

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

DEPARTMENT: Development Services Department-Planning Division

AGENDA DATE: Introduction 06-10-08; Public Hearing 06-17-08

CONTACT PERSON/PHONE: Mirian Spencer, Planner, (915) 541-4192, spencermd2@elpasotexas.gov

DISTRICT(S) AFFECTED: 8

SUBJECT:

An Ordinance granting a Special Privilege to YEK #2 L.P. to permit aerial, surface, and subsurface encroachments within a portion of the alley between San Antonio Street and Texas Street more particularly described as a portion of public right-of-way within Block 12, Mills Map Addition, City of El Paso, El Paso County, Texas for an aerial structure, underground passage, two wrought iron security gates, and two canopies. Applicant: YEK #2, L.P. SPL08-00010, District 8

BACKGROUND / DISCUSSION:

See attached information.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

On May 28, 2008 the Development Coordinating Committee recommended approval.

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: Victor A. Torres

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

CITY CLERK DEPT.
06 JUN -2 PM 12:12

ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO YEK #2 L.P. TO PERMIT AERIAL, SURFACE, AND SUBSURFACE ENCROACHMENTS WITHIN A PORTION OF THE ALLEY BETWEEN SAN ANTONIO STREET AND TEXAS STREET MORE PARTICULARLY DESCRIBED AS A PORTION OF PUBLIC RIGHT-OF-WAY WITHIN BLOCK 12, MILLS MAP ADDITION, CITY OF EL PASO, EL PASO COUNTY, TEXAS FOR AN AERIAL STRUCTURE, UNDERGROUND PASSAGE, TWO WROUGHT IRON SECURITY GATES AND TWO CANOPIES.

WHEREAS, YEK #2 L.P. (hereinafter referred to as “Grantees”) are the owners of the property located to the east of the alley for a distance of 100 feet and the property located to the west side of the alley running north and south between San Antonio Avenue and Texas Avenue, and between Mesa Street and Stanton Street in Block 12, Mills Map Addition to the City of El Paso, El Paso County Texas, more commonly known as 301 San Antonio Street, (hereinafter referred to as “Alley”); and

WHEREAS, Grantee desires to continue to utilize the connection between the buildings located to the east and west sides of the Alley over and under the Alley within the south 100 foot portion of the Alley; and

WHEREAS, Grantee constructed and maintained the existing overhead and underground passageways in accordance with Ordinance 5285, dated April 11, 1974, granting a license to the Popular Dry Goods Company for the erection of a structure and underground passage across and under an alley between San Antonio Street and Texas Street; and

WHEREAS, Grantee constructed two wrought iron security gates across the alley in 2004, and desires to continue to utilize the existing security gates; and

WHEREAS, Grantee constructed two canopies over public rights-of-way located adjacent to the property located at 301 San Antonio Street, legally described as a portion of Block 12, Mills, City of El Paso, El Paso County, Texas; and

WHEREAS, Grantee shall pay the City of El Paso for this special privilege;

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

That the Mayor be authorized to sign, on behalf of the City of El Paso, a Special Privilege to Grantee, upon the following terms.

1. This Special Privilege shall be in a form, which is attached and incorporated as Exhibit "A".

2. 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
3. This Special Privilege shall be for a term of five (5) years from the date of execution of this ordinance with renewal options as set forth in Section 2 of Exhibit "A"

PASSED AND APPROVED this ____ day of _____, 2008.

THE CITY OF EL PASO

ATTEST:

John F. Cook
Mayor

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Lupe Cuellar
Assistant City Attorney

Patricia D. Adauto, Deputy City Manager
Development and Infrastructure Services

CITY CLERK DEPT.
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THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

EXHIBIT "A"
SPECIAL PRIVILEGE

This Special Privilege is made and entered into this ___ day of _____, 2008, by and between the **CITY OF EL PASO**, hereinafter called "City," and YEK #2, its successors, and assigns, hereinafter called "Grantee," for use of certain City right-of-way located along the property described as the Alley running North and South between San Antonio Avenue and Texas Avenue, and between Mesa Street and Stanton Street in Block 12, Mills Map Addition, City of El Paso, El Paso County, Texas; and adjacent to the property described as the 86.667 feet on Mesa, 120 feet on Texas (Northwest Corner), Block 12, Mills, City of El Paso, El Paso County, Texas, commonly known as 301 San Antonio Street.

