

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

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DEPARTMENT: Sun Metro, Mass Transit Department
Department of Transportation

AGENDA DATE: September 14, 2010

CONTACT PERSON/PHONE: Jay Banasiak, Sun Metro Director, (915) 534-5810
Daryl Cole, Department of Transportation, (915) 621-6750

DISTRICT(S) AFFECTED: 3

SUBJECT:

That the City Manager be authorized to sign a Right of Entry for Construction and Property Owner Participation Agreement and an Access Easement Agreement by and between the **CITY OF EL PASO** and **SIMON PROPERTY GROUP (TEXAS), L.P.**, which will allow for cost sharing in the construction of identified improvements, including a sidewalk and ADA accessible ramps and will grant the City an easement for the pedestrian access, ingress and egress to and from the Eastside Transfer Center and the intersection of Sunmount Drive and Edison Way.

BACKGROUND / DISCUSSION:

Construction of the sidewalk and ADA accessible ramps will provide improved pedestrian access between the Sun Metro's Eastside Transfer Center and the intersection of Sunmount Drive and Edison Way. The Eastside Transfer Center is located adjacent to Cielo Vista Mall. Simon Property Group and the City of El Paso will participate at a rate of 50 percent each in the cost of the identified improvements, which are estimated to be \$45,000. The City will be responsible for construction and maintenance of the improvements located within the identified easement, which will be granted to the City.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

Detailed funding sources will be provided when the contracts are awarded. Anticipated sources of funding include Federal Transit Administration (FTA) accessibility and sidewalk gap funding.

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD:



Cc: Jane Shang, Deputy City Manager Mobility Services

RESOLUTION

CITY CLERK DEPT.

10 SEP -8 AM 11:57

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

That the City Manager be authorized to sign a Right of Entry for Construction and Property Owner Participation Agreement and an Access Easement Agreement by and between the CITY OF EL PASO and SIMON PROPERTY GROUP (TEXAS), L.P., which will allow for cost sharing in the construction of identified improvements, including a sidewalk and ADA accessible ramps, and will grant the City an easement for the pedestrian access, ingress and egress to and from the Eastside Transit Terminal and the intersection of Sunmount Drive and Edison Way.

ADOPTED THIS ____ DAY OF _____, 2010.

THE CITY OF EL PASO:

John F. Cook, Mayor

ATTEST:

Richarda D. Momsen, City Clerk

APPROVED AS TO CONTENT:



Jay Banasiak, Director
Mass Transit Department

APPROVED AS TO CONTENT:

Jane Shang, Deputy City Manager
Mobility Services

APPROVED AS TO FORM:



Theresa Cullen
Deputy City Attorney

10 SEP -8 AM 11:57

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OF THE FOLLOWING INFORMATION FROM THIS INSTRUMENT BEFORE IT IS FILED OF RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER AND DRIVER'S LICENSE NUMBER.

ACCESS EASEMENT AGREEMENT

Date: September 3, 2010

Grantor: **SIMON PROPERTY GROUP (TEXAS), L.P.**, a Texas limited partnership

Grantor's Mailing Address (including county):

Simon Property Group (Texas), L.P.
225 W. Washington Street
Marion County
Indianapolis, Indiana 46204
Attn: Vice President – Development

Grantee: **CITY OF EL PASO, TEXAS**

Grantee's Mailing Address (including county):

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

Dominant Estate Property (including any improvements):

A portion of Block 2, Celina Plaza Subdivision, City of El Paso, El Paso County, Texas and being more particularly described in a Special Warranty Deed dated December 12, 1994, and recorded as Document No. 94-87313 in Book 2831, Page 0177 of the Real Property Records, El Paso County, Texas.

Easement Property: A portion of Block 2, Celina Plaza Subdivision (Book 36, Page 10, Plat Records), City of El Paso, El Paso County, Texas, being more particularly described and depicted on Exhibit "A" attached hereto and made a part hereof.

Easement Purpose: Free and uninterrupted pedestrian traffic for purposes of ingress, egress and access between the Dominant Estate Property and the intersection of

Sunmount Drive and Edison Way.

Consideration: Ten and no/100 Dollars (\$10.00) and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the parties hereto.

Reservations from and Exceptions to Conveyance:

All liens, encumbrances, restrictions, prior easements, rights of way and prescriptive rights, whether of record or not, and all presently recorded and valid instruments that affect the Easement Property.

Grantor, for the Consideration and subject to the Reservations from and Exceptions to Conveyance as defined above, grants, sells, and conveys to Grantee a non-exclusive easement over, upon and across the Easement Property for the Easement Purpose and for the benefit of the Dominant Estate Property and portions thereof for the purposes and subject to the limitations set forth herein without covenants, warranties or representations of any kind, express, implied, statutory or otherwise, except as specifically set forth herein; all warranties or covenants that might arise by common law and the implied covenants in Section 5.023 of the Texas Property Code (or its successor) are excluded. The following terms and conditions shall apply to the easement:

1. Character of Easement. The easement granted is appurtenant to, and shall run with, the Dominant Estate Property, and portions thereof, whether or not such easement is referenced in any conveyance of the Dominant Estate Property or any portion thereof.

2. Non-Exclusiveness of Easement. The easement granted is a nonexclusive easement, in common with Grantor and all others to whom Grantor has granted and may hereafter grant rights. Grantor reserves, for the benefit of Grantor, its successors and assigns, the right to convey fee title or other rights and/or easements in and to the Easement Property to others, which further conveyance(s) shall be subject to this grant of easement.

