

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

DEPARTMENT: Department of Transportation

AGENDA DATE: Introduction: July 12, 2011
Public Hearing: July 19, 2011

CONTACT PERSON NAME AND PHONE NUMBER: Mirian Spencer, (915) 541-4482, Spencermd2@elpasotexas.gov

DISTRICT(S) AFFECTED: 3

SUBJECT:

An Ordinance granting a Special Privilege License to Management and Engineering Technologies International, Inc. for the construction, installation, maintenance and repair of 70 linear feet of subsurface fiber optic conduit and cables within portions of City right-of-way beneath Maca Street between Boeing Drive and Lockheed Street for a term of five years with two renewable five year terms (NESV11-00025) District 3.

BACKGROUND / DISCUSSION:

The applicants are requesting to install fiber optic conduit and cables within the City right-of-way in order to provide communication connections between 8600 Boeing Drive and 8550 Boeing Drive. The applicants have coordinated with the utility companies that have existing utility lines within the right-of-way being proposed for use.

The term of the License is for five years with two options to renew for additional five year terms. In order to renew, the applicants will be required to submit written notification of their intention to renew three months prior to the expiration date of the license.

The annual fee for the license is \$140.00 and the applicants will pay the net present value of the entire five year term at a 3% discount rate for a total of \$641.16. By paying the net present value of the entire term, the applicants is not entitled to a refund should they terminate the special privilege prior to the expiration of the term.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

The Development Coordinating Committee will consider the special privilege request on July 13, 2011.

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

DEPARTMENT HEAD:

**Daryl W. Cole, Director
Department of Transportation**

ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE LICENSE TO MANAGEMENT AND ENGINEERING TECHNOLOGIES INTERNATIONAL, INC. FOR THE CONSTRUCTION, INSTALLATION, MAINTENANCE, AND REPAIR OF 70 LINEAR FEET OF SUBSURFACE FIBER OPTIC CONDUIT AND CABLES WITHIN PORTIONS OF CITY RIGHT-OF-WAY BENEATH MACA STREET BETWEEN BOEING DRIVE AND LOCKHEED STREET FOR A TERM OF FIVE YEARS WITH TWO RENEWABLE FIVE YEAR TERMS.

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

SECTION 1. DESCRIPTION

The City of El Paso for itself and on behalf of the El Paso Water Utilities/Public Service Board (EPWU/PSB) (hereinafter called "City") hereby grants a Special Privilege License (hereinafter called "License") to Management and Engineering Technologies International, Inc. (hereinafter referred to as the "Grantee") for the installation, future maintenance, and repair of 70 linear feet of subsurface fiber optic conduit and cables within portions of City right-of-way beneath Maca Street between Boeing Drive and Lockheed Street as shown in Exhibit "A" which is made a part hereof for all purposes (hereinafter referred to as "Cables"). Use of the City right-of-way shall be limited to the purpose of allowing the installation, operation, repair and maintenance of the Cables.

SECTION 2. LICENSE AREA

The subsurface rights granted herein beneath portions of right-of-way on Maca Street between Boeing Drive and Lockheed Drive as shown in Exhibit "B" which is made a part hereof for all purposes (hereinafter referred to as "License Area"). The Cables are to be installed maintaining a five-foot separation from existing utilities. For the areas necessitating pavement cuts, the repairs and pavement cuts shall comply with the provisions of Chapter 12.30 (Temporary Traffic Control), Chapter 13.04 (Street and Sidewalk Construction and Maintenance), and Chapter 13.08 (Excavations) of the El Paso City Code.

SECTION 3. PURPOSE

The only City right-of-way Grantee shall use pursuant to this License shall be License Area shown for the installation, operation, repair and maintenance of the Cables described in Exhibit A attached hereto. Any use of the License Area other than in connection with the installation, operation, use, maintenance, reconstruction, or modification of the Cables is not authorized by this License. Nothing herein shall grant any real property interest to the Grantee nor give rise to any vested right in the Grantee, his assigns or successors in interest, none of whom shall have a cause of action for damages upon revocation or termination of this License in accordance with the terms herein.

This License shall not permit or be construed to permit any other private use of the City right-of-way that impairs its function as a City right-of-way. Except as provided herein, Grantee shall not construct any additional improvements, or make any additions or alterations on, above, or below the City right-of-way, without prior written consent of the El Paso City Council.

SECTION 4. REGULATION OF CONSTRUCTION

The work done by Grantee in placing, constructing, replacing, repairing, reconstructing, or maintaining the Structure shall be subject to and governed by all laws, rules and regulation of the City and State of Texas, Federal Communications Commission, and the U.S. Government that are applicable to the construction of the Cables. Work done in connection with the construction, repair and maintenance of such facilities is subject to the continuing police power of the City.

