

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

DEPARTMENT: City Development Department

AGENDA DATE: Introduction: 10-23-2012
Public Hearing: 10-30-2012

CONTACT PERSON NAME AND PHONE NUMBER: Mirian Spencer, (915) 541-4056, spencermd2@elpasotexas.gov

DISTRICT(S) AFFECTED: 2

SUBJECT:

An Ordinance granting a special privilege license to Edgar Lopez for the construction, installation, maintenance, use and repair of a pedestrian bridge and walkway within portions of City right-of-way along Wheeling Avenue adjacent to the property located at 2308 Wheeling Avenue (NESV12-00029) District 8.

BACKGROUND / DISCUSSION:

The proposed special privilege will allow the encroachment of a 29ft. by 4.5 ft. pedestrian bridge and walkway within portions of City rights-of-way along Wheeling Avenue. The walkway is being constructed for a proposed residential home; however, there is a 30 ft. portion of City right-of-way at a steep grade which is being utilized for the encroachment.

The applicant may seek a request to vacate the portion of right-of-way at a later date.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

N/A

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

DEPARTMENT HEAD:

Mathew S. McElroy, Director
City Development Department

Information copy to appropriate Deputy City Manager

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE LICENSE TO EDGAR LOPEZ FOR THE CONSTRUCTION, INSTALLATION, MAINTENANCE, USE, AND REPAIR OF A PEDESTRIAN BRIDGE AND WALKWAY WITHIN PORTIONS OF CITY RIGHT-OF-WAY ALONG WHEELING AVENUE ADJACENT TO THE PROPERTY LOCATED AT 2308 WHEELING AVENUE.

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 Edgar Lopez (hereinafter jointly referred to as the "Grantee"), for the construction, installation, future maintenance, use and repair of one (1) 29 ft. by 4.5 ft. pedestrian bridge and walkway within portions of City rights-of-way along Wheeling Avenue as shown in Exhibit "A," which is made a part hereof for all purposes (hereinafter referred to as "Bridge").

SECTION 2. LICENSE AREA

The aerial, subsurface and surface rights granted herein along portions of rights-of-way along Wheeling Avenue adjacent to the property described as Lots 26 through 28, Block 79, Highland Park Addition, City of El Paso, El Paso County, Texas, to install the Bridge 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 Bridge. Grantee agrees 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. Grantee shall be responsible for all maintenance. Grantee, 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 Bridge. The License Area may be fenced using the materials and methods approved by the concurrence of Engineering and Construction Management, City Development Department, and the El Paso Fire Department.

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

SECTION 4. REGULATION OF CONSTRUCTION

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

In the event that Grantee desires to reconstruct, repair, maintain, or replace the Bridge built hereunder, Grantee 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.

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

The City shall have the power at any time to order and require Grantee to remove and abate any portion of the License Area that is dangerous to life or property. Should Grantee, after notice, fail or refuse to comply within a reasonable time, the City shall have the power to remove or abate the same, at the expense of Grantee. In the event City removes or abates the License Area as provided herein, Grantee 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 Grantee 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 Grantee and approval of the El Paso City Council. If Grantee wishes the City to renew this License, Grantee shall submit a request in writing to the City no later than three (3) months prior to the expiration date of this License. Should Grantee fail to submit such request for the renewal of this License to the City as herein required, the License shall expire upon the expiration date. Grantee understands, agrees, and accepts that the City may require the terms, conditions, and provisions of this License be modified as a condition for renewing the grant of the encroachment within the License Area as permitted by this License.

SECTION 6. WORK DONE BY OTHERS

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

The City reserves the right, subject to further conditions described in this paragraph, to lay and permit to be laid, utility lines including, but not limited to, storm and sanitary sewer, gas, water, and other pipelines or cables, and 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 Grantee, and to change any curb or sidewalk or the street grade of any street. The City shall notify Grantee of work to be performed as herein described. The City shall not be liable to Grantee for any damage resulting there from, nor shall the City be liable to Grantee for any damages arising out of the performance of any work by the City, its contractors or subcontractors, not willfully and unnecessarily occasioned; provided, however, nothing herein shall relieve any other persons or entities from liability for damage to the License Area. If the City requires Grantee to alter, change, adapt, remove, or relocate the Bridge 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, Grantee shall make the alterations or changes as soon as practicable when ordered in writing by the City without claim for reimbursement or damages against the City. If these requirements impose a financial hardship upon Grantee, Grantee shall have the right to present alternative proposals for the City's consideration. If the City requires Grantee to remove, alter, change, adapt or relocate its Bridge 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, Grantee shall not be required to make such changes until

such other entity or person shall have undertaken with solvent bond, to reimburse Grantee for any loss and expense which will be caused by or arise out of such removal, alteration, change, adaptation or conformance of the Bridge; 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 Grantee provided such use does not interfere with Grantee's use of the License Area. Whenever by reason of said work in connection with said purposes it shall be deemed necessary by the City to alter, change, adapt, conform or relocate portions of the Bridge such alteration or change or relocation shall be made by Grantee 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, Grantee shall pay to the City ONE HUNDRED AND NO/100 DOLLARS (\$100.00) per year. The annual fee shall remain the same for a period of one year from the date of execution by the El Paso 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 Grantee of any proposed changes in fees as prescribed in Section 15 (Notice) of this License. This License is granted on the condition the Grantee pay for all costs associated with the Bridge, 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 the El Paso 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 El Paso 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.