3. Secondary Easement. In addition, Grantee shall have the right to use so much of the surface and subsurface of the property adjacent to the Easement Property as may be reasonably necessary to construct, install, maintain, repair and replace the sidewalk and the stem/retaining wall located or to be located on the Easement Property, in a condition reasonably suited for the Easement Purpose as defined above. Grantee shall promptly restore any such adjacent property to its previous physical condition if changed by the utilization of the rights granted by this Secondary Easement.

4. Maintenance. The maintenance, repair and replacement of the sidewalk and the stem/retaining wall within the Easement Property, but not including the driveway access ramp into Grantor's abutting parking lot, shall be accomplished at the sole expense of Grantee and without cost or expense to Grantor (except to the extent Grantor specifically agrees in writing to participate in such expense). The Easement Property shall be maintained by Grantee so that the same shall be neat and clean in appearance and in good repair and safe condition at all times and

10 SEP -8 AM 11:57

in compliance with all applicable statutes, laws, ordinances, governmental rules, regulations and orders. Grantee shall, at its expense, promptly restore the surface and subsurface of the land (including pavement, curbs, gutters, landscaping and the like) to the same condition that existed prior to such installation, maintenance, repair and replacement by Grantee.

5. Rights Reserved. Grantor reserves the right to use and enjoy the surface and subsurface of the Easement Property for all purposes which are not inconsistent with the uses and purposes for which this easement has been granted, do not unreasonably interfere with or interrupt the use or enjoyment of the easement for the Easement Purpose and will not create unreasonable cleaning, maintenance and repair work for Grantee. Grantor further reserves the right to use, maintain, repair and replace the driveway access ramp located on the Easement Property for purposes of ingress, egress and access to and from Grantor's adjacent parking lot and land. Grantor will give Grantee ten (10) days prior written notice of any maintenance, repair or replacement work it may perform on the driveway access ramp located in the Easement Property if such work will materially interrupt or interfere with the use or enjoyment of the easement for the Easement Purpose.

6. Noninterference. Grantee will exercise its rights under this Agreement in such a way as to not interfere with the conduct by Grantor or others claiming by, through or under Grantor of the business(es) now or hereafter located on the Easement Property and on the lands located adjacent thereto commonly known as and being part of the Cielo Vista Mall.

7. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective representatives, successors and assigns.

8. Choice of Law. This Agreement shall be subject to and governed by the laws of the State of Texas, excluding any conflicts-of-law rule or principle that might refer the construction or interpretation of this Agreement to the laws of another state. Each party hereby submits to the jurisdiction of the state and federal courts in the State of Texas and to venue in El Paso County.

9. Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all signatory parties had signed the same document. All counterparts shall be construed together and shall constitute one and the same instrument.

10. Effect of Waiver or Consent. No waiver or consent, express or implied, by any party to or of any breach or default by any party in the performance by such party of its obligations under this Agreement, shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance by such party of such obligations or any other breach or default in the performance by such party of such obligations or any other obligations of such party under this Agreement. Failure on the part of a party to complain of any act of any party or to declare any party in default, irrespective of how long such failure continues, shall not constitute a waiver by such party of its rights under this Agreement until the applicable statute of limitation period has run.

11. Further Assurances. In connection with this Agreement, Grantor and Grantee

10 SEP -8 AM 11:57

agree to cooperate with each other and to make, execute, acknowledge and deliver, or cause to be made, executed, acknowledged and delivered, at such times and places as the other may reasonably deem necessary, all other additional documents and instruments, and to perform all other and further actions as the other may reasonably request from time to time in order to create, perfect, preserve and/or confirm the interests and rights created by this Agreement, and otherwise to effectuate the purposes and provisions of this Agreement.

12. Indemnity. To the extent allowed by state law, Grantee will indemnify, defend and hold Grantor harmless from and against any and all claims, demands, liability, actions loss, cost, expenses and damages (including, without limitation, reasonable attorney fees) (referred to hereinafter, collectively, as "Claims") for death or injury to any person and damage to any property, or any action of every kind and nature which may be caused by or arise out of the construction, installation, maintenance, repair, use or existence of the sidewalk and/or the stem/retaining wall, or by reason of the use of the easements herein granted, except to the extent such Claims arise out of or result from the gross negligence or willful acts or omissions of Grantor, its successors, assigns, agents, contractors, subcontractors, tenants and others acting under the authority of, by, through or under Grantor. Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the termination of this Agreement and the easement granted until satisfied.