In the event that Grantee desires to reconstruct, repair, maintain, or replace the Cables built hereunder, Grantee shall obtain all applicable permits required by the City. Where proposed, any excavation or trenching and other construction in the City right-of-way shall be so carried out as to interfere as little as practical with the surface use of the City right-of-way in accordance with any lawful and reasonable direction given by or under the authority of the governing body of the City under the police and regulatory powers necessary to provide for public convenience. After installation of the Cables, Grantee shall restore the City right-of-way to substantially the same condition as before any such boring, excavation, or trenching and to the reasonable satisfaction of the City, in accordance with applicable City specifications.

Grantee covenants and agrees that Grantee shall, at its own expense, repair all water lines, storm and sanitary sewer lines, service lines and water meters owned by the City that Grantee, its employees, contractors, agents or assigns, damage so that such repair of the water lines, storm and sanitary sewer lines and water meters shall comply with the approval of the City.

The City shall have the power at any time to order and require Grantee to remove and abate any portion of the Structure that is dangerous to life or property. Should Grantee, after notice, fail or refuse to comply within a reasonable time, the City shall have the power to remove or abate same, at the expense of Grantee. In the event City removes or abates the Cables as provided herein, Grantee shall not be compensated for the loss of the Cables, or revenues associated with the Structure, nor shall the City be liable to the Grantee for any direct, indirect or consequential damages due to the removal or abatement of the Cables.

SECTION 5. TERM

This Special Privilege shall be for a term of five (5) years from the effective date hereof, unless terminated earlier as provided herein. At the end of this term, the City shall have the unilateral option of renewing this Special Privilege for two (2) additional five (5) year terms upon the request of the Grantee. If Grantee wishes the City to renew this License, Grantee shall submit a request in writing to the City no later than three (3) months prior to the expiration date of this License. Should Grantee fail to submit such request for the renewal of this License to the City as herein required, the License shall expire upon the expiration date. Grantee understands, agrees, and accepts that the City may require the terms, conditions, and provisions of this License be modified as a condition for renewing the grant of the encroachment within the License Area as permitted by this License.

SECTION 6. WORK DONE BY OTHERS

Throughout the term of this License, the City expressly reserves the right to install, repair, or reconstruct the City right-of-way used or occupied by Grantee, any streets or alleys and all ancillary public uses, usual and customary in connection with streets and alleys, expressly including but not limited to, drainage facilities and structures.

The City reserves the right, subject to further conditions described in this paragraph, to lay and permit to be laid, utility lines including, but not limited to, storm and sanitary sewer, gas, water, and other pipelines or cables and conduits, and to do and permit to be done, any underground and overhead installation or improvement that may be deemed necessary or proper by the governing body of the City in, across, along, over or under the City right-of-way occupied by Grantee, and to change any curb or sidewalk or the street grade of any street. The City shall not be liable to Grantee for any damage resulting there from, nor shall the City be liable to Grantee for any damages arising out of the performance of any work by the City, its contractors or subcontractors, not willfully and unnecessarily occasioned; provided, however, nothing herein shall relieve any other persons or entities from liability for damage to the Cables. If the City requires Grantee to, alter, change, adapt, or relocate the Cables, due to imminent public safety concerns, because of changes in the grade of the City right-of-way or in the location or manner of constructing a water pipe, sewer pipe or other underground or aboveground pipes owned by the City, Grantee shall make the alterations or changes as soon as practicable when ordered in writing by the City without claim for reimbursement or damages against the City. If these requirements impose a financial hardship upon Grantee, Grantee shall have the right to present alternative proposals for the City's consideration. If the City requires Grantee to remove, alter, change, adapt or relocate its Cables or any portion there of to enable any other entity or person, except the City, to use, or to use with

greater convenience, the City right-of-way, Grantee shall not be required to make such changes until such other entity or person shall have undertaken with solvent bond, to reimburse Grantee for any loss and expense which will be caused by or arise out of such removal, alteration, change, adaptation or conformance of the Cables; provided, however, the City shall not be responsible nor liable for such reimbursement.

SECTION 7. RESERVATION OF SURFACE, SUBSURFACE, AND AIRSPACE RIGHTS

The City reserves the right to use the surface or subsurface or airspace within the License Area for any public purposes allowed by law and deemed necessary by the City and to do or permit to be done any work in connection therewith which may be deemed necessary or proper by the City on, across, along, under or over said City right-of-way occupied by Grantee provided such use does not interfere with Grantee's use of the License Area. Whenever by reason of said work in connection with said purposes it shall be deemed necessary by the City to alter, change, adapt, conform or relocate portions of the Cables, such alteration or change or relocation shall be made by Grantee when ordered in writing by the Traffic Engineer without any claim for reimbursement or damages against the City.

SECTION 8. CONSIDERATION

As consideration for this Special Privilege, Grantee shall pay to the City the sum of ONE HUNDRED FORTY AND NO/100 DOLLARS (\$140.00) per year. The annual consideration is calculated pursuant to Section 15.08.120.F.1 of the El Paso City Code.

