

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

DEPARTMENT: City Development Department

AGENDA DATE: Introduction: July 24, 2012
Public Hearing: July 31, 2012

CONTACT PERSON NAME AND PHONE NUMBER: Mirian Spencer, (915) 541-4482, spencerm2@elpasotexas.gov

DISTRICT(S) AFFECTED: 8

SUBJECT:

An Ordinance granting a special privilege license to Marcus Courts Partners, LP, owner, Lowbrow Palace, LLC and Drag-In, LLC DBA The Palomino, Lessees, for the construction, installation, maintenance, use, and repair of two outdoor patio cafés within portions of City right-of-way along East Robinson Avenue adjacent to the property located at 2601 North Mesa Street, also known as 111 East Robinson Avenue, and allowing the sale and service of alcoholic beverages as a permissible activity within the outdoor patio café areas (NESV11-00032) District 8.

BACKGROUND / DISCUSSION:

The applicants are requesting to install a two-story outdoor patio café located within a portion of City right-of-way along East Robinson Avenue to serve Lowbrow Palace and The Palomino. The special privilege ties both patios together financially to ensure both patios remain in compliance at all times and to limit the possibilities of default. The patios are one structure, serving two floors.

TABC requires City Council authorization to allow for the sale and service of alcohol within City right-of-way. Both establishments have provided their current TABC mixed beverage licenses and have provided liability insurance naming the City as additionally insured.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

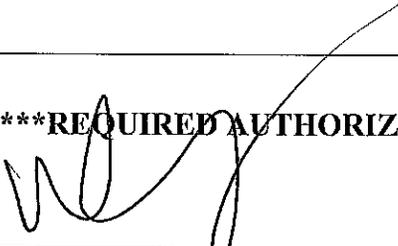
N/A

BOARD / COMMISSION ACTION:

The Development Coordinating Committee (DCC) approved the request for the outdoor patio cafés at the September 28, 2011 meeting.

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

DEPARTMENT HEAD:



Mathew S. McElroy, Director
City Development Department

Information copy to appropriate Deputy City Manager

ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE LICENSE TO MARCUS COURTS PARTNERS, LP, OWNER, LOWBROW PALACE, LLC AND DRAG-IN, LLC, DBA THE PALOMINO, LESSEES, FOR THE CONSTRUCTION, INSTALLATION, MAINTENANCE, USE, AND REPAIR OF TWO OUTDOOR PATIO CAFÉS WITHIN PORTIONS OF CITY RIGHT-OF-WAY ALONG EAST ROBINSON AVENUE ADJACENT TO THE PROPERTY LOCATED AT 2601 NORTH MESA STREET, ALSO KNOWN AS 111 EAST ROBINSON AVENUE, AND ALLOWING THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES AS A PERMISSIBLE ACTIVITY WITHIN THE OUTDOOR PATIO CAFÉ AREAS.

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

SECTION 1. DESCRIPTION

The City of El Paso (hereinafter called "City") hereby grants a Special Privilege License (hereinafter called "License") to Marcus Courts Partners, LP, owner, Lowbrow Palace, LLC and Drag-In, LLC d/b/a The Palomino, Lessees (hereinafter jointly referred to as the "Grantees"), for the construction, installation, future maintenance, use and repair of two (2) outdoor patio cafés within portions of City rights-of-way along East Robinson Avenue, as shown in Exhibit "A," which is made a part hereof for all purposes (hereinafter referred to as "Cafés").

SECTION 2. LICENSE AREA

The aerial and surface rights granted herein along portions of rights-of-way along East Robinson Avenue to install the Cafés is more particularly shown in Exhibit "B," which is made a part hereof for all purposes (hereinafter referred to as "License Area").

SECTION 3. USE OF PROPERTY

This License is granted solely for the encroachment onto City rights-of-way for the Cafés. The sale and service of alcoholic beverages is a permissible activity within the Cafés during regular business hours. As an express condition of this License, and not as a mere covenant, Grantees agree that the Cafés shall contain removable chairs and related appurtenances. Grantees agree to restore the License Area to the reasonable satisfaction of the City, in accordance with applicable City specifications, which include restoration to allow for pedestrian access.