WITNESSETH:

WHEREAS, Grantee is requesting the use of a portion of City right-of-way located along 301 San Antonio Street in the City of El Paso, El Paso County, Texas; and

WHEREAS, Grantee has requested permission from the City to continue to maintain the existing canopies, overhead and underground passageway, and wrought iron security gates; and

WHEREAS, the City Council finds that the grant of a Special Privilege 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;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, the parties agree and covenant as follows:

1. **DESCRIPTION.** The City hereby grants a Special Privilege to Grantee to encroach onto a portion of public right-of-way abutting the property commonly known as 301 San Antonio Street, as shown in Exhibit "B", 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 renew 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. The term of the Special Privilege may also terminate upon mutual agreement of all parties involved.

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. Should the Grantee fail to submit such request for the renewal of this Special Privilege to the City as herein required, the Special Privilege will expire upon the expiration date. 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, pursuant to the fee structures set forth in Ordinance 10363, as amended, Section 15.08.120D of the El Paso Municipal Code, Forty and No/100ths Dollars (\$40.00) per year for the canopies; Five Hundred Fifty and No/100ths Dollars (\$550.00) per year for the security wrought iron gates; Three Hundred Thirty and No/100ths Dollars (\$330.00) per year, for the subsurface passageway; and Five Thousand, Two Hundred Fifty and No/100ths Dollars (\$5,250.00) per year, for the aerial structure encroachments; and are subject to change after each one year period the license remains in effect. The total sum of Six-Thousand, One Hundred Seventy and No/100ths Dollars (\$6,170.00) for the First Year shall be due prior to the execution of this Special Privilege by 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 Development Services Department. If the Special Privilege is disapproved by the City Council, the Development Services Department shall make full refund of the advance payment within fifteen (15) days of the denial action.

Each year, no later than the tenth day of the month in which the Special Privilege was approved by the City Council, the grantee shall remit to the City payment in full of all annual fees. Failure to remit such payment will be cause for termination.

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 15.08.120D. This Special Privilege is granted on the condition that Grantee shall pay for all costs associated with the canopy, and as well as all costs for the restoration of the Premises.

4. USE OF PROPERTY. This Special Privilege is granted for the encroachment onto public right-of-way with a canopy without signage), hereinafter called “Canopy;” wrought iron security gates, hereinafter called “Gates;” and the overhead and underground passageways “hereinafter called structures” onto the Premises. This Special Privilege shall not be construed to waive any City permit requirements. Grantee shall be responsible for all maintenance of the Structure.

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 for any reason whatsoever.

Nothing contained herein shall be construed to imply that the City is involved in the design, construction, maintenance, or repair of the Structure.

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 may impair 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, Canopy, Gates, 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 rights-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 insured 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 Development Services Department – Planning 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.

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, the encroaching Structure 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 Manager.

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 add additional encroachments without first having obtained any required building permits from the City Development Services Department.

- 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 301 San Antonio 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 301 San Antonio 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, 2nd Floor
 El Paso, Texas 79901-1196

and: YEK #2, L.P.
 112 E. Overland Avenue
 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 Development Services 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 Development Services 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 Development Services 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 limited partnership, each of the persons accepting on behalf of such Grantee warrant to the City that the corporate Grantee is a duly authorized and existing limited partnership, 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.