ADVANCE PAYMENT REQUIRED: Grantee shall pay forth to the City the sum of SIX HUNDRED FORTY ONE DOLLARS AND 16/100 CENTS (\$641.16) prior to City Council action of this License. Said \$641.66 reflects the net present value of the annual fees required by this License. In the event of cancellation of this License by the City, the Grantee shall not be entitled to a refund of the annual consideration paid to the City.

The consideration shall be due as specified in the preceding paragraph. The advance payment shall be in the form of a cashier's check or business check payable to "The City of El Paso" and delivered to the Department of Transportation for remittance to the Financial Services Department. If the Special Privilege is disapproved by the City Council, a full refund of the payment shall be made by the Financial Services Department within fifteen (15) days of the denial action.

The fee payment shall be exclusive of and in addition to all general municipal taxes of whatever nature, including, but not limited to, the ad valorem taxes, and assessments for public

improvements except as hereinafter provided as may be enacted during the term of this License or any renewal. The fee established in this section shall not be affected by any relocation of Grantee's Cables required by the City pursuant to this License.

The fee payment shall be exclusive of and in addition to all costs of obtaining required permits, plans and other approvals as necessary to conform to all other applicable City Special Privileges and regulations.

SECTION 9. INSURANCE

Prior to commencement of any future construction, repairs, or maintenance operations during the term of this License, Grantee shall provide the City with a certificate of insurance and shall maintain such insurance in effect during the term of this License. The City shall be named as an additional insured on all of the Grantee's insurance policies that are required by this License. Failure to maintain insurance shall be a material breach of this license and a basis for termination of this License by the City.

Grantee shall provide public liability insurance for personal injuries and death growing out of any one (1) 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 (1) accident or other cause. These amounts are not a limitation upon Grantee's agreement to indemnify and hold the City harmless.

Grantee shall procure said insurance with a solvent insurance company authorized to do business in Texas. Such policy or certificate shall provide that the insurance cannot be canceled without thirty (30) days prior written notice to the Financial Services Department, or ten (10) days prior written notice to the Financial Services Department for cancellation based on non-payment of insurance premiums. Notification to the City is not required for modifications to the policy coverage amount provided the minimum liability coverage amounts listed in the preceding paragraph are maintained for the duration of the term of this License. Grantee shall file a copy of the policy or certificate of insurance with Financial Services and the Department of Transportation. If the policy is not kept in full force and effect throughout the term of this License, the License shall automatically become void.

SECTION 10. INDEMNITY

As a condition of this License, Grantee shall indemnify, defend and hold harmless the City, its officers, agents, servants and employees from and against any and all costs, claims, liens, damages, losses, expenses (including but not limited to attorneys' fees and costs), fees, fines, penalties, proceedings, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury or death or property damage, arising out of, resulting from or related to the GRANTEE'S activities under this License, including any act or omission by the GRANTEE, its agents, employees or subcontractors, all, without, however, waiving governmental immunity available to the City, hereafter, the "damages". This indemnification shall apply even where such damages described above involve the negligence or allegations of negligence on the part of the City, its officers, agents or employees.

The provisions of this indemnification are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any person or entity. 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. GRANTEE shall investigate or cause the investigation of accidents or occurrences involving such damages, negotiate or cause to be negotiated the claim as the GRANTEE may deem expedient, and defend or cause to be defended on behalf of the City all suits for damages, even if groundless, false or fraudulent brought because of such damages. GRANTEE shall pay all judgments finally establishing liability of the City in actions defended by Contractor pursuant to this section, along with all attorneys' fees and costs incurred by the City, including interest accruing to the date of payment by 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. In addition, the GRANTEE shall promptly advise the City in writing of any claim or demand against the City or the GRANTEE known to the GRANTEE related to or arising out of the GRANTEE'S activities under this License. **The City will not be responsible for any loss of or damage to the GRANTEE'S property from any cause.**

SECTION 11. RIGHTS IN THE EVENT OF ABANDONMENT

As an express condition of this License, and not as a mere covenant, in the event Grantee abandons the Cables or a portion thereof or ceases to use the Cables for the purposes enumerated

herein for any period of six (6) months or longer, other than the time elapsing between the effective date of this license and the completion of construction of the Cables, this License shall automatically terminate, free and clear of any right, title, or interest in Grantee without the necessity of any notice to Grantee or any re-entry by the City.

SECTION 12. CANCELLATION

Grantee shall have the option to terminate this License at any time upon giving the City written notice thirty (30) days in advance of such termination. In addition, the City shall have the option to cancel and terminate this License for failure of Grantee to comply with any material provision or requirement contained in this agreement after thirty (30) days written notice to Grantee. However, if said breach or failure to comply cannot be reasonably cured within thirty (30) days, if Grantee shall proceed promptly to cure the same with due diligence, the time for curing such failure to comply shall be extended for such period of time as may be deemed reasonably necessary by the City to complete such curing unless such breach involves public safety.