This Special Privilege License shall not be construed to waive any City permit requirements. Grantees shall be responsible for all maintenance. Grantees, at no cost to the City, shall clean up all litter and debris within the License Area, leaving City rights-of-way in a clean and orderly condition at all times when not in use as the Cafés. The License Area may be fenced using the

materials and methods approved by the concurrence of Engineering and Construction Management and the Fire Department, in accordance with Texas Alcoholic Beverage Commission standards, with a minimum clearance width of six (6) feet of unobstructed sidewalk for pedestrian traffic.

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, Grantees 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 Grantees in installation, replacing, repairing, reconstructing, or maintaining the Cafés 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 Cafés. Work done in connection with the construction, repair and maintenance of such facilities is subject to the continuing police power of the City.

The construction of the Cafés shall comply with the provisions of Section 15.08.120 K (Additional Requirements for Outdoor Patio Cafés) of the El Paso City Code.

In the event that Grantees desire to reconstruct, repair, maintain, or replace the Cafés built hereunder, Grantees shall obtain all applicable permits required by the City. Where proposed, any excavation or trenching and other construction in the License Area shall be so carried out as to interfere as little as practical with the surface use of the License Area 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.

Grantees covenant and agree that Grantees shall, at their own expense, repair all water lines, storm and sanitary sewer lines, service lines and water meters owned by the City that Grantees, their 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 Grantees to remove and abate any portion of the License Area that is dangerous to life or property. Should Grantees, 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 Grantees. In the event City removes or abates the License Area as provided herein, Grantees shall not be compensated for the loss of the License Area, or revenues associated with the area, nor shall the City be liable to the Grantees for any direct, indirect or consequential damages due to the removal or abatement of the License Area.

SECTION 5. TERM

This Special Privilege shall be for a term of ten (10) 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 ten (10) year terms upon the request of the Grantees and approval of the El Paso City Council. If Grantees wish the City to renew this License, Grantees shall submit a request in writing to the City no later than three (3) months prior to the expiration date of this License. Should Grantees 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. Grantees understand, agree, and accept 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 Grantees, 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 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 License Area occupied by Grantees, and to change any curb or sidewalk or the street grade of any street. The City shall notify Grantees of work to be performed as herein described. The City shall not be liable to Grantees for any damage resulting

there from, nor shall the City be liable to Grantees 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 License Area. If the City requires Grantees to alter, change, adapt, remove, or relocate the Cafés due to imminent public safety concerns, or because of changes in the grade of the License Area or in the location or manner of constructing a water pipe, sewer pipe or other underground or aboveground pipes owned by the City, Grantees 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 Grantees, Grantees shall have the right to present alternative proposals for the City's consideration. If the City requires Grantees to remove, alter, change, adapt or relocate its Cafés or any portion thereof to enable any other entity or person, except the City, to use, or to use with greater convenience, the License Area, Grantees shall not be required to make such changes until such other entity or person shall have undertaken with solvent bond, to reimburse Grantees for any loss and expense which will be caused by or arise out of such removal, alteration, change, adaptation or conformance of the Cafés; 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 License Area occupied by Grantees provided such use does not interfere with Grantees' 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 Cafés, such alteration or change or relocation shall be made by Grantees when ordered in writing by the City Manager or designee without any claim for reimbursement or damages against the City.

SECTION 8. CONSIDERATION

As consideration for this Special Privilege, Grantees shall pay to the City THREE HUNDRED AND NO/100 DOLLARS (\$300.00) per outdoor patio café per year for a total sum of SIX HUNDRED AND NO/100 DOLLARS (\$600.00) per year. The annual fee shall remain the same for a period of

one year from the date of execution by City Council and shall be subject to change after each one year period the License remains in effect. The El Paso City Council retains the right to increase or decrease the annual fee specified in this License.

The City shall notify the Grantees of any proposed changes in fees as prescribed in Section 15 (Notice) of this License. This License is granted on the condition the Grantees pay for all costs associated with the Cafés, as well as all costs for the restoration of the License Area upon the termination of the License.