(Signatures on following page)

**WITNESS THE FOLLOWING SIGNATURES AND SEALS:
THE CITY OF EL PASO**

John F. Cook
Mayor

ATTEST:

Richarda Duffy-Momsen
City Clerk

CITY CLERK DEPT.
08 JUN -2 PM 12:13

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

Lupe Cuellar
Assistant City Attorney

Patricia D. Adata
Patricia D. Adata, Deputy City Manager
Development and Infrastructure Services

ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this 29th day of May, 2008.

GRANTEE: YEK #2, ITS SUCCESSORS, AND ASSIGNS

By:

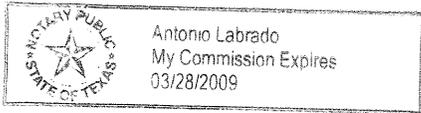
Enoch Kimmelman
Enoch Kimmelman, Manager
(Printed Name and Title)

ACKNOWLEDGEMENT

**THE STATE OF TEXAS)
COUNTY OF EL PASO)**

This instrument is acknowledged before me on this 29th day of May, 2008, by Enoch Kimmelman as Manager, on behalf of YEK #2, ITS SUCCESSORS, AND ASSIGNS

Antonio Labrado
Notary Public, State of Texas



Antonio Labrado
Notary's Printed or Typed Name:

March 28, 2009
My Commission Expires:

METES AND BOUNDS DESCRIPTION

Description of a parcel of land being portion of the 20 foot alley of Block 12 Mills Map Addition, City of El Paso, El Paso County, Texas and being more particularly described by metes and bounds as follows:

COMMENCING for reference at an existing city monument lying 10 feet North and 10 feet East of the centerline intersection of Texas Avenue and Mesa Street, from this point an existing city monument lying 10 feet North and 10 feet East of the centerline intersection of Mesa Street and Mills Avenue bears North 37° 37' 00" West a distance of 309.81 feet; **THENCE**, North 52° 23' 00" East a distance of 165.00 feet; **THENCE**, South 37° 37' 00" East a distance of 184.75 feet to a nail on the Easterly boundary line of a 20 foot alley in Block 12, Mills Map Addition; **THENCE**, South 37° 37' 00" East a distance of 5.54 feet to a point for the **TRUE POINT OF BEGINNING**;

THENCE, South 37° 37' 00" East a distance of 94.46 feet to a PK nail set;

THENCE, South 74° 26' 15" West along said right-of-way line a distance of 21.58 feet to a point on the Westerly boundary line of said 20 foot alley;

THENCE, North 37° 37' 00" West along said 20 foot alley a distance of 91.41 feet;

THENCE, N 66° 34' 28" East a distance of 20.63 feet to the **TRUE POINT OF BEGINNING** containing 1,859 square feet or 0.043 acres.

