or any part thereof or interest therein; or (ii) no liens or lien claims, choate or inchoate, arising from the Seller's actions or otherwise, exist or can exist for the benefit of mechanics or materialmen in regard to the Property. Except as expressly disclosed in the documents relating to this transaction, the Seller has not entered into any contracts or agreements relating to the use of ownership of the Property or by which any person or entity agreed to provide labor, services or materials in regard to the Property or the business of the Seller.

4.4 Litigation. To the best of its knowledge and belief, there is no pending litigation or litigation contemplated by Seller before or by any court of law pertaining to the Property or which involve incidents occurring on the Property including, but not limited to, claims of damage to persons or property and no third party has threatened any such litigation.

4.5 Bills Paid. At closing, there will be no unpaid bills or claims in connection with any repair or operation of the Property.

4.6 Compliance With Law. To the best of Seller's knowledge and belief, the Property is in compliance with all applicable laws, ordinances, rules and regulations of any Government or any agency, body or subdivision, including any environmental issues related to the Seller's activities thereof.

4.7 Taxes. No state or municipal taxes are due with respect to the Property and no liens for such taxes are in effect against the Property, except as set forth on the Title Commitment. The Seller agrees to pay the prorated taxes due on the Property for the year 2010, through the date of Closing.

4.8 Pre-Closing Claims. To the best of its knowledge and belief, there are no pending or threatened claims being made by any third person or entity against Seller arising from or connected with the use of the Property or its present or past condition.

- (a) The Seller agrees that the City's acceptance of title to the Property under the conveyance documents should not create any liability on the City's part to third parties that have claims of any kind against the Seller in connection with the Property. The City hereby expressly disclaims any and all liability to third parties that have any claims against the Seller. The City will not assume or agree to discharge any liabilities pertaining to the Property that occurred or accrued prior to the date of Closing.
- (b) The Seller and the City each agree to promptly inform other party of any correspondence, directive, inquiry, demand, request, or similar communication from any federal or state environmental agency relating to the Property.

4.9 Authority. The Seller has full right, power and authority to convey the Property to the City and to consummate this transaction as provided in this Contract without the joinder of any other person or entity.

4.10 Title. The Seller has good and indefeasible title to a fee simple estate in the Property, subject to no liens, charges, encumbrances or exceptions other than those shown on the Title Commitment.

4.11 Condition of Property Prior to Closing. Prior to Closing, the Seller shall not create or permit to be created any easement or other encumbrance on the Property without the prior written consent of the City.

4.12 Knowing Misrepresentation. The Seller shall indemnify and hold the City harmless from and against any losses, damages, costs or expenses (including attorneys' fees) incurred by the City as a direct or indirect result of (i) a knowing breach of any representation or warranty of the Seller contained in this document, or (ii) any breach or default by the Seller under any of the covenants or agreements contained in this document to be performed by the Seller, all of which shall survive the Closing hereof.

4.13 Survival. All representations, warranties, covenants and agreements of the Seller made in this document, including without limitation any indemnity obligations, shall survive the execution and delivery hereof and of the Deed as well as the Closing hereunder, until such time as all of the obligations of the signatories hereto shall have lapsed in accordance with their respective terms, if and as applicable, or shall have been discharged in full.

5. Closing. The closing of this transaction ("Closing") shall take place at the offices of Stewart Title of El Paso, 415 N. Mesa, El Paso, Texas 79901, or another Title Company of City's choosing (the "Title Company"). The Closing shall occur on or before ten (10) days after the City Council has approved this Agreement, unless more time is needed to obtain clear title, in which case the City may unilaterally extend the Closing for an additional thirty (30) days.

5.1 Real Property Taxes. The Seller agrees to pay any past due taxes on the Property. Seller agrees to pay the taxes due on the Property for the year 2010, prorated through the day of closing.

5.2 Closing Costs.

- (a) All recording fees arising from the recordation of documents necessary to show good title to the Property shall be paid by the City.
- (b) Premiums and other charges for the issuance of the Owner's Policy of Title Insurance for the Property shall be paid by the City.
- (c) Escrow fees, if any, shall be paid by the City.