The first annual consideration shall be due and owing prior to City Council approval of the License. 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 City Development Department 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.

Subsequent annual considerations shall be due the first day of the month in which the License has been granted by the El Paso City Council and remitted to the Financial Services Department.

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 Grantees' Cafés 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, Grantees 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 Grantees' 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.

Grantees shall obtain and provide a commercial general liability policy with a minimum one million dollar (\$1,000,000.00) limit, per occurrence, for personal injury, death, and property damage, with a minimum one million dollar (\$1,000,000.00) general aggregate limit. These amounts are not a limitation upon the Grantees' agreement to indemnify and hold the City harmless.

In addition to the insurance required above, Grantees shall obtain and maintain a liquor liability insurance policy, or the equivalent thereof, in the amount of One Million and NO/100 Dollars (\$1,000,000.00) and provide a certificate of insurance as required for other insurance policies in this Section and name the City as an additional insured. This amount is not a limitation upon the Grantees' agreement to indemnify and hold the City harmless.

Grantees 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, modified or the amount of coverage changed 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. Grantees shall file a copy of the policy or certificate of insurance with Financial Services and the City Development Department. 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. TEXAS ALCOHOLIC BEVERAGE COMMISSION LICENSE

Grantees shall provide the City at all times during the term of this License the current copy of the annual mixed-beverage permit, beverage cartage permit, and mixed beverage late hours permit issued by the Texas Alcoholic Beverage Commission for the sale and service of alcoholic beverages.

SECTION 11. INDEMNITY

As a condition of this License, Grantees 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 GRANTEES' activities under this License, including any act or omission by the GRANTEES, their 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 GRANTEES every demand, notice, summons, or other process received by the City in any claim or legal proceeding contemplated herein. GRANTEES shall investigate or cause the investigation of accidents or occurrences involving such damages, negotiate or cause to be negotiated the claim as the GRANTEES 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. GRANTEES shall pay all judgments finally establishing liability of the City in actions defended by GRANTEES pursuant to this section, along with all attorneys' fees and costs incurred by the City, including interest accruing to the date of payment by GRANTEES 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 GRANTEES shall promptly advise the City in writing of any claim or demand against the City or the GRANTEES known to the GRANTEES related to or arising out of the GRANTEES' activities under this License. The City

will not be responsible for any loss of or damage to the GRANTEES' property from any cause.

SECTION 12. RIGHTS IN THE EVENT OF ABANDONMENT

As an express condition of this License, and not as a mere covenant, in the event Grantees abandon the Cafés or a portion thereof or ceases to use the Cafés 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 Cafés, this License shall automatically terminate, free and clear of any right, title, or interest in Grantees without the necessity of any notice to Grantees or any re-entry by the City.

SECTION 13. CANCELLATION

Grantees 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 Grantees to comply with any material provision or requirement contained in this agreement after thirty (30) days written notice to Grantees. However, if said breach or failure to comply cannot be reasonably cured within thirty (30) days, if Grantees 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, Grantees shall remove its Cafés located in the License Area at no cost to the City. Grantees shall restore the License Area to the reasonable satisfaction of the City Engineer and in accordance with City specifications, at Grantees' own cost and expense. Any such restoration shall be subject to the reasonable approval of the City. If the Grantees fail to restore the License Area as required herein, the City may at its option restore the License Area and charge such costs to Grantees who shall be responsible for payment of such repair and restoration costs.

SECTION 14. RECORDS

The El Paso City Council and the City Manager or designee shall be kept fully informed by Grantees as to matters pertaining in any way to Grantees' exercise of its rights under this License,

including the construction, replacement, reconstruction, maintenance, and repair of the Cafés within the License Area. Obtaining all applicable City permits shall be deemed sufficient to keep such parties informed. Grantees shall keep complete and accurate maps, construction drawings, and specifications describing the location of the structures within the City right-of-way. The City shall have the right, at reasonable times to inspect such maps, construction drawings, and specifications.

