

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

DEPARTMENT: **Engineering**

AGENDA DATE: **July 22, 2008**

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

DISTRICT AFFECTED: **1**

SUBJECT:

Item is to request approval of a resolution authorizing the City Manager to execute, on behalf of the City of El Paso, a purchase of a portion of undeveloped private property to be used as right of way for the Westside Flood Drainage Improvements Phase I Project.

BACKGROUND / DISCUSSION:

This portion of undeveloped property is located 369 Shadow Mountain where Coronado Channel meets Shadow Mountain. During the design phase of the Westside Flood Improvements, it was determined that a portion of the existing channel was located on private property. The City obtained written permission to carry out the improvements which are complete. As a matter course, it is recommended that the City move forward and obtain the required right of way for this critical infrastructure. The proposed purchase price is \$14,500, the appraised value.

PRIOR COUNCIL ACTION:

None

AMOUNT AND SOURCE OF FUNDING:

This expenditure is funded through Storm 2006 COs. No budgetary adjustments are necessary.

<u>Project</u>	<u>Fund</u>	<u>Department</u>	<u>Account</u>
PSTM06 PW43-0	27264	14200500	508000

BOARD / COMMISSION ACTION:

(N/A)

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

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

DEPARTMENT HEAD: _____ 

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

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 **STEPHEN ZUCKER**, for the purchase of

a 0.039-acre portion of Tract 2E12, A.F. Miller Survey 212, City of El Paso, El Paso County, Texas,

to be used for the Westside Flood Drainage Improvements, Phase I.

ADOPTED this _____ day of _____, 2008.

THE CITY OF EL PASO

John F. Cook, Mayor

ATTEST:

Richarda D. Momsen, City Clerk

APPROVED AS TO FORM:



Theresa Cullen-Garney
Deputy City Attorney

APPROVED AS TO CONTENT:



Patricia D. Adauto
Deputy City Manager
Development & Infrastructure Services

STATE OF TEXAS

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§
§

CONTRACT OF SALE

COUNTY OF EL PASO

This Agreement is entered into as of the _____ day of _____, 2008 by and between the CITY OF EL PASO, hereinafter referred to as the "City," and STEPHEN ZUCKER, hereinafter referred to as "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:

A 0.039-acre portion of Tract 2E12, A.F. Miller Survey 212, City of El Paso, El Paso County, Texas, and more particularly described in Exhibit "A" attached hereto and made a part hereof for all purposes,

together with any interest of the Seller in (i) all improvements, if any, 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 or street, 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. The purchase price for the Property shall be a total of FOURTEEN THOUSAND, FIVE HUNDRED and 00/100 DOLLARS (\$14,500.00).

2.1 Payment of Purchase Price. The full amount of the purchase price will be payable in cash at the closing.

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 contract, 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 it receives the 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 may at its option promptly undertake to eliminate or modify all unacceptable matters to the reasonable satisfaction of the City. Otherwise, this condition will be deemed acceptable and any objection by the City will be deemed waived.

4. Representations and Warranties of Seller. The Seller hereby represents, to the best of its knowledge, 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. The Seller warrants that 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 Seller's best knowledge and belief: (i) no action has been taken, suffered or permitted by or 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 knowledge of the Seller, there is no pending or contemplated litigation 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.

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 Seller's knowledge, 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. To the best of the Seller's knowledge, 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 2008 through the date of Closing.

4.8 Pre-Closing Claims.

- 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. The Seller agrees to indemnify and hold the City

harmless from and against any claims, injuries, liabilities, losses, damages, or expenses, including attorneys' fees and court costs, pertaining to claims arising out of the Property, and accruing prior to and arising from events that occurred prior to the date of Closing.

- B. The Seller agrees to indemnify and hold the City harmless from and against any and all claims, injuries, liabilities, losses, damages, or expenses, including attorneys fees and court costs, pertaining to claims arising out of the Property, accruing prior to and arising from events that occurred prior to the date of Closing, and arising from any of the following: (i) testing or inspection obligations required by federal or state environmental agencies, including without limitation any required after the date of Closing; (ii) pending environmental investigations or cases by the Texas Commission on Environmental Quality known to the Seller; or (iii) the acts or omissions of the Seller on the Property. 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, to reasonably cooperate with the other party on the response to and handling of such communication and any related proceeding, and allow the reasonable participation of the other party in connection with the same.