5.3 Seller's Obligations. At Closing, the Seller shall deliver to the City a duly executed and acknowledged Warranty Deed to the Property, free and clear of any and all liens, encumbrances, conditions, easements, assessments, and restrictions, except for (i) ad valorem taxes for the year of Closing which shall be prorated to the date of Closing, (ii) the standard printed exceptions contained in the usual form of the Owner's Policy, and (iii) any other exceptions set forth in the Title Policy which the City has approved pursuant to Paragraph 3.2 above.

5.4 Other Obligations. Each party shall do all other acts, or deliver any other instruments or documents required or helpful to be done or delivered, in order to consummate this transaction.

5.5 Special Provisions. Except as otherwise provided with respect to chain link fencing, Seller shall remove its personal property, if any, from the Property before closing.

6. Default.

6.1 Breach by Seller. In the event that the Seller shall fail to fully and timely perform any of its obligations under this Agreement, or shall fail to consummate the sale of the Property for any reason, except the City's default, or the termination of this Agreement in accordance with its terms, the City may enforce specific performance of this Agreement, as its sole and exclusive remedy. Notwithstanding the foregoing, this limitation of liability does not apply to Seller's breach of its representations under paragraph 4.12 above.

6.2 Breach by City. In the event that City shall fail to fully and timely perform any of its obligations under this Agreement, or shall fail to consummate the sale of the Property for any reason, except the Seller's default, or the termination of this Agreement in accordance with its terms, due to the difficulty of assessing the Seller's actual damages as a result of such breach by City, the Seller shall have a right to receive \$1,000.00 as independent consideration plus the reasonable and necessary out-of-pocket expenses of the Seller directly relating to this Agreement, such sum being agreed upon as liquidated damages for the failure of the City to perform the duties, liabilities and obligations imposed upon it by the terms and provisions of this Agreement, and the Seller agrees to accept and take such cash payment as its total, reasonable damages and relief and as the Seller's sole, exclusive remedy hereunder in such event.

7. Miscellaneous.

7.1 Notice. Any notice, demand, direction, request, or other instrument authorized or required by this Agreement to be given to or filed with either party, shall be deemed to have been sufficiently given or filed for all purposes, if and when personally delivered or sent by certified mail, postage prepaid, return receipt requested, to the address specified below or at such other address as may be designated in writing by the parties:

Seller: D & L Land Partnership, LP
11 Garnet Crest Way
El Paso, Texas 79902

City: City Manager
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

Copy to: Risher S. Gilbert
201 E. Main Street, Suite 1501
El Paso, TX 79902

8. Entire Agreement/Governing Law. This Agreement constitutes the entire agreement between the parties, and supersedes all prior agreements and understandings, written or oral, regarding the subject matter of this Agreement, and may be amended or supplemented only by an instrument in writing, executed by the party against whom enforcement is sought. This Agreement shall be governed in all respects, including validity, interpretation and effect, by and shall be enforceable in accordance with the laws of the State of Texas.

8.1 Time. Time is of the essence of this Agreement and each and every provision hereof.

8.2 Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portion shall not in any way be affected or impaired.

8.3 Survival of Provisions. The terms contained in this Agreement, including without limitation, representations, warranties, covenants and agreements of the parties, shall survive the Closing and shall not be merged therein. In case any one or more of the provisions contained in this Contract for any reason is held invalid, this invalidity will not affect any other provision of this Contract, which will be construed as if the invalid or unenforceable provision had never existed.

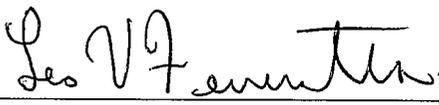
8.4 Binding Effect. This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

8.5 Compliance. In accordance with the requirements of Section 2B of the Texas Real Estate License Act, the City or its representatives is hereby advised that it should be furnished with or obtain a policy of title insurance or have an abstract covering the Property examined by an attorney of its own selection.

SELLER:

D & L LAND PARTNERSHIP, LP

By: D & L LAND, LLC, its general partner

By: 
LEO V. FEUERSTEIN, Member

By: 
DAVID A. FEUERSTEIN, Member

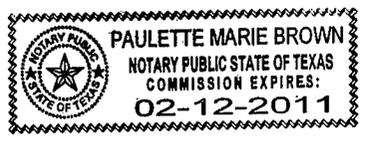
ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the 20th day of May, 2010 by LEO V. FEUERSTEIN.

