

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

DEPARTMENT: Department of Transportation

AGENDA DATE: Introduction: August 9, 2011 Public Hearing: August 16, 2011

CONTACT PERSON NAME AND PHONE NUMBER: Mirian Spencer, (915) 541-4482, spencermd2@elpasotexas.gov

DISTRICT(S) AFFECTED: 8

SUBJECT:

An Ordinance granting a special privilege license to Mills Plaza Parking, LP, owner and El Paso Community Foundation, lessee for the construction, installation, maintenance, use and repair of one outdoor patio café within portions of City right-of-way along North Oregon Street adjacent to the property located at 401 North Oregon Street and allowing the sale and service of alcoholic beverages as a permissible activity within the outdoor patio café area (SPL10-00006) District 8.

BACKGROUND / DISCUSSION:

Mills Plaza Parking, LP and El Paso Community Foundation are requesting to install an outdoor patio café in a portion of City right-of-way in front of the St. Regis Building located at 401 N. Oregon Street. The applicants are also requesting to allow for the sale and service of alcoholic beverages within the outdoor patio café.

The special privilege is for a term of ten years with two additional renewable terms. The applicants will pay an annual consideration of \$300.00 for the special privilege and will be required to provide general liability insurance with the City listed as additionally insured in the amount of \$250,000 for injury to one person, \$500,000 for injury of two or more people, and \$100,000 property damage. They will also be required to maintain an active TABC license as well as provide an additional liquor liability insurance policy of \$1,000,000.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

The Development Coordinating Committee approved the special privilege application (SPL10-00006) on May 4, 2011. The Historic Landmark Commission approved the outdoor patio request (PHAP11-00012) on April 11, 2011.

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

DEPARTMENT HEAD:

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

Information copy to appropriate Deputy City Manager

ORDINANCE NO. _____

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE LICENSE TO MILLS PLAZA PARKING, LP, OWNER AND EL PASO COMMUNITY FOUNDATION, LESSEE, FOR THE CONSTRUCTION, INSTALLATION, MAINTENANCE, USE, AND REPAIR OF ONE OUTDOOR PATIO CAFÉ WITHIN PORTIONS OF CITY RIGHT-OF-WAY ALONG NORTH OREGON STREET ADJACENT TO THE PROPERTY LOCATED AT 401 NORTH OREGON STREET AND ALLOWING THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES AS A PERMISSABLE ACTIVITY WITHIN THE OUTDOOR PATIO CAFE AREA.

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 Mills Plaza Parking, LP, owner and El Paso Community Foundation, lessee (hereinafter jointly referred to as the “Grantees”) for the construction, installation, future maintenance, and repair of one (1) outdoor patio café within portions of City rights-of-way along North Oregon Street as shown in Exhibit “A” which is made a part hereof for all purposes (hereinafter referred to as “Café”).

SECTION 2. LICENSE AREA

The subsurface rights granted herein along portions of rights-of-way along North Oregon Street to install the Café 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 Café. The sale and service of alcoholic beverages is a permissible activity within the Café during regular business hours. As an express condition of this License, and not as a mere covenant, Grantees agree that Café shall contain removable chairs and related appurtenances. Grantees agree to restore the License Area as mutually agreed upon, and as particularly shown in Exhibit “C,” which is made a part hereof for all purposes, to the reasonable satisfaction of the City, in accordance with applicable City specifications, which includes restoration to allow for pedestrian access.

This Special Privilege 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 Café. The License Area may be fenced using the materials and methods approved by the concurrence of Engineering and Construction Management, Fire Department and the Historic Landmark Commission, 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 Café 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 Café. 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 Café 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 Café 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 Café 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 Café 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 Café; 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 Café, such alteration or change or relocation shall be made by Grantees 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, Grantees shall pay to the City the sum of THREE HUNDRED AND NO/100 DOLLARS (\$300.00) 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 pays for all costs associated with the Café, 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 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.

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' Café 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 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 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 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. 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 suites 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 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 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 Café or a portion thereof or ceases to use the Café 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 Café, 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 Café located in the License Area at no cost to the City. Grantees shall restore the License Area as particularly shown in Exhibit "C," which is made a part hereof for all purposes, 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 Traffic Engineer 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 Café 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 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 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 10 th 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 7 th Floor El Paso, Texas 79901

GRANTEES: Mills Plaza Parking, LP
ATTN: Brent Harris
123 Mills Avenue Ste. 600
El Paso, Texas 79901

El Paso Community Foundation
ATTN: Eric Pearson
123 Mills Avenue Ste. 520
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 Traffic Engineer 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 Traffic Engineer.