KISTENMACHER ENGINEERING COMPANY, INC.
1420 GERONIMO DRIVE, SUITE A-2
EL PASO, TEXAS 79925
(915) 778-4476

May 8, 2002

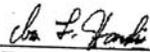

IRA L. HARDIN
Registered Professional Land Surveyor
Texas No. 1798



EXHIBIT B

Pg. 1 OF 3

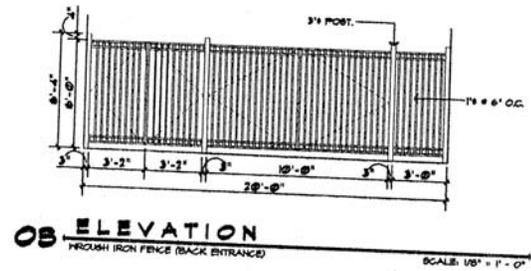
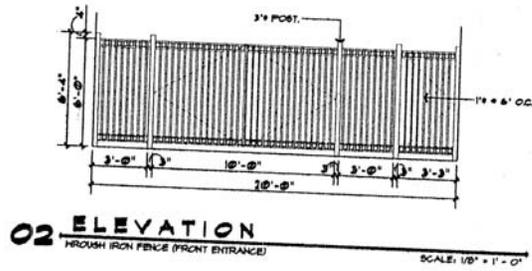
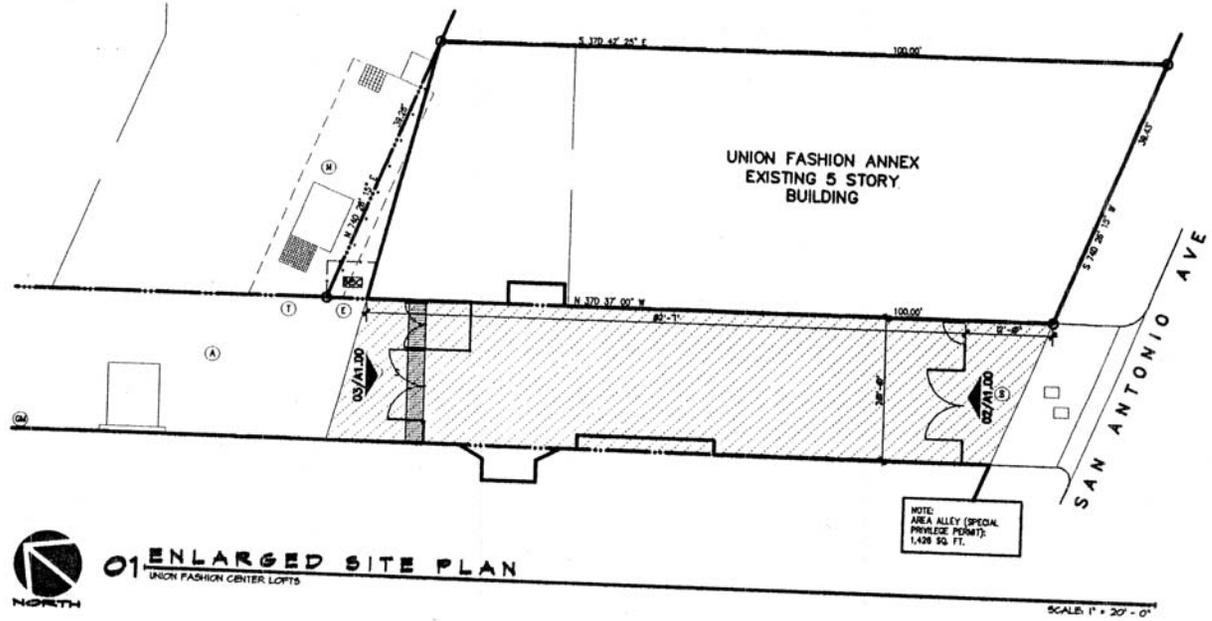
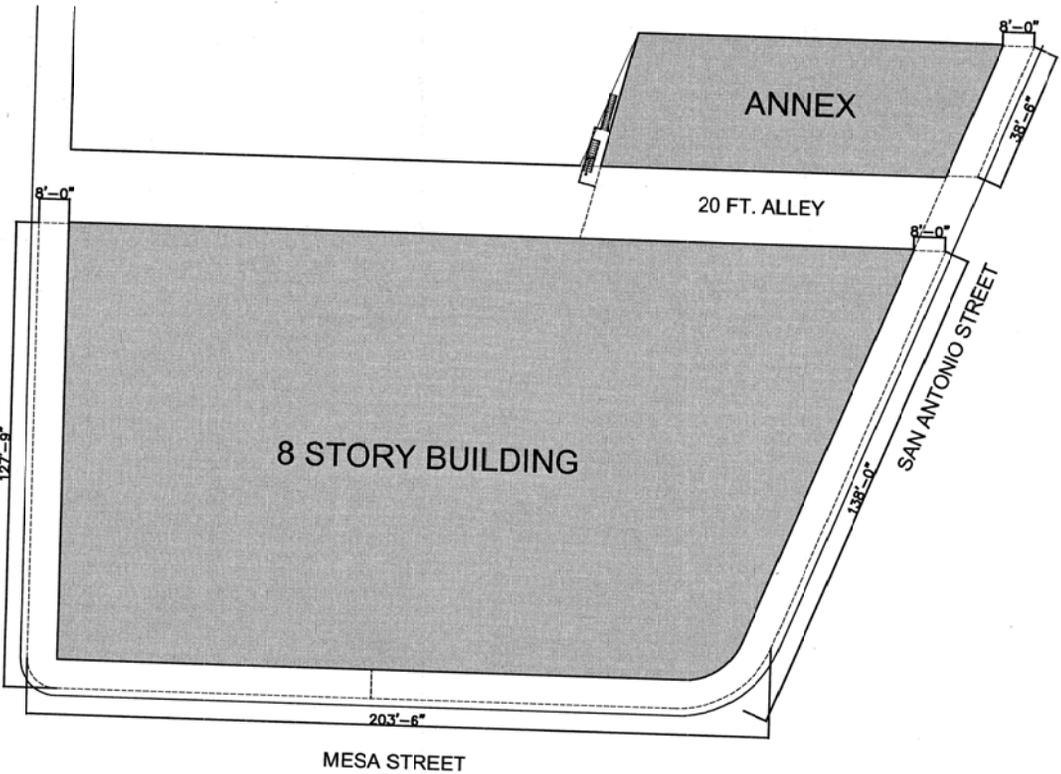