13. Mechanics Liens. Prior to the date of commencement of construction, Grantee will have its contractor provide a payment bond in a sum equal to the full amount of the construction contract awarded. Said bond shall guarantee payment of all wages for labor and services engaged and of all bills for materials, supplies, and equipment used in the performance of said construction contract. Grantee will keep the Easement Property (and all portions thereof) at all times free of mechanics' liens and other liens for labor, services, supplies, equipment or materials purchased or procured by or for Grantee. Grantee agrees that it will promptly pay and satisfy all liens of contractors, subcontractors, mechanics, laborers, materialmen, suppliers and others of like character, and, to the extent allowed by state law, will indemnify, defend and hold harmless Grantor from all liabilities, expenses, damages, claims, actions and causes of actions, costs, charges and fees, including, without limitation, bond payments for release of liens and attorneys' fees and costs reasonably incurred in discharging the Easement Property (or any portion thereof) from any liens, judgments or encumbrances, caused or suffered by or through Grantee, whether or not suit is brought or appeals taken therefrom. In the event any such liens shall be made or filed, Grantee shall bond against or discharge the same within thirty (30) days after receiving written notice of the filing or making of the same. Grantee shall not have any authority to create any liens for labor or material on the Easement Property, and all persons contracting with Grantee for the performance of any services, supply of any materials or provision of any work done in, on or around said Easement Property, and all materialmen, contractors, suppliers, mechanics and laborers are hereby charged with notice that they must look solely to Grantee to secure payment of any bill for work done or material furnished at the request or instruction of Grantee. Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the termination of this Agreement and the easement granted until satisfied.

14. No Dedication for Public Use. This Agreement is not intended to, and does not,

10 SEP -3 AM 11:57

effect or constitute a dedication for public use, and the rights and easements created hereunder are private and for the benefit only of the persons and entities designated herein.

15. Integration. This Agreement contains the sole and only agreement between the parties and supersedes any prior understandings or written or oral agreements between the parties respecting the within subject matter. This Agreement cannot be amended or modified except by written agreement signed by Grantor and Grantee. The parties agree that there are no oral agreements, understandings, representations or warranties respecting the within subject matter which are not expressly set forth herein.

16. Legal Construction. In case any one or more of the provisions contained in this Agreement shall for any reason be deemed by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, to the extent such invalidity or unenforceability does not destroy the basis of the bargain between the parties, such invalidity, illegality or unenforceability shall not affect any other provision hereof and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein. Whenever required by the context, as used in this Agreement, the singular shall include the plural and the neuter shall include the masculine or feminine gender, and vice versa. The paragraph numbers and headings appearing in this Agreement are for convenience of reference only and are not intended, to any extent or for any purpose, to limit or define the text of any article or section. This Agreement shall not be construed more or less favorably for or against either party by reason of authorship or origin of language.

17. Notices. Any notice or communication required or permitted hereunder shall be in writing and shall be sent to the other party by either (a) United States mail, postage fully prepaid, registered or certified mail, (b) hand delivery or (c) reputable national express overnight mail or courier service which provides proof of delivery, and addressed to the intended recipient at the address shown herein. Notice shall be deemed received (a) upon delivery if delivered by hand, (b) the next business day if overnight mail or courier service is used, or (c) when the return receipt is signed by the recipient, or its agent, or if the return receipt is not signed or delivery refused, three (3) business days after the sender has so deposited such notice in a U.S. post office or any branch thereof if United States registered or certified mail is used. Notice given in any other manner shall be effective only if and when received by the addressee. Any address for notice may be changed by written notice delivered as provided herein.

Grantor: Simon Property Group (Texas), L.P.
225 W. Washington Street
Indianapolis, Indiana 46204
Attn: Vice President - Development

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

10 SEP -8 AM 11:57

18. Recitals. Any recitals in this Agreement are represented by the parties hereto to be accurate, and constitute a part of the substantive agreement.

19. Equitable Rights of Enforcement. In the event of any interference or threatened interference with the easements and rights granted or reserved herein, such easements and rights may be enforced by restraining orders and injunctions (temporary or permanent) prohibiting such interference and commanding compliance hereof, which restraining orders and injunctions shall be obtainable upon proof of the existence of such interference or threatened interference, and without the necessity of proof of inadequacy of legal remedies or irreparable harm, and shall be obtainable only by the parties hereto or those benefitted hereby; provided, however, nothing herein shall be deemed to be an election of remedies or a waiver of any other rights or remedies available at law or in equity.

(Signatures begin on next page)

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10 SEP -8 AM 11:57

ACCEPTED THIS _____ DAY OF _____, 2010.

CITY OF EL PASO

Joyce Wilson, City Manager

APPROVED AS TO CONTENT:



Jay Banasiak, Director
Mass Transit Department

APPROVED AS TO CONTENT:

Jane Shang, Deputy City Manager
Mobility Services

APPROVED AS TO FORM:



Theresa Cullen
Deputy City Attorney

ACKNOWLEDGMENT

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

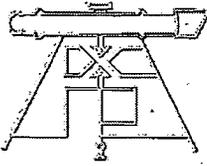
This instrument was acknowledged before me on the _____ day of _____, 2010, by Joyce Wilson as City Manager of the City of El Paso, Texas.

Notary Public in and for the State of Texas

My commission expires

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10 SEP -3 AM 11:57



Frank X. Spencer & Associates, Inc.
Consulting Civil Engineers & Surveyors
1130 Montana * El Paso, Texas 79902

(915) 533-4600
FAX (915) 533-4673
e-mail: elpaso@fxsa.com

Frank X. Spencer, P.E., R.P.L.S.