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 condition affecting the Property without the prior written consent of the City.

4.12 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) 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. Closing. The closing of this transaction ("Closing") shall take place at the offices of Del Norte First American Title Insurance Company, 320 Texas Ave., El Paso, Texas 79901 (the "Title Company") on or before thirty (30) days after the execution of this Agreement by the City.

5.1 Real Property Taxes. The Seller agrees to pay the taxes due on the Property for the year 2008 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. The Seller shall be entitled to remove all furnishings, fixtures, equipment, or its personal property 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.

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 the \$100.00 as independent consideration as well as 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: Stephen Zucker
6990 Westwind Dr.
El Paso, TX 79912

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

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.

8.6 Reservation. The City reserves, and does not waive, its rights of sovereign immunity and similar rights and its rights under the Texas Tort Claims Act, except to the extent necessary to give legal effect to this Contract.

The above instrument, together with all conditions thereto is hereby EXECUTED by the Seller to be effective as of the 24 day of June, 2008.

SELLER:


Stephen Zucker

ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the 24 day of June, 2008 by STEPHEN ZUCKER.


Notary Public, State of Texas

My commission expires:

1/17/2010



EXECUTED by the City of El Paso to be effective as of the _____ day of _____, 2008.

City of El Paso

By: _____
Joyce Wilson
City Manager

(Signatures continued on next page)

APPROVED AS TO FORM:

Theresa Cullen-Garney
Theresa Cullen-Garney
Deputy City Attorney

APPROVED AS TO CONTENT:

Patricia D. Adauto
Patricia D. Adauto
Deputy City Manager
Development & Infrastructure Services

ACKNOWLEDGEMENT

STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument was acknowledged before me on the _____ day of _____, 2008 by
Joyce Wilson, City Manager of the City of El Paso.

Notary Public, State of Texas

My commission expires:

Property description: A 0.039-acre portion of Tracts 2E6B and 2E12, A.F. Miller Survey 212, El Paso, El Paso County, Texas

METES AND BOUNDS DESCRIPTION

The parcel of land herein described is a 0.039-acre portion of Tracts 2E6B and 2E12, A.F. Miller Survey 212 (June 1, 1981, Book 1179, Page 689, Deed Records, El Paso County, Texas), El Paso, El Paso County, Texas, and is more particularly described by metes and bounds as follows:

COMMENCING at a city monument at the centerline intersection of Shadow Mountain Drive (120-foot right-of-way) and Caprock Drive (60-foot right-of-way), from which a city monument at the centerline P.C. of Caprock Drive bears North 89°56'01" West, a distance of 300.78 feet; Thence, North 02°58'30" East, a distance of 772.63 feet to a 5/8" rebar with cap marked "RPLS 4178" set on the westerly right-of-way of Shadow Mountain Drive for the **POINT OF BEGINNING** of this description;

THENCE, North 90°00'00" West, a distance of 100.60 feet to a 5/8" rebar with cap marked "RPLS 4178" set on the common boundary between Tract 2E12, A.F. Miller Survey 212 and Mountain Spring Subdivision (Book 67, Page 1, Plat Records, El Paso County, Texas);

THENCE, North 08°28'43" East, along said boundary, a distance of 30.19 feet to a 5/8" rebar with cap marked "RPLS 4178" set on the southerly boundary of Lot 1, Block 1, Sutton Place Unit One (Book 21, Page 29, Plat Records, El Paso County, Texas);

THENCE, South 75°03'20" East, along said boundary, a distance of 100.13 feet to a chiseled "X" set on the westerly right-of-way of Shadow Mountain Drive (Thunderbird Mountain Estates Correction Plat, Book 60, Page 37, Plat Records, El Paso County, Texas);

THENCE, South 08°21'34" West, along said right-of-way, a distance of 4.08 feet to the **POINT OF BEGINNING** of this description.

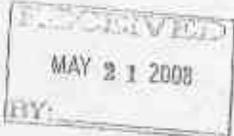
Said parcel of land contains 0.039 acres (1,705 square feet) of land more or less.

NOTE: A PLAT OF EVEN DATE HEREWITH ACCOMPANIES THIS DESCRIPTION.