Upon termination of this License, prior to the expiration of the original term for any reason, Grantee shall remove its Cables located in the License Area at no cost to the City. When said Structure is removed from the License Area, Grantee shall restore all pavement or base, damaged, or removed during the term of this License, if any, at Grantee's own cost and expense, as determined by the City Engineer and in accordance with City specifications. Any such restoration shall be subject to the reasonable approval of the City. If the Grantee fails to restore the pavement as required by the City, the City may at its option restore the pavement and charge such costs to Grantee who shall be responsible for payment of such repair and restoration costs.

SECTION 13. RECORDS

The El Paso City Council and the Traffic Engineer or designee shall be kept fully informed by Grantee as to matters pertaining in any way to Grantee's exercise of its rights under this License, including the construction, replacement, reconstruction, maintenance, and repair of the Cables within the City right-of-way. Obtaining all applicable City permits shall be deemed sufficient to keep such parties informed. Grantee shall keep complete and accurate maps, construction drawings, and specifications describing the location of the Structure within the City right-of-way. The City shall have the right, at reasonable times to inspect such maps, construction drawings, and specifications.

SECTION 14. NOTICE

Any notice or communication required in the administration of this License shall be sent in writing by prepaid certified mail, return receipt requested, to the following addresses:

CITY: City of El Paso
Attn: City Manager
#2 Civic Center Plaza 10th Floor
El Paso, Texas 79901

with copy to: City of El Paso
ATTN: Department of Transportation
7968 San Paulo Drive
El Paso, Texas 79915

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

with copy to: El Paso Water Utilities/Public Service Board
ATTN: John E. Balliew, P.E.
P.O. BOX 511
El Paso, Texas 79961

GRANTEE: Management and Engineering Technologies International, Inc.
ATTN: Renard Johnson
8600 Boeing Drive
El Paso, Texas 79925

or to such other addresses as Grantee may designate from time to time by written notice as required in this paragraph.

SECTION 15. ASSIGNMENT

The rights granted by this License inure to the benefit of the Grantee, and any parent, subsidiary, or successor entity now or hereafter existing. The rights shall not be assignable without the express advanced written consent of the El Paso City Manager; however, such consent will not be unreasonably withheld.

SECTION 16. LEASING OR DEDICATION OF FACILITIES

Grantee, without the advanced written consent of the El Paso City Manager or designee, shall not lease the License Area, to any non-grantee person or entity; however, such consent will not be unreasonably withheld.

SECTION 17. ADMINISTRATION OF LICENSE

The Traffic Engineer or designee is the principal City official responsible for the administration of this License. Grantee recognizes that questions regarding the interpretation or application of this License shall be referred to the Traffic Engineer.

SECTION 18. NO PROPERTY RIGHTS

Nothing herein shall grant any real property interest to the Grantee nor give rise to any vested right in the Grantee, his assigns or successors in interest, none of who shall have a cause of action for damages upon revocation or termination of this License in accordance with the terms herein.

SECTION 19. 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 License Area that arises or is alleged to have arisen from Grantee's use of the License Area.

SECTION 20. RIGHT OF ENTRY AND INSPECTION

The City's authorized representative shall have the right to enter upon the License Area at all reasonable times for the purpose of inspecting the same and determining compliance with the terms of this License.

SECTION 21. LAWS AND ORDINANCES

Grantee shall comply with all statutes, laws, codes and ordinances applicable to Grantee's construction, repair, renovation, alteration or use of the License Area.

SECTION 22. 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.

SECTION 23. 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 shall not affect the validity of the remainder of this license.

SECTION 24. LAWS GOVERNING/VENUE

The laws of the State of Texas shall govern the validity, performances, and enforcement of this license and if legal action is necessary to enforce it, exclusive venue shall be in El Paso County, Texas.

SECTION 25. 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 license, 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 License Area, Grantee shall have the right to terminate this License upon giving the City prior written notice of its intent to do so.

SECTION 26. EFFECTIVE DATE

The effective date of this License shall be the date last entered below. This License shall not take effect unless Grantee files its written acceptance with the City prior to the enactment of this License by the El Paso City Council.

PASSED AND APPROVED this ____ day of _____, 2011.