PROPERTY DESCRIPTION

**A 0.020 ACRE PORTION OF BLOCK 2, CELINA PLAZA, CITY OF EL PASO,
EL PASO COUNTY TEXAS**

**BEING A 0.020 ACRE (885 SQUARE FEET) PORTION OF BLOCK 2, CELINA PLAZA,
AN ADDITION TO THE CITY OF EL PASO ACCORDING TO PLAT RECORDED IN
BOOK 36, PAGE 10, PLAT RECORDS OF EL PASO COUNTY, TEXAS BEING MORE
PARTICULARLY DESCRIBED BY METES AND BOUNDS AS FOLLOWS:**

COMMENCING at a recovered 1/2" rebar at the northeast corner of that certain tract of land described by deed recorded in Book 391, Page 107, on May 12, 1972, Deed Records, El Paso County, Texas, from which a recovered 1/2" rebar on the present North line of Interstate-10 bears South 31°30'09" West, (South 28°21'26" West Record) a distance of 741.91 feet (741.95 Record) **THENCE**, North 43°30'50" West, a distance of 914.44 feet to MAG nail found on the northerly boundary line of a certain parcel of land described January 31, 1977, in Book 755, Page 2176, **THENCE**, 35.69 feet along said northerly boundary line along the arc of a curve to the left, having a radius of 93.00 feet, a central angle 21°59'11", and a chord which bears North 47°30'11" West, a distance of 35.47 feet, to a found MAG nail; **THENCE**, North 58°29'55" West, continuing along said boundary line, a distance of 12.90 feet, to a set chiseled "X" on top of rock rip rap for the **POINT OF BEGINNING** of this description;

THENCE, North 58°29'19" West, a distance of 11.98 feet, to a set concrete nail on top of rock rip rap;

THENCE, 32.48 feet along the arc of a non-tangent curve to the left, having a radius of 33.50 feet, a central angle 55°33'07", and a chord which bears North 59°05'44" East, a distance of 31.22 feet, to a set concrete nail on top of rock rip rap;

THENCE, North 31°19'10" East a distance of 79.50 feet, to a set chiseled "X" on concrete;

THENCE, South 58°29'19" East a distance of 8.00 feet to a set nail in asphalt;

THENCE, South 31°19'10" West a distance of 79.47 feet to a set nail in asphalt;

THENCE, 30.28 feet along the arc of a curve to the right, having a radius of 41.50 feet, a central angle 41°48'30", and a chord which bears South 52°13'25" West, a distance of 29.61 feet to the **POINT OF BEGINNING**, containing 0.020 Acres (885 square feet) of land, more or less.

1. DIRECTIONAL CONTROL LINE IS THE LINE BETWEEN THE FOUND 1/2" REBARS WITHIN BLOCK 2, OF CELINA PLAZA SUBDIVISION.
2. BEARINGS WERE OBTAINED BY GPS OBSERVATIONS
3. A PLAT OF SURVEY OF EVEN DATE ACCOMPANIES THIS DESCRIPTION

Frank X. Spencer & Associates, Inc.


Charles Gutierrez, RPLS
Texas License No. 5572

8/23/10
Date:



CITY CLERK DEPT.

10 SEP -8 AM 11:58

**RIGHT OF ENTRY FOR CONSTRUCTION
And
PROPERTY OWNER PARTICIPATION AGREEMENT**

WHEREAS, the **CITY OF EL PASO** (hereinafter called the "City") is the owner of a certain tract of land within Block 2, Celina Plaza Subdivision, El Paso County, Texas (hereinafter called the "Transit Terminal Land"), being more particularly described in and acquired by the City pursuant to a Special Warranty Deed dated December 12, 1994, recorded as Document No. 94-87313 in Book 2831, Page 017, Real Property Records of El Paso County, Texas, from **SIMON PROPERTY GROUP (TEXAS), L.P.**, a Texas limited partnership, having an office at 225 W. Washington Street, Indianapolis, Indiana 46204 (hereinafter called the "Simon"); and

WHEREAS, the City has built a transit terminal on the Transit Terminal Land; and

WHEREAS, Simon granted to the City an easement for the purpose of access, ingress and egress to and from the Transit Terminal Land (hereinafter called the "Access Easement") by virtue of an Access Easement Agreement dated December 14, 1994, recorded in Book 2831, Page 0181, Real Property Records of El Paso County, Texas; and

WHEREAS, Simon granted to the City a second easement by virtue of an Access Easement Agreement of even date herewith for the purpose of pedestrian access, ingress and egress to and from the Transit Terminal Land and the intersection of Sunmount Drive and Edison Way (hereinafter called the "Sidewalk Easement"); and

WHEREAS, the City desires to obtain from Simon and Simon desires to grant to the City a right of entry to enable construction by the City of a sidewalk and ADA accessible ramps within parts of the Access Easement and Sidewalk Easement to allow pedestrian traffic to safely travel between the Transit Terminal Land and the intersection of Sunmount Drive and Edison Way; and

WHEREAS, Simon and the City have agreed to share in the cost of construction for identified improvements, which will allow for the pedestrian traffic, and the construction costs are estimated to be \$45,000.00.