ROBERT SEIPEL ASSOCIATES, INC.
Professional Land Surveyors



Robert R. Seipel, R.P.L.S.
President
Texas License No. 4178



Job Number 06-0037C
May 7, 2008

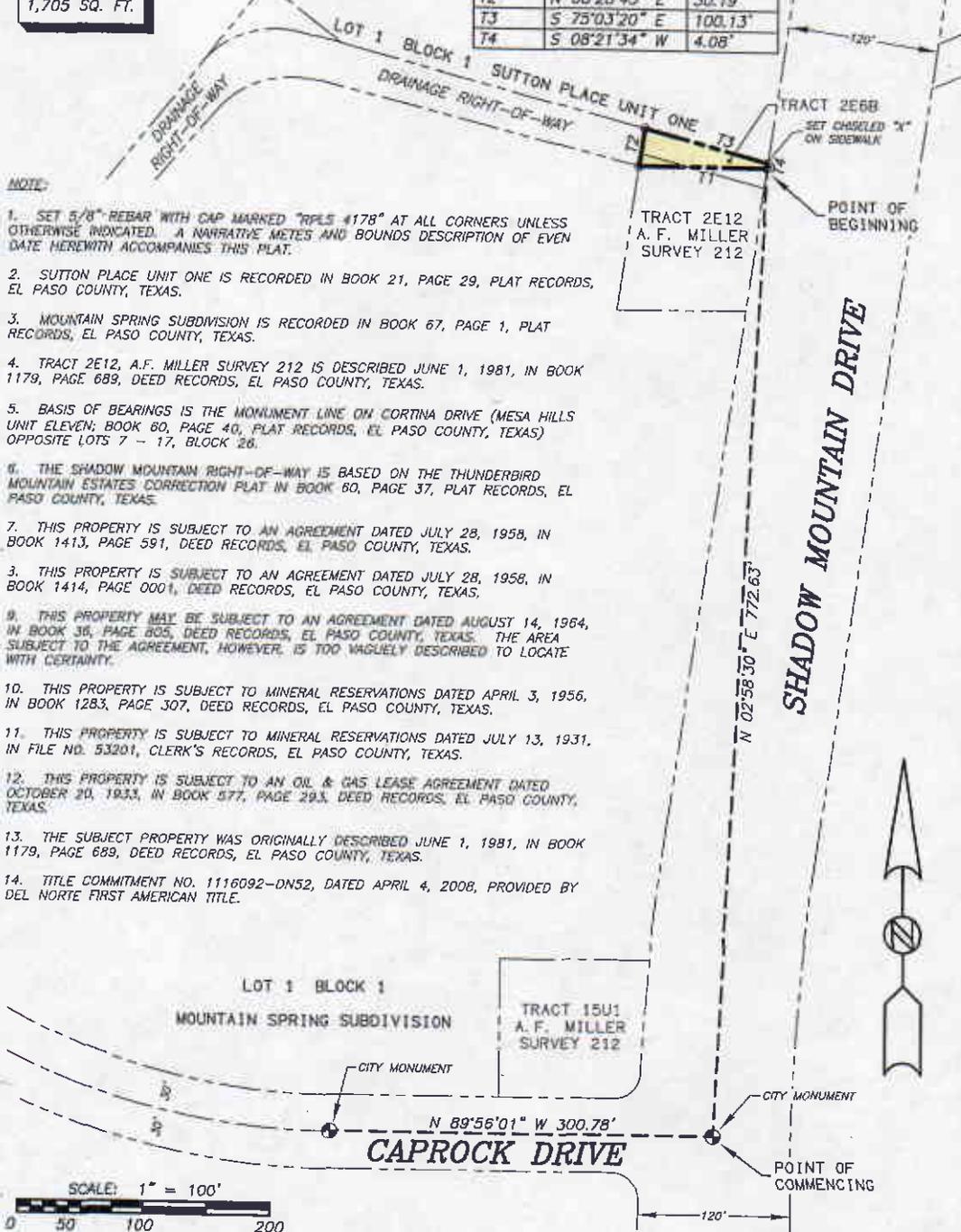
Exhibit "A"
Page 1 of 2

PARCEL AREA
0.039 ACRES
1,705 SQ. FT.