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, 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.

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.

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:

APPROVED AS TO CONTENT:

Elizabeth Ruhmann
Assistant City Attorney

Teresa Quezada, Deputy Director
El Paso Department of Transportation

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this ____ day of _____, 2011.

GRANTEE:
Mills Plaza Parking, LP

By: Brent Harris

Title: _____

ACKNOWLEDGMENT

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this ____ day of _____, 2011, by Brent Harris on behalf of Mills Plaza Parking, LP, as Grantee.

Notary Public, State of Texas

Notary's Printed or Typed Name:

My Commission Expires:

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this ____ day of _____, 2011.

**GRANTEE:
EL PASO COMMUNITY FOUNDATION**

By: Eric Pearson

Title: _____

ACKNOWLEDGMENT

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this _____ day of _____, 2011, by Eric Pearson on behalf of El Paso Community Foundation, as Grantee.

Notary Public, State of Texas

Notary's Printed or Typed Name:

My Commission Expires:

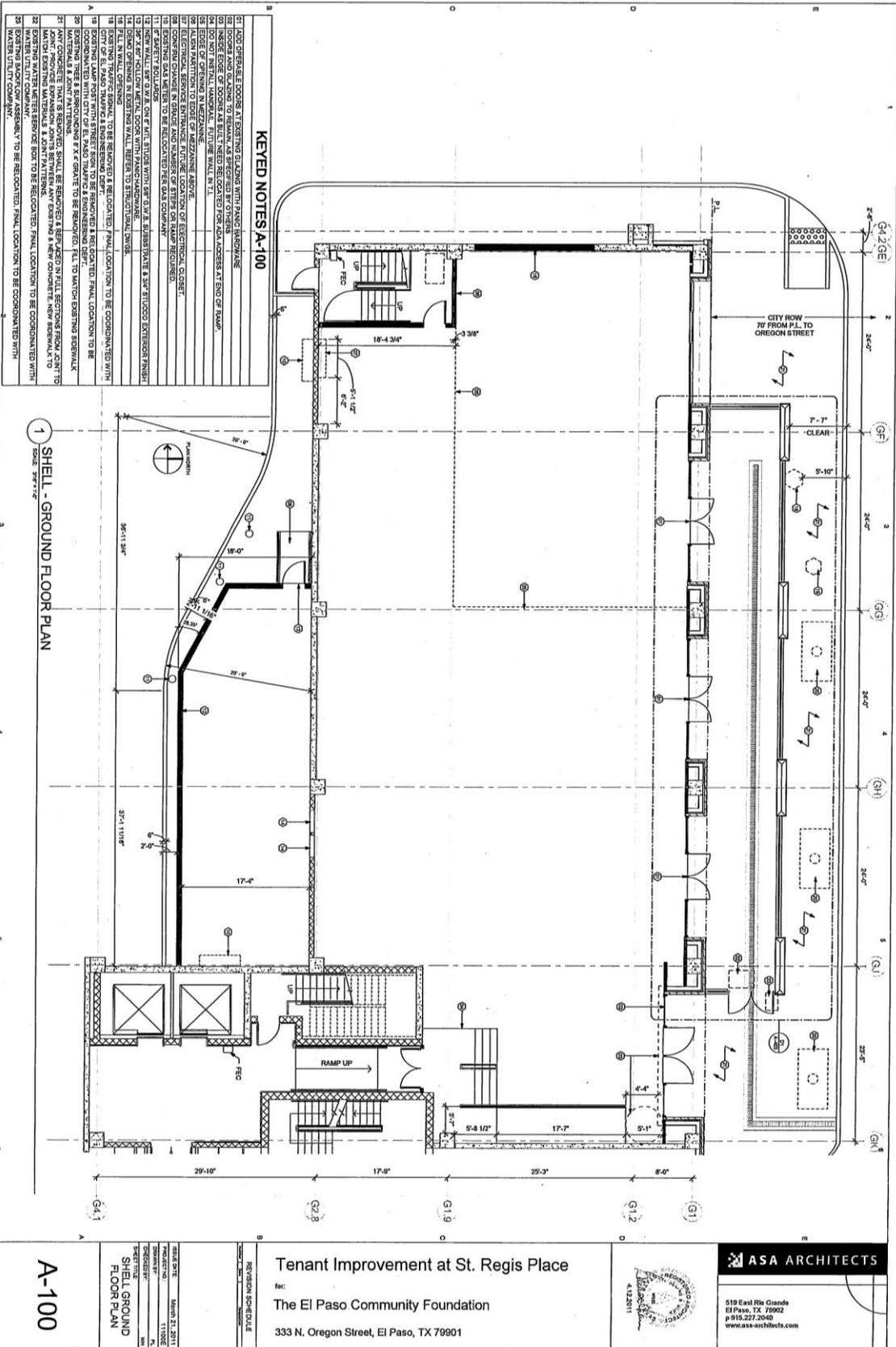


EXHIBIT B

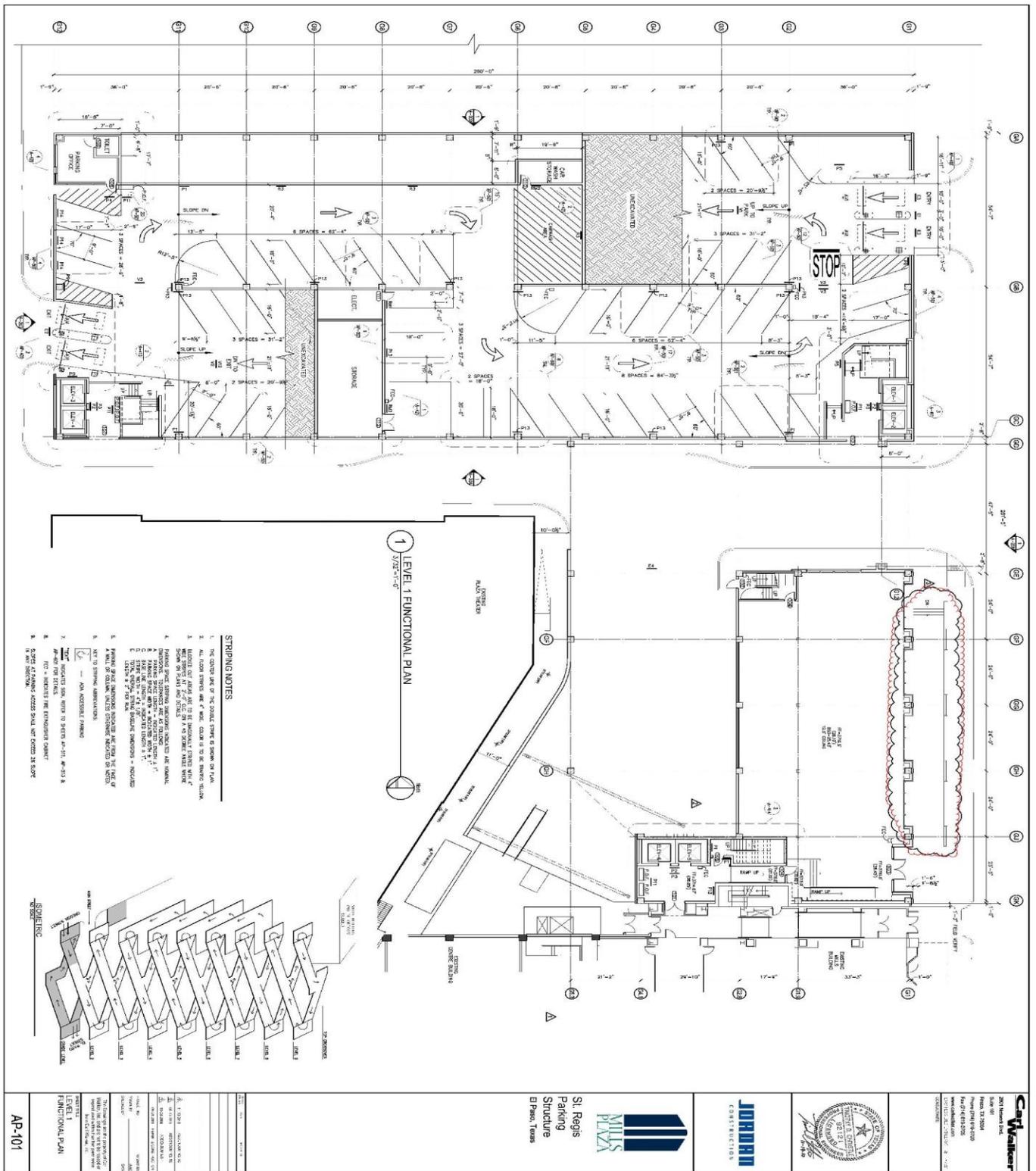
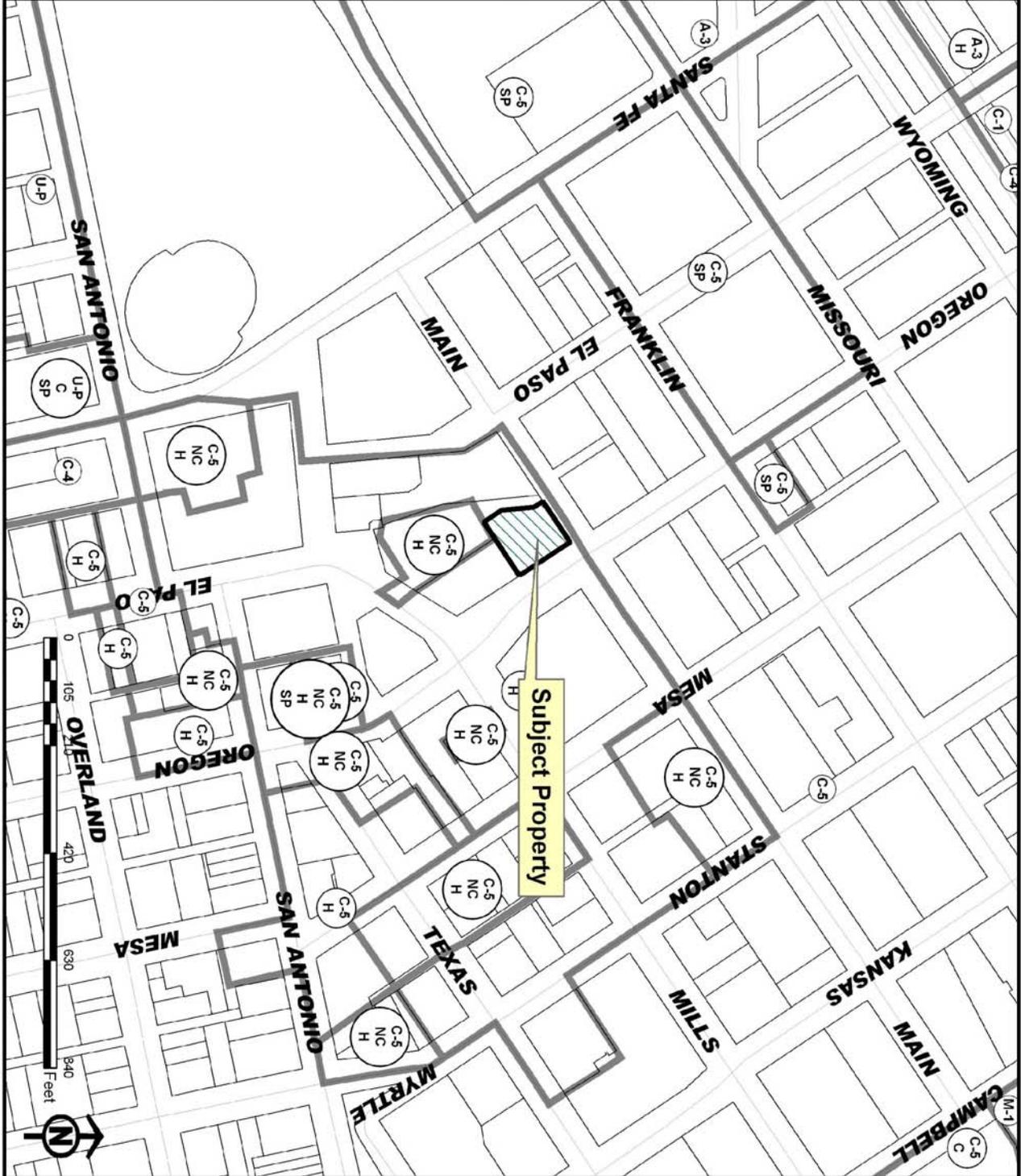


EXHIBIT C
PG 1 of 2

LOCATION MAP

SPL10-00006



AERIAL MAP

SPL10-00006