WITNESS THE FOLLOWING SIGNATURES AND SEALS

THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

Elizabeth M. Ruhmann
Assistant City Attorney

APPROVED AS TO CONTENT:

Teresa Quezada, Deputy Director
Department of Transportation

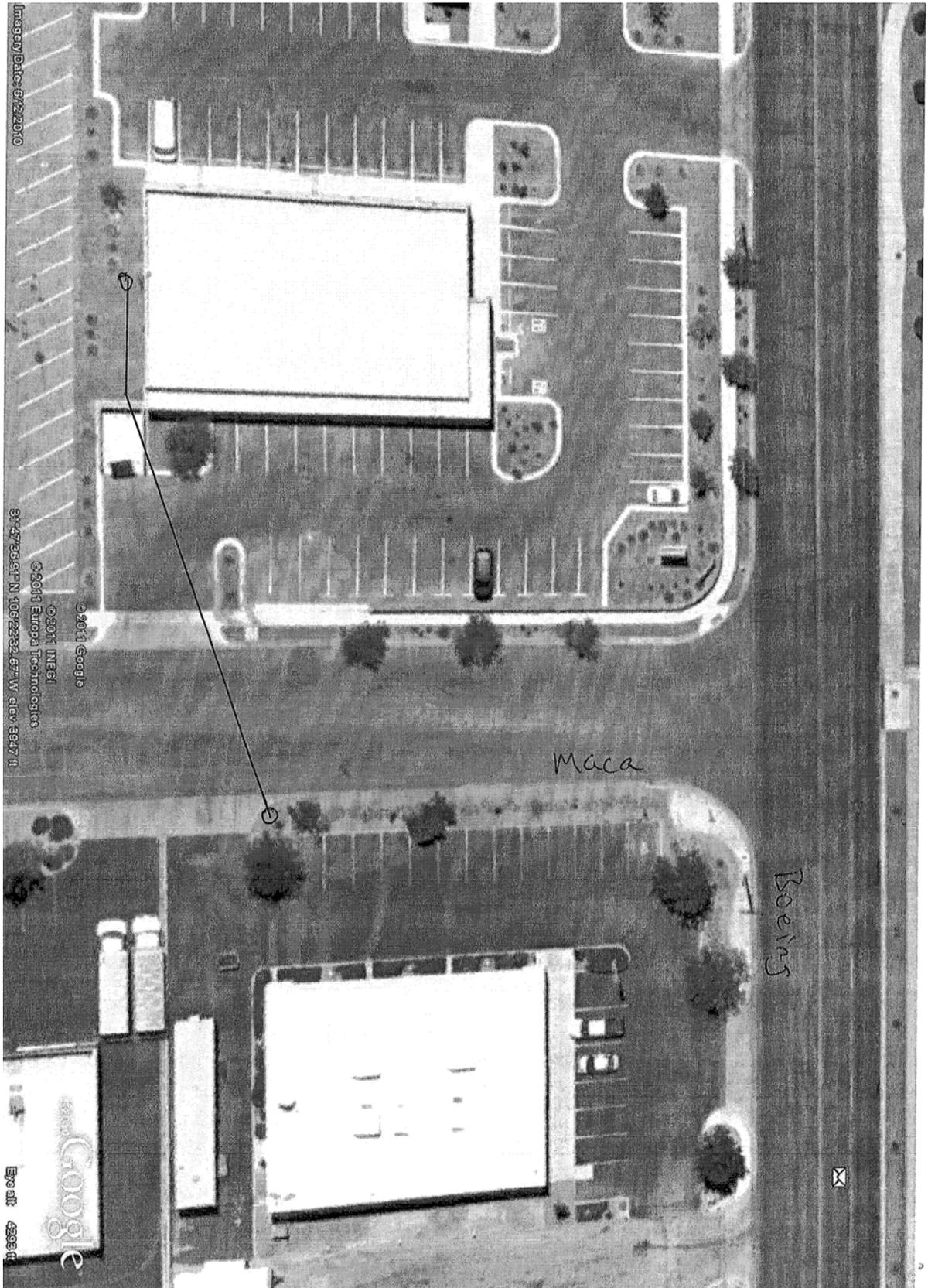


EXHIBIT A
Pg 1 of 3

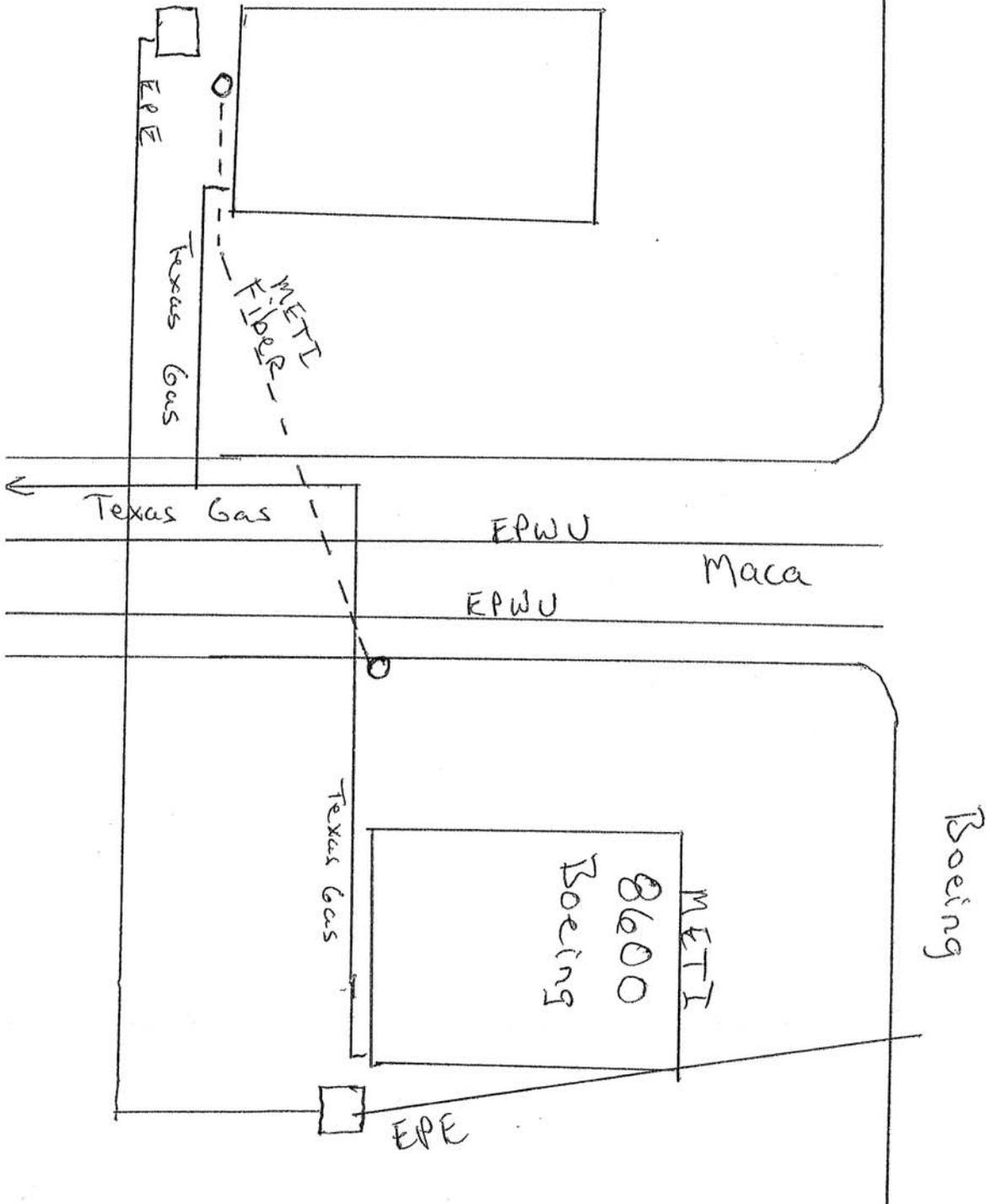


EXHIBIT A
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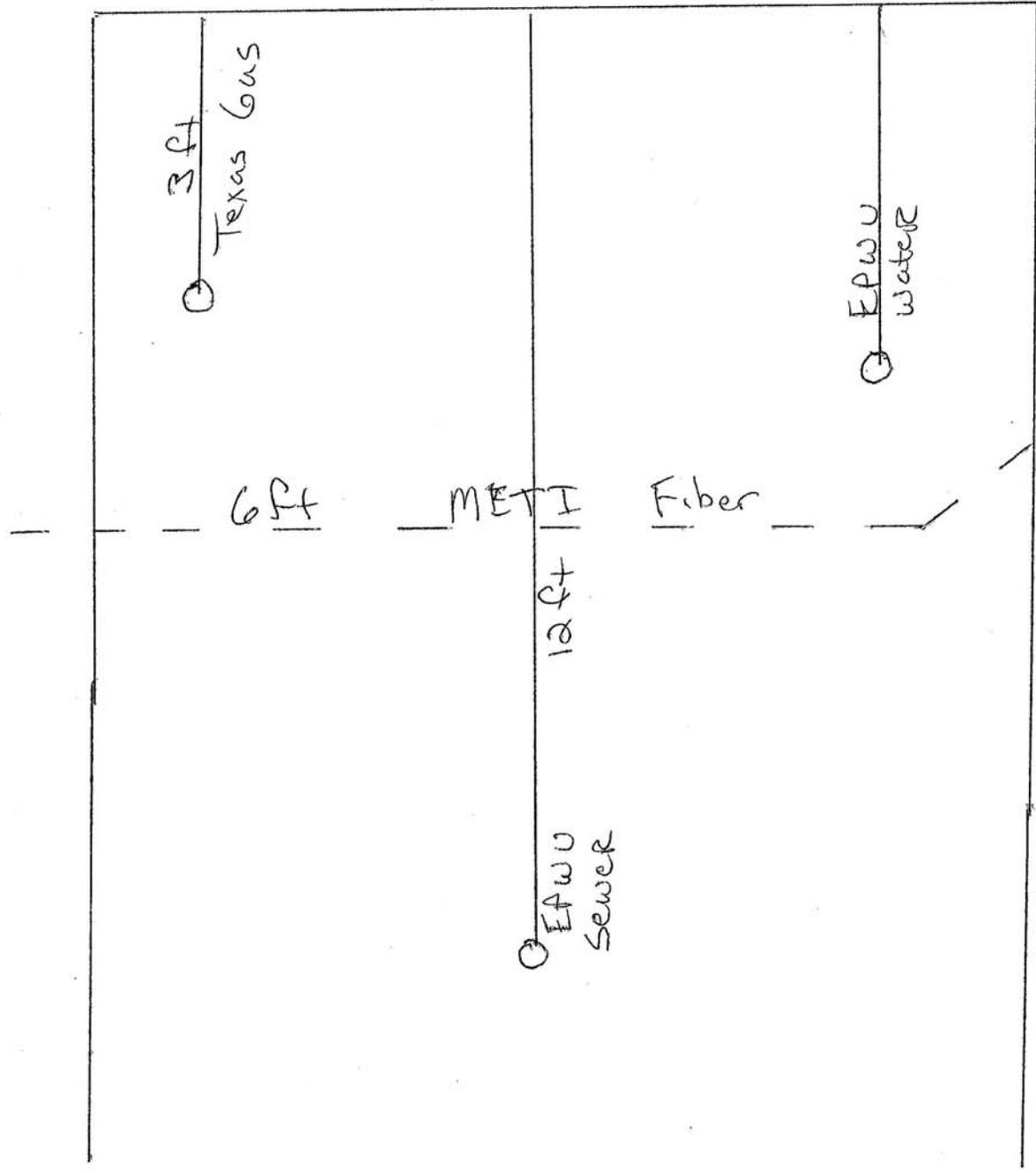