NUMBER	BEARING	DISTANCE
T1	N 90°00'00" W	100.60'
T2	N 08°28'43" E	30.19'
T3	S 75°03'20" E	100.13'
T4	S 08°21'34" W	4.08'

NOTE:

1. SET 5/8" REBAR WITH CAP MARKED "RPLS #178" AT ALL CORNERS UNLESS OTHERWISE INDICATED. A NARRATIVE METES AND BOUNDS DESCRIPTION OF EVEN DATE HERewith ACCOMPANIES THIS PLAT.
2. SUTTON PLACE UNIT ONE IS RECORDED IN BOOK 21, PAGE 29, PLAT RECORDS, EL PASO COUNTY, TEXAS.
3. MOUNTAIN SPRING SUBDIVISION IS RECORDED IN BOOK 67, PAGE 1, PLAT RECORDS, EL PASO COUNTY, TEXAS.
4. TRACT 2E12, A.F. MILLER SURVEY 212 IS DESCRIBED JUNE 1, 1981, IN BOOK 1179, PAGE 689, DEED RECORDS, EL PASO COUNTY, TEXAS.
5. BASIS OF BEARINGS IS THE MONUMENT LINE ON CORTINA DRIVE (MESA HILLS UNIT ELEVEN; BOOK 60, PAGE 40, PLAT RECORDS, EL PASO COUNTY, TEXAS) OPPOSITE LOTS 7 - 17, BLOCK 26.
6. THE SHADOW MOUNTAIN RIGHT-OF-WAY IS BASED ON THE THUNDERBIRD MOUNTAIN ESTATES CORRECTION PLAT IN BOOK 60, PAGE 37, PLAT RECORDS, EL PASO COUNTY, TEXAS.
7. THIS PROPERTY IS SUBJECT TO AN AGREEMENT DATED JULY 28, 1958, IN BOOK 1413, PAGE 591, DEED RECORDS, EL PASO COUNTY, TEXAS.
8. THIS PROPERTY IS SUBJECT TO AN AGREEMENT DATED JULY 28, 1958, IN BOOK 1414, PAGE 0001, DEED RECORDS, EL PASO COUNTY, TEXAS.
9. THIS PROPERTY MAY BE SUBJECT TO AN AGREEMENT DATED AUGUST 14, 1964, IN BOOK 38, PAGE 805, DEED RECORDS, EL PASO COUNTY, TEXAS. THE AREA SUBJECT TO THE AGREEMENT, HOWEVER, IS TOO VAGUELY DESCRIBED TO LOCATE WITH CERTAINTY.
10. THIS PROPERTY IS SUBJECT TO MINERAL RESERVATIONS DATED APRIL 3, 1956, IN BOOK 1283, PAGE 307, DEED RECORDS, EL PASO COUNTY, TEXAS.
11. THIS PROPERTY IS SUBJECT TO MINERAL RESERVATIONS DATED JULY 13, 1931, IN FILE NO. 53201, CLERK'S RECORDS, EL PASO COUNTY, TEXAS.
12. THIS PROPERTY IS SUBJECT TO AN OIL & GAS LEASE AGREEMENT DATED OCTOBER 20, 1933, IN BOOK 577, PAGE 293, DEED RECORDS, EL PASO COUNTY, TEXAS.
13. THE SUBJECT PROPERTY WAS ORIGINALLY DESCRIBED JUNE 1, 1981, IN BOOK 1179, PAGE 689, DEED RECORDS, EL PASO COUNTY, TEXAS.
14. TITLE COMMITMENT NO. 1116092-DNS2, DATED APRIL 4, 2008, PROVIDED BY DEL NORTE FIRST AMERICAN TITLE.



ROBERT SEIPEL ASSOCIATES, INC.

PROFESSIONAL LAND SURVEYORS

1845 NORTHWESTERN DR. SUITE C EL PASO, TX 79912 915-877-1928

PLAT OF SURVEY

A 0.039-ACRE PORTION OF TRACTS 2E6B AND 2E12, A.F. MILLER SURVEY 212, EL PASO, EL PASO COUNTY, TEXAS.

Exhibit "A"
Page 2 of 2

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SURVEY DATE: 05-07-08
SCALE: 1" = 100'
DRAWN BY: RRS
CHECKED BY: RRS
FIELD BOOK: -
FILE #: 06-0037C

Robert Seipel