EXHIBIT B



 WRIGHT & DALBIN <small>INCORPORATED</small> 2142 Westwood Dr El Paso, Texas 79901 Phone 915-833-9777 Fax 915-833-7923 www.wrightdalbin.com	SCALE: 1" = 40' - 0"	LEGAL DESCRIPTION: 12 MILLS WESTERLY PORTION OF BLOCK AND PORTION OF CLOSED ALLEY	LEGAL DESCRIPTION: 301 SAN ANTONIO EL PASO, TEXAS
	DATE: MAY, 2008		

EXHIBIT B

PG. 3 OF 3

GENERAL INFORMATION:

SUBJECT: Special Privilege SPL08-00010

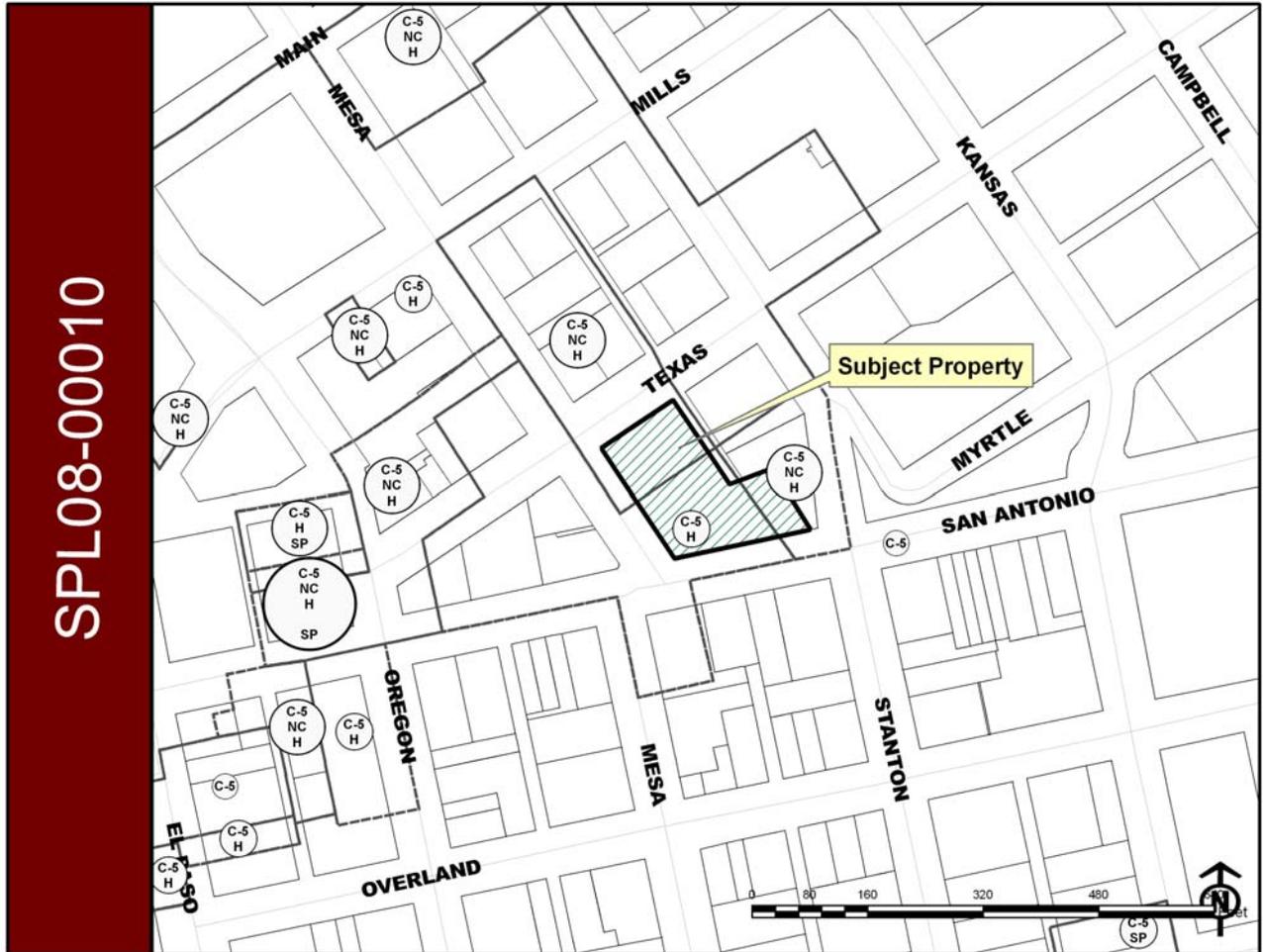
The Special Privilege will permit the existing encroachments of an overhead structure, underground passageway, security gates, and canopies within a portion of the dedicated 20 foot alley and the public right-of-way adjacent to 301 San Antonio Street.

The Development Coordinating Committee recommends approval based on and subject to the following:

- EPWU requires vehicular access for routine inspections, maintenance, and repair of the existing eight inch diameter sanitary sewer main located within the centerline of the alley.
- Grantee is responsible for restoration of the premises to its original state upon removal of any of the encroachments;
- Grantee is responsible for all maintenance and any damages due to a failure to maintain;
- A five (5) year term with the City having the option to renew for two (2) additional five (5) year terms upon the request of the Grantee;
- Annual consideration of \$6,170.00 subject to change annually.
- The City may, upon thirty (30) days written notice, cancel the Special Privilege at no cost to the City and may take possession of the public right-of-way;
- Grantee may cancel the Special Privilege, for any reason, upon thirty (30) days prior written notice to the city, and all rights of the Grantee shall be terminated; and
- Providing liability insurance throughout the term of the license agreement.