KNOW ALL MEN BY THESE PRESENTS:

I. Right of Entry for Construction.

A. That Simon, for and in consideration of the sum of TEN AND NO/100THS DOLLARS (\$10.00) and other good and valuable consideration paid, the receipt and sufficiency of which is hereby acknowledged, does hereby grant to the City, the right of entry in, upon and across the following described real property (collectively the "Property") situated in El Paso County, Texas, to-wit:

A portion of Lot 1, Block 1 and a portion of Block 2, Celina Plaza Subdivision, El Paso, El Paso County, Texas, being more particularly described and depicted on Exhibit "A" attached hereto and made a part hereof;

10 SEP -3 AM 11:58

together with the right of ingress and egress for all purposes incident to said grant (collectively, the "Right of Entry"), for the purpose of using and occupying such Property during construction of a sidewalk from the Transit Terminal Land to the intersection of Sunmount Drive and Edison Way and the construction of ADA accessible ramps at both the northwest and northeast corners of the intersection of Sunmount Drive and Edison Way, hereinafter referred to as the "Project," including the right of workmen to occupy the Property, to cross such Property with materials, machinery and equipment, and to store the same thereon; to replace an existing rip rap wall adjacent to the City's Access Easement and Simon's parking lot with a combination vertical wall and altered rip rap wall (hereinafter called the "stem/retaining wall"); to install a handrail behind the existing curb within Simon's parking lot which will be parallel to the stem/retaining wall; to reconfigure a driveway access ramp into Simon's parking lot because of the sidewalk construction; to deposit fill, spill, spoil and waste material from adjacent properties thereon; and to erect and remove temporary structures on the Property, together with the right to cut, fill and remove therefrom all improvements, structures or obstacles within the limits of the Property, which are impacted by the construction of the Project. The surface of the Property will be restored and cleaned by the City to the condition agreed upon by Simon and the City to the full extent reasonably practicable.

B. This grant of authority shall extend to the City and its contractors and assigns under all contracts let by the City in furtherance of the Project and the objectives herein stated.

C. This grant shall carry with it the right of ingress and egress, to and from the Property at all reasonable times, with the right to use existing roads for the purpose of the Project.

D. The construction of the Project shall be considered full compensation for same and for any diminution in value which may result to remaining property owned by Simon by virtue of the Project, construction, installation and repair of utility lines and improvements, if any, grade alignment or the alteration of drainage patterns and facilities.

E. The City shall have the right to assign all or any part of its rights hereunder to third parties, upon Simon's consent, which shall not be unreasonably withheld.

F. To have and to hold, the above-described rights for the purposes and subject to the limitations hereinabove set forth without covenants, warranties or representations of any kind, express, implied, statutory or otherwise, except as specifically set forth herein; all warranties or covenants that might arise by common law and the implied covenants in Section 5.023 of the Texas Property Code (or its successor) are excluded.

G. Simon herein warrants that no person or corporation owns an interest in the fee title to the Property described in said Exhibit "A" other than Simon; provided that this Right of Entry For Construction is granted subject to any and all existing covenants, easements, encumbrances, liens, prescriptive rights, restrictions, rights-of-way, leases and subleases affecting the Property, or any part thereof, whether of record or not.

10 SEP -8 AM 11:58

H. Simon reserves the right to full use and enjoyment of the Property encumbered by the Right of Entry, except as otherwise provided herein, and such use shall not hinder, conflict, or interfere with the exercise of the City's rights hereunder.

I. Simon warrants to the City that the undersigned is the owner of record of the Property and has the full power and authority to grant this Right of Entry. Additionally, in the event that additional authorization is required, Simon agrees to promptly execute the required documents at the reasonable request of the City.

J. This Right of Entry becomes effective when executed by all parties and shall continue in force until the Project has been completed and accepted by the City.

II. Project Scope and Simon Participation.

A. Project Scope.

1. Simon has approved the Project drawings, plans and specifications submitted by the City which are identified on Exhibit "B" attached hereto and made a part hereof. The City represents that the Project drawings, plans and specifications identified on Exhibit "B" consist of all necessary drawings, plans and specifications according to the City design standards and policies for the Project, as well as accepted engineering principles and practices to enable the City to construct the Project. If any substantial material changes are made to the Project and/or the approved Project drawings, plans and specifications, such changes shall be subject to Simon's review and approval or disapproval, not to be unreasonably withheld. Not less than ten (10) days prior to commencement of construction the City shall deliver to Simon copies of all such changed drawings, plans and specification for review and approval or disapproval, and should Simon fail to deliver to the City its approval or disapproval of the changes in writing within ten (10) days after receipt, then Simon shall be conclusively presumed to have disapproved the changes. Approval by Simon of the Project drawings, plans and specifications shall not be deemed to be an assumption of responsibility by Simon for the accuracy, sufficiency or propriety of such drawings, plans and specifications or a representation that the Project drawings, plans and specifications provide for construction of the Project that complies with applicable laws, rules, ordinances, regulations, covenants or restrictions, including, without limitation, compliance with applicable City design standards and policies and accepted engineering principles and practices.

2. The City will provide all traffic control for construction and shall keep and maintain Sunmount Drive and at least one lane of the driveway access ramp to Simon's adjacent parking lot accessible and open to pedestrian and vehicular traffic at all times during construction of the Project and while this Right of Entry shall be in effect.

3. The City agrees that it will give to Simon, by delivery to the management office at the Cielo Vista Mall, not less than seven (7) days prior written notice of the mobilization and commencement of construction for the Project.

10 SEP -8 AM 11:58

4. All Project construction shall be completed by the City within **60 days** after the City issues a "Notice to Proceed" to the contractor to commence construction, unless otherwise extended by written amendment and approval by the City and Simon. It is expressly understood and agreed, by Simon and the City, that the time for the completion of the Project is a reasonable time for completion. The City and Simon agree that no Project construction will be undertaken between November 15 in any calendar year and January 6 of the next following calendar year.