Paulette Marie Brown
Notary Public, State of Texas

My commission expires:
02-12-2011

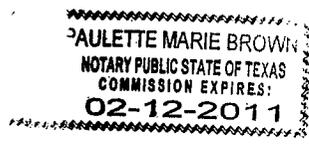


STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the 20th day of May, 2010 by DAVID A. FEUERSTEIN.

Paulette Marie Brown
Notary Public, State of Texas

My commission expires:
02-12-2011



EXECUTED by the City of El Paso to be effective as of the _____ day of _____, 2010.

City of El Paso

By: _____
Joyce Wilson
City Manager

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Mark Shoosmith
Mark Shoosmith

Alan Shubert
Alan Shubert

Assistant City Attorney

City Engineer
Development & Infrastructure Services

ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the ____ day of _____, 2010 by Joyce Wilson, City Manager of the City of El Paso.

My commission expires:

Notary Public, State of Texas

PROPERTY DESCRIPTION
2,570 Square Feet

Being a portion of Tract 12T, Block 46, Ysleta Grant, City of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING FOR REFERENCE at the city monument at the intersection of Oñate Way and Candelaria Street and the city monument at the intersection of said Candelaria Street and Benito Way bears, South 23°00'49" West, 285.62 feet;

THENCE, North 21°32'33" West, a distance of 443.66 feet to a set ½ inch rebar with cap marked (Tx2027) in the South line of said Tract 12T (book 1776, page 866) and POINT OF BEGINNING for the herein described tract;

THENCE, leaving said South line, North 45°09'19" West, a distance of 142.21 feet to a set ½ inch rebar with cap marked (Tx2027) in the North line of Tract 12T;

THENCE, along the north line of said Tract 12T, North 20°57'00" East, a distance of 19.24 feet to the Northeast corner of said Tract 12T in the West right-of-way line of Roseway Drive (30 feet wide);

THENCE, along said right-of-way line, South 45°09'00" East, a distance of 150.00 feet to the Southeast corner of said Tract 12T;

THENCE, leaving said right-of-way line and along the South line of said Tract 12T, South 44°51'00" West, a distance of 17.58 feet to the POINT OF BEGINNING and containing 2,570 square feet of land.

This description was prepared from a survey made on the ground on 7-13-04 with a plat of same date.

PREPARED BY:
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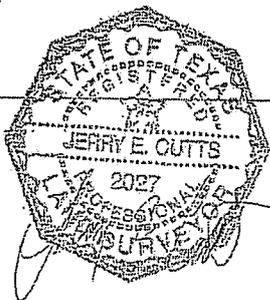


EXHIBIT "A-1"

PROPERTY DESCRIPTION
4,300 Square Feet

Being a portion of Tract 12A, Block 46, Ysleta Grant, City of El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING FOR REFERENCE at the city monument at the intersection of Onate Way and Candelaria Street and the city monument at the intersection of said Candelaria Street and Benito Way bears, South 23°00'49" West, 285.62 feet;

THENCE, North 02°50'01" East, a distance of 239.17 feet to a set ½ inch rebar with cap marked (Tx2027) in the South line of said Tract 12A (book 3677, page 136) and POINT OF BEGINNING for the herein described tract;

THENCE, leaving said South line, North 45°09'19" West, a distance of 246.44 feet to a set ½ inch rebar with cap marked (Tx2027) in the North line of Tract 12A;

THENCE, along the north line of said Tract 12A, North 44°51'00" East, a distance of 17.58 feet to the Northeast corner of said Tract 12A in the West right-of-way line of Roseway Drive (30 feet wide);

THENCE, along said right-of-way line, South 45°09'00" East, a distance of 243.40 feet to the Southeast corner of said Tract 12A;

THENCE, leaving said right-of-way line and along the South line of said Tract 12A, South 35°01'00" West, a distance of 17.81 feet to the POINT OF BEGINNING and containing 4,300 square feet of land.

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December 10, 2004
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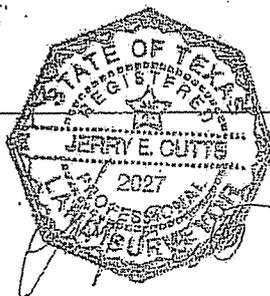


EXHIBIT "A-2"