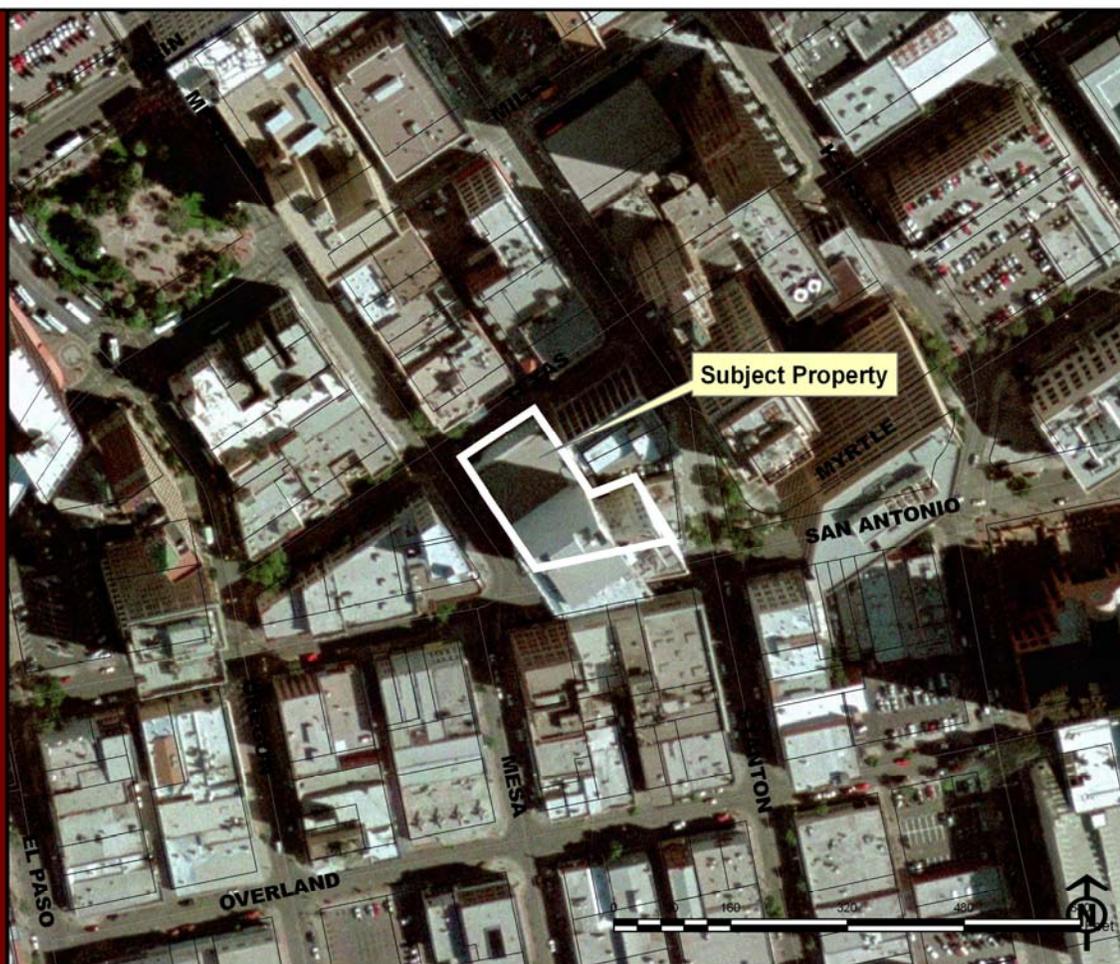
Location Map

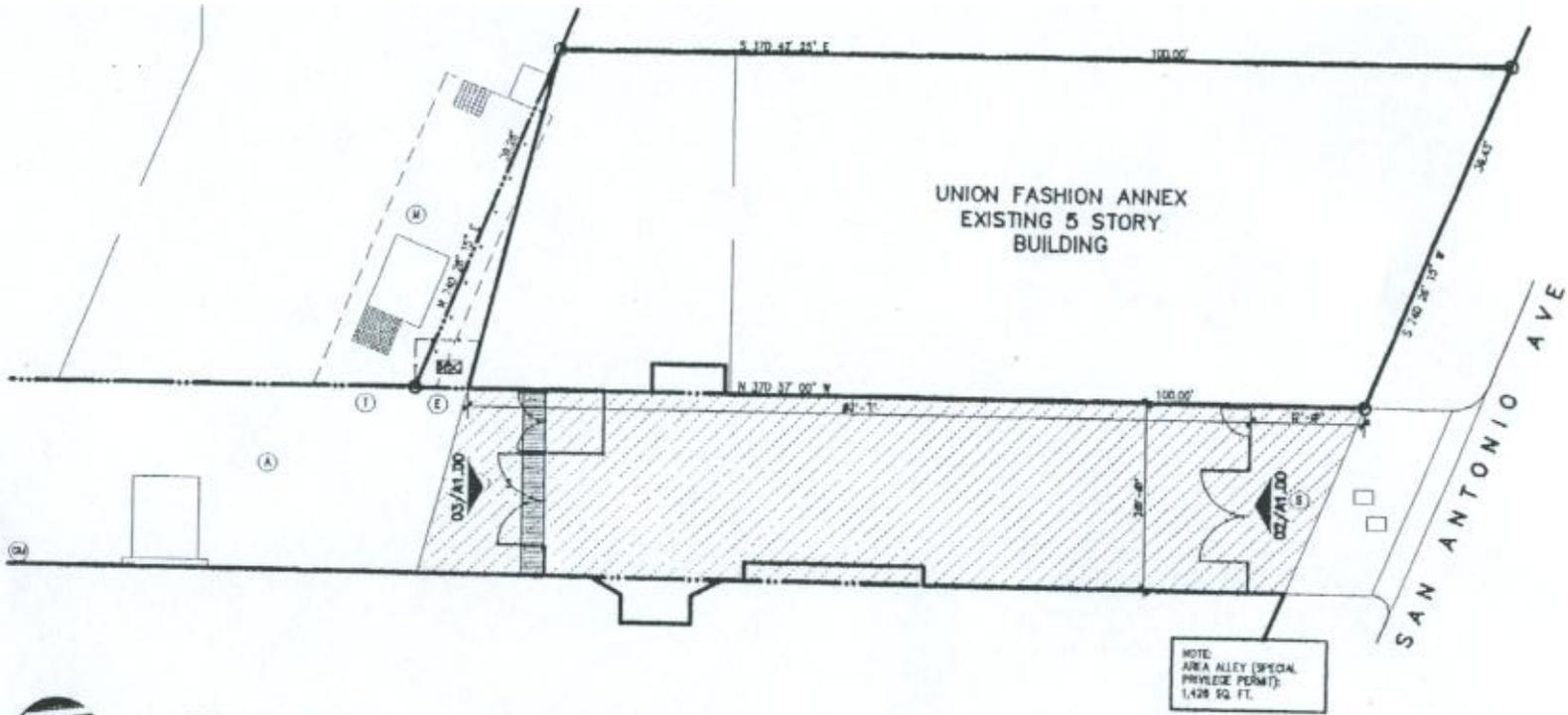
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Aerial

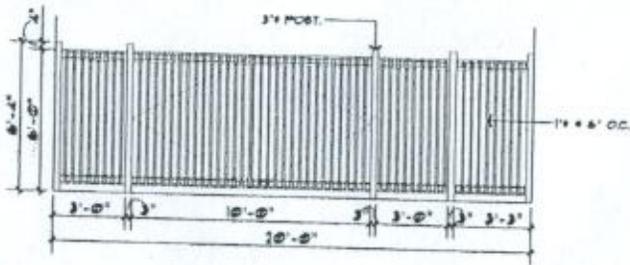
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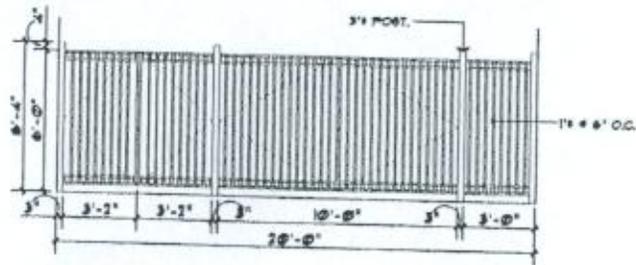
01 ENLARGED SITE PLAN
UNION FASHION CENTER LOFTS

SCALE: 1" = 20' - 0"



02 ELEVATION
THROUGH IRON FENCE (FRONT ENTRANCE)

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



03 ELEVATION
THROUGH IRON FENCE (BACK ENTRANCE)

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

Gate Site Plan

Aerial Survey