5. If the Project is not completed within the time herein specified or any proper extension granted by the City and Simon, or if the City should identify any safety issue to persons or property as reasonably identified by the City during construction of the Project, Simon agrees that the City may issue a stop work order for any work in progress under any issued building permit for the Project, and Simon waives any and all causes of action it may have against the City arising from the City's stop work order, provided that the Property is restored by the City to a neat, clean and safe condition reasonably acceptable to Simon.

6. The City shall be responsible for maintenance and repair of the constructed sidewalk and the stem/retaining wall. Simon shall be responsible for maintenance and repair of the constructed handrail behind the existing curb within Simon's parking lot.

7. If, in exercising the City's rights in and to the Property, the City causes any damage to the Property not contemplated by this Right of Entry or any damage to any property of Simon, any other property adjacent thereto or any improvements located on any property of Simon or on any other property adjacent thereto, the City shall, at the City's sole cost and expense and within a reasonable time after the exercise of such rights, but in no event later than thirty (30) days from the date the damage occurred, restore the Property and all other property and/or improvements to as near as possible to the condition existing prior to the occurrence of the damage. Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the expiration or earlier termination of the Right of Entry until satisfied.

8. All work to be performed by the City or its agents, contractors, employees, representatives, or any other persons acting under its control or at its direction or request shall:

(a) be done at the sole risk, cost and expense of the City (except as provided in Section II.B. below);

(b) be done in accordance with the applicable requirements of all Federal, state and local governmental and regulatory authorities having jurisdiction thereof, including, without limitation, complying with all applicable zoning ordinances, building codes and environmental laws; and

(c) be done in a manner as will not substantially impair access to or the business being conducted on the adjacent or remainder of the property of Simon.

CITY CLERK DEPT.

10 SEP -8 AM 11:58

Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the expiration or earlier termination of this Right of Entry until satisfied.

9. Prior to commencement of Project construction, the City will have its contractor provide a payment bond in a sum equal to the full amount of the Project construction contract awarded. Said bond shall guarantee payment of all wages for labor and services engaged and of all bills for materials, supplies, and equipment used in the performance of said construction contract. The City will keep the Property (and all portions thereof) at all times free of mechanic's liens and other liens for labor, services, supplies, equipment or materials purchased or procured by or for the City. The City agrees that it will promptly pay and satisfy, or cause to be paid and satisfied all liens of contractors, subcontractors, mechanics, laborers, materialmen, suppliers and others of like character and, to the extent allowed by state law, will indemnify, defend and hold harmless Simon from all liabilities, expenses, damages, claims, actions and causes of actions, costs, charges and fees, including, without limitation, bond payments for release of liens and attorneys' fees and costs reasonably incurred in discharging the Property (or any portion thereof) from any liens, judgments or encumbrances, caused or suffered by or through the City, whether or not suit is brought or appeals taken therefrom. In the event any such liens shall be made or filed, the City shall bond against or discharge the same within thirty (30) days after receiving written notice of the filing or making of the same. The City shall not have any authority to create any liens for labor or material on the Property, and all persons contracting with the City for the performance of any services, supply of any materials or provision of any work done in, on or around said Property, and all materialmen, contractors, suppliers, mechanics and laborers are hereby charged with notice that they must look solely to the City to secure payment of any bill for work done or material furnished at the request or instruction of the City. Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the expiration or earlier termination of the Right of Entry until satisfied.

10. To the extent allowed by state law, the City will indemnify, defend and hold Simon harmless from and against any and all claims, demands, liability, actions loss, cost, expenses and damages (including, without limitation, reasonable attorney fees) (referred to hereinafter, collectively, as "Claims") for death or injury to any person and damage to any property, or any action of every kind and nature which may be caused by or arise out of the City's construction, installation, maintenance and/or repair, of the Project or the use of the Right of Entry herein granted, except to the extent such Claims arise out of or result from the gross negligence or willful acts or omissions of Simon, its successors, assigns, agents, contractors, subcontractors, tenants and others acting under the authority of, by, through or under Simon. Notwithstanding anything contained herein to the contrary, the provisions of this Section shall survive the termination of this Agreement and the Right of Entry herein granted until satisfied.

B. Project Funding and Simon Participation

10 SEP -8 AM 11:58

Simon and the City have agreed to share equally, fifty percent (50%) each, in the cost of the identified construction and related costs, including, without limitation, the cost for installation of the hand rail within Simon's parking lot (hereinafter referred to as the "Project Costs"), which amount is estimated to be \$45,000.00, provided, that, notwithstanding the foregoing, the total portion of Project Costs for which Simon is responsible shall not exceed \$22,500.00 in the aggregate. Simon agrees to pay the City Simon's share of the Project Costs within thirty (30) days from receipt of the itemized bill for Simon's share together with such backup materials evidencing the amount and payment of total Project Costs as are reasonably requested by Simon.

III. Termination.

This Agreement may be terminated by the City upon thirty (30) days prior written notice for any reason, provided, that, in the event construction of the Project has commenced prior to such termination the Property shall be restored by the City to a neat, clean and safe condition reasonably acceptable to Simon.

IV. Relationship of the Parties.

The City acknowledges that it is not an agent, servant, or employee of Simon and will be responsible for its own actions performed by itself, its agents or employees during the term of this Agreement. Simon acknowledges that it is not an agent, servant, or employee of the City and will be responsible for its own actions performed by itself, its agents or employees during the term of this Agreement.

THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE EXPIRATION OR EARLY TERMINATION OF THIS AGREEMENT.