SECTION 15. 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: City Development Department
#2 Civic Center Plaza 5th Floor
El Paso, Texas 79901

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

- GRANTEES: Marcus Courts Partners, LP
ATTN: Meyer Marcus
6500 Montana Avenue
El Paso, Texas 79925

- Lowbrow Palace, LLC
ATTN: Austin Allen
111 Robinson Avenue
El Paso, Texas 79902

- Drag-In, LLC d/b/a The Palomino
Attn: Mario Porras
2601 North Mesa Street
El Paso, Texas 79901

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

SECTION 16. ASSIGNMENT

The rights granted by this License inure to the benefit of the Grantees, 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.

SECTION 17. LEASING OR DEDICATION OF FACILITIES

Grantees, 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.

SECTION 18. ADMINISTRATION OF LICENSE

The City Manager or designee is the principal City official responsible for the administration of this License. Grantees recognize that questions regarding the interpretation or application of this License shall be referred to the City Manager or designee.

SECTION 19. NO PROPERTY RIGHTS

Nothing herein shall grant any real property interest to the Grantees nor give rise to any vested right in the Grantees, their 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.

SECTION 20. LIENS AND ENCUMBRANCES

Grantees 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 Grantees' use of the Licensed Area.

SECTION 21. RIGHT OF ENTRY AND INSPECTION

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

SECTION 22. LAWS AND ORDINANCES

Grantees shall comply with all statutes, laws, codes and ordinances applicable to Grantees'

construction, repair, renovation, alteration or use of the License Area.

SECTION 23. 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 24. 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 25. 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 26. 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 Grantees' use of the License Area, Grantees shall have the right to terminate this License upon giving the City prior written notice of its intent to do so.

SECTION 27. EFFECTIVE DATE

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

(Signatures begin on following page)

PASSED AND APPROVED this ____ day of _____, 2012.

WITNESS THE FOLLOWING SIGNATURES AND SEALS

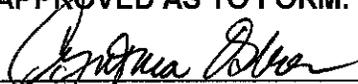
THE CITY OF EL PASO

John F. Cook
Mayor

ATTEST:

Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:



Cynthia Osborn
Assistant City Attorney

APPROVED AS TO CONTENT:



Mathew S. McElroy, Director
City Development Department

(Signatures continue on following page)

ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this 6 day of June, 2012.

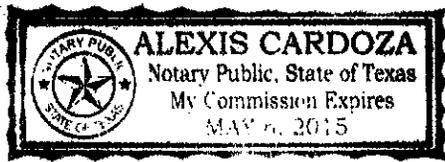
GRANTEE: Lowbrow Palace, LLC

By: *AA*
Austin Allen, Managing Member

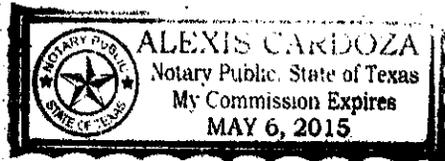
ACKNOWLEDGEMENT

THE STATE OF TEXAS)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this 6 day of June, 2012, by Austin Allen on behalf of Lowbrow Palace, LLC as Grantee.



Alexis Cardoza
Notary Public, State of Texas
Alexis Cardoza
Notary's Printed or Typed Name
May 6, 2015
My Commission Expires



(Signatures continue on following page)

ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this 29 day of June, 2012.

GRANTEE: Drag-In, LLC dba The Palomino

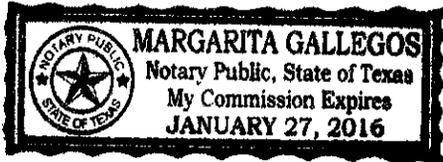
By: [Signature]
Mario Porras, Member

ACKNOWLEDGEMENT

THE STATE OF TEXAS)

COUNTY OF EL PASO)

This instrument is acknowledged before me on this 29 day of June, 2012, by Mario Porras on behalf of Drag-In, LLC, dba The Palomino as Grantee.



[Signature]
Notary Public, State of Texas

Margarita Gallegos
Notary's Printed or Typed Name

1-27-16
My Commission Expires

Exhibit "B"