EXHIBIT A
Pg 3 of 3

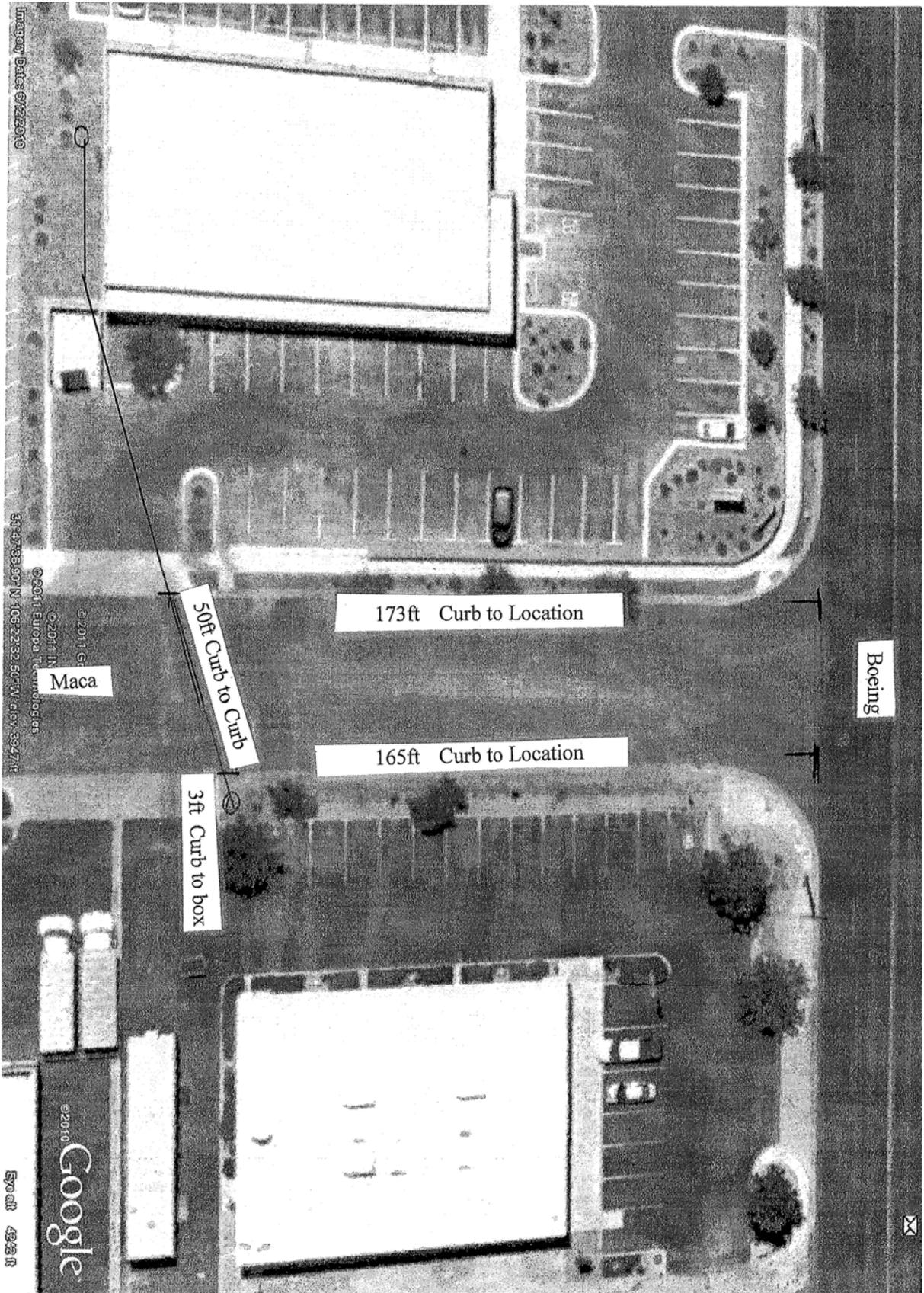
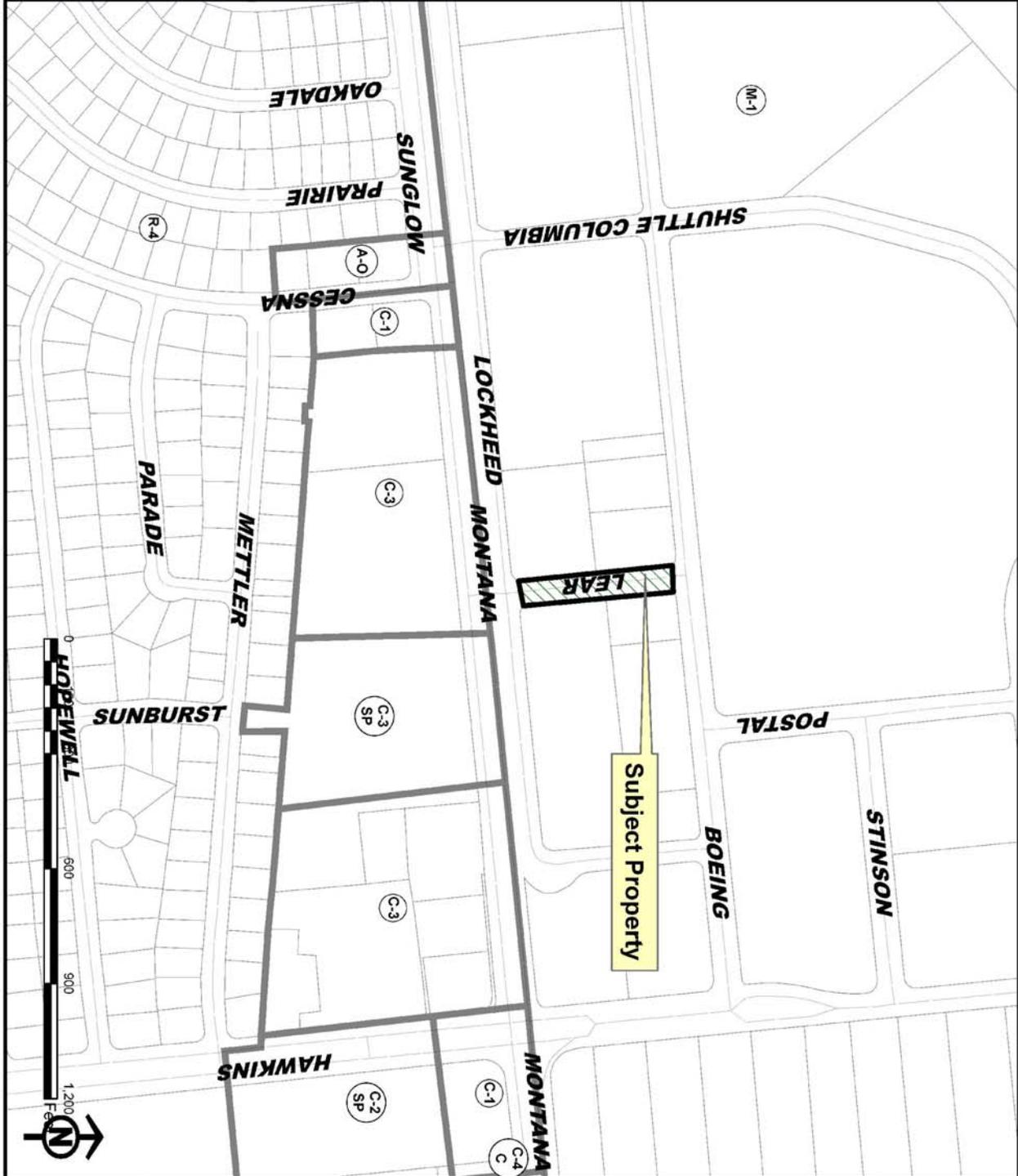


EXHIBIT B

LOCATION MAP

NESV11-00025



AERIAL MAP

NESV11-00025