V. Notice.

All notices provided for herein shall be sufficient if sent by certified mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

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

Simon: Simon Property Group (Texas), L.P.
225 W. Washington Street,
Indianapolis, Indiana 46204
Attn: Vice President-Development

or such other addresses as the parties may designate to each other in writing from time to time.

VI. Law Governing Agreement.

10 SEP -8 AM 11:58

The laws of the State of Texas shall govern the validity, performance, interpretation and enforcement of this Agreement. Venue shall be in the courts of El Paso, County, Texas.

VII. Interpretation.

The City and Simon agree that this Agreement has been freely negotiated by both parties and that in any controversy, dispute or contest over the meaning, interpretation, validity or enforceability of this Agreement, or any of its terms or conditions, there shall be no inference, presumption or conclusion drawn whatsoever against either party by virtue of that party having drafted this Agreement or any portion thereof.

VIII. Severability.

If any provision of this Agreement is prohibited by law or otherwise determined to be illegal, invalid or unenforceable in a court of competent jurisdiction, such provision shall not affect the validity of the remaining provisions of this Agreement; instead, the Agreement shall be construed as if it did not contain the illegal, invalid or unenforceable provision(s) and the rights and obligations of the parties shall be construed and enforced accordingly.

IX. Entire Agreement.

This Agreement constitutes and expresses the entire agreement between the parties and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement shall not be amended or modified except by written instrument signed by both parties.

X. Authority to Contract.

All persons that are signatories to this Agreement represent that they have authority to enter into this Agreement and bind their respective organizations thereto.

(Signatures begin on next page)

CITY CLERK DEPT.

10 SEP -8 AM 11:58

IN WITNESS WHEREOF this instrument is executed on the 3rd day of September, 2010.

SIMON:

SIMON PROPERTY GROUP (TEXAS), L.P., a Texas limited partnership

By: GOLDEN RING MALL COMPANY LIMITED PARTNERSHIP, an Indiana limited partnership, its general partner

By: SIMON PROPERTY GROUP (DELAWARE), INC., a Delaware corporation, its general partner

By: Andrew Juster
Name: _____ Andrew Juster
Title: _____ EVP-Treasurer

ACKNOWLEDGMENT

STATE OF INDIANA §
 §
COUNTY OF MARION §

Before me, a Notary Public in and for Marion County, State of Indiana, personally appeared Andrew Juster, to me personally known as the EVP & Treasurer of SIMON PROPERTY GROUP (DELAWARE), INC., a Delaware corporation, general partner of GOLDEN RING MALL COMPANY LIMITED PARTNERSHIP, an Indiana limited partnership, general partner of SIMON PROPERTY GROUP (TEXAS), L.P., a Texas limited partnership, who acknowledged his execution of the foregoing instrument for and on behalf of said Corporation by authority of its Board of Directors.

WITNESS my hand and notarial seal this 3rd day of September, 2010.

2/6/13
My commission expires

Joan Walker-Emminger
Notary Public in and for the State of Indiana



Joan Walker-Emminger
Res. Of Shelby County
Comm: Exp. 2/6/2013

(SIGNATURES CONTINUED ON NEXT PAGE)

ACCEPTED THIS _____ DAY OF _____, 2010.

CITY OF EL PASO

City Manager

APPROVED AS TO CONTENT:

APPROVED AS TO CONTENT:



Jay Banasiak, Director
Mass Transit Department

Jane Shang, Deputy City Manager
Mobility Services

APPROVED AS TO FORM:



Theresa Cullen
Deputy City Attorney

ACKNOWLEDGMENT

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me on the _____ day of _____, 2010, by _____ as City Manager of the City of El Paso, Texas.

Notary Public in and for the State of Texas

My commission expires

10 SEP -8 AM 11:58

EXHIBIT "A"

Legal Description and Sketch of the Property
EASEMENT FOR CONSTRUCTION

A portion of Lot 1, Block 1, and a portion of Block 2, Celina Plaza Subdivision, El Paso, Paso County, Texas, being more particularly described by metes and bounds as follows:

Commencing at a rebar common to lot 4, Block 3, Young American Subdivision and Block 5, Celina Plaza Subdivision and the northerly right-of-way line of U.S. Interstate Highway No. 10, thence North 28°21'26" East along a line common to Blocks 5 and 2, Celina Plaza Subdivision and lots 4 to Block 4, Young American Subdivision a distance of 925.00 feet to the southerly right-of-way line Edison Way, thence South 61°38'34" East along the southerly right-of-way line of Edison Way a distance of 285.60 feet thence North 28°21'26" East distance of 60.00 feet to the northerly right of way line of Edison Way to the true point of beginning of this parcel of land.

Thence North 28°21'26" East a distance of 106.91 feet.

Thence South 61°38'34" East a distance of 89.99 feet.

Thence South 28°21'26" West a distance of 86.90 feet.

Thence along the arc of a curve to the left an arc distance of 31.42 feet, having a radius of 20.00 feet, a central angle of 90°00'00", a chord distance of 28.29 feet bearing South 16°38'34" East.

Thence South 61°38'34" East a distance of 22.33 feet.

Thence South 28°21'26" West a distance of 57.57 feet.

Thence along the arc of a curve to the left an arc distance of 109.72 feet, having a radius of 93.00 feet, a central angle of 67°35'58", a chord distance of 103.47 feet bearing North 27°50'35" West.

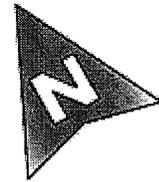
Thence North 61°38'34" West a distance of 46.34 feet.

Said parcel of land contains 11,076.84 square feet or 0.25 acres more or less.

February 17, 2010

Curve Table				
Curve #	Length	Radius	Chord	Chord Direction
C1	31.420	20.000	28.29	S16 38 34.00E
C2	109.720	93.000	103.47	N27 50 35.00W

Line Table		
Line #	Length	Direction
L4	106.910	N28° 21' 26.00"E
L5	89.990	S61° 38' 34.00"E
L6	86.900	S28° 21' 26.00"W
L7	22.332	S61° 38' 34.00"E
L8	57.570	S28° 21' 26.00"W
L9	46.344	N61° 38' 34.00"W
L1	923.000	N28° 21' 26.00"E
L2	265.604	S61° 38' 34.00"E
L3	60.000	N28° 21' 26.00"E



SCALE: 1" = 100'
FEBRUARY 17, 2010

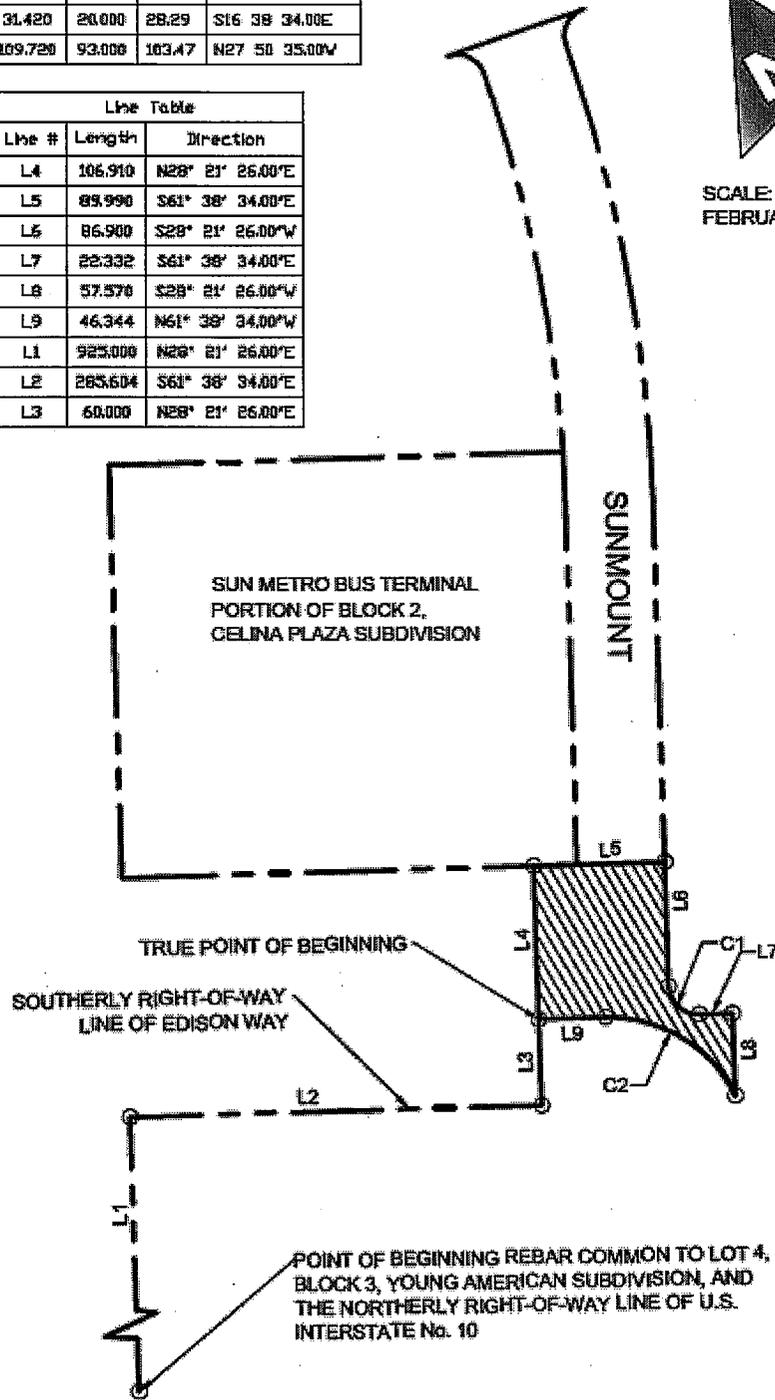


EXHIBIT "B"

Approved Project Drawings, Plans and Specifications

SUNMOUNT PARKWAY IMPROVEMENTS

Layout Sheet 1 of 4	Rev 3-17-10
Details Sheet 2 of 4	Rev 3-17-10
Details Sheet 3 of 4	Rev 3-17-10
Details Sheet 4 of 4	Rev 3-17-10

SUNMOUNT PROPOSED HANDRAIL

Layout Sheet 1 of 1	Rev 6-29-10
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Engineering Department Design Standards for Construction

Sidewalk Adjacent to Curb Section 6-2	Rev 6-3-08
Concrete Apron for Driveways/Alleyways 6-17	Rev 6-3-08
Transition Ramp With Detectable Warning 6-26	Rev 6-3-08

Citywide Repair or Construction of Parkway Structures

Stemwalls Detail 3	Rev 9-7-06
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