ADVANCE PAYMENT OPTION:

Grantee shall have the option of pre-paying the City the entire amount for the ten (10) year term of the License, prior to the execution of this License. The ten (10) year amount is equal to ONE THOUSAND, TWO HUNDRED, FIFTY-SIX AND NO/100 DOLLARS (\$1,256.00). Said \$1,256.00 reflects the net present value (NPV) at a three percent (3%) discount rate of the annual fees for the entire ten (10) year term of the License. Should Grantee select the advance payment option, Grantee shall not be entitled to a refund of the consideration paid to the City in case of cancellation by the City and/or the Grantee prior to the expiration of the 10 year term.

Both the annual consideration and the advance payment shall be exclusive of and in addition to all general municipal taxes of whatever nature, including, but not limited to, ad valorem taxes, assessments for public improvements or any other assessments that may be enacted during the term of this License or any renewal, except hereinafter provided. The fee established in this section shall not be affected by any relocation of Grantee's Bridge required by the City pursuant to this License.

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

SECTION 9. INSURANCE

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

Grantee shall obtain and provide a homeowner's general liability policy with a 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 Grantee's agreement to indemnify and hold the City harmless.

Grantee shall procure said insurance with a solvent insurance company authorized to do business in Texas. Such policy or certificate shall provide that the insurance cannot be canceled, 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. Grantee shall file a copy of the policy or certificate of insurance with Financial Services Department 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. INDEMNITY

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

The provisions of this indemnification are solely for the benefit of the parties hereto and not intended to create or grant any rights, contractual or otherwise, to any person or entity. Without modifying the conditions of preserving, asserting, or enforcing any legal liability against the City as required by the City Charter or any law, the City will promptly forward to the Grantee every demand, notice, summons, or other process received by the City in any claim or legal proceeding contemplated herein. Grantee shall investigate or cause the investigation of accidents or occurrences involving such damages, negotiate or cause to be negotiated the claim as the Grantee may deem expedient, and defend or cause to be defended on behalf of the City all suits for damages, even if groundless, false or fraudulent brought because of such damages. Grantee shall pay all judgments finally establishing liability of the City in actions defended by Grantee pursuant to this section, along with all attorneys' fees and costs incurred by the City, including interest accruing to the date of payment by Grantee and premiums on any

appeal bonds.

The City, at its election, will have the right to participate in any such negotiations or legal proceedings to the extent of its interest. In addition, the Grantee shall promptly advise the City in writing of any claim or demand against the City or the Grantee known to the Grantee related to or arising out of the Grantee's activities under this License. **The City will not be responsible for any loss of or damage to the Grantee's property from any cause.**

SECTION 11. RIGHTS IN THE EVENT OF ABANDONMENT

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

SECTION 12. CANCELLATION

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

The City shall have the option to terminate this License at any time upon giving the Grantee written notice thirty (30) days in advance of such termination, at no cost to the City and may take possession of the City right-of-way. All rights of the Grantee for the City right-of-way shall then be terminated. If the License is cancelled by the City, Grantee shall not be entitled to a refund of the paid annual consideration for the months remaining in the License year (the twelve month period beginning on the effective date of this License). If this License is cancelled due to Grantee's failure to cure any default under this License, abandonment or cancellation by Grantee, Grantee shall not be entitled to a refund of consideration paid to the City.

Upon termination of this License, prior to the expiration of the original term for any reason, Grantee shall remove Grantee's Bridge located in the License Area at no cost to the City. Grantee shall restore the License Area to the reasonable satisfaction of the City Engineer and in accordance with City specifications, at Grantee's own cost and expense. Any such restoration shall be subject to the reasonable approval of the City. If the Grantee fails to restore the License Area as required herein, the City may at its option restore the License Area and charge such costs to Grantee who shall be responsible for payment of such repair and restoration costs.

SECTION 13. RECORDS

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

SECTION 14. NOTICE

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

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

with copy to: City of El Paso
ATTN: City Development Department
#2 Civic Center Plaza 5th Floor
El Paso, Texas 79901

with copy to: City of El Paso
ATTN: Financial Services Department –
Financial Accounting & Reporting
#2 Civic Center Plaza 7th Floor
El Paso, Texas 79901

GRANTEE: Edgar Lopez
1600 Hawthorne Street
El Paso, Texas 79902

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

SECTION 15. ASSIGNMENT

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

SECTION 16. LEASING OR DEDICATION OF FACILITIES

Grantee, without the advanced written consent of the El Paso City Manager or designee, shall not lease the License Area to any non-grantee person or entity.

SECTION 17. ADMINISTRATION OF LICENSE

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

SECTION 18. NO PROPERTY RIGHTS

Nothing herein shall grant any real property interest to the Grantee nor give rise to any vested right in the Grantee, Grantee's 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 19. LIENS AND ENCUMBRANCES

Grantee shall defend and indemnify the City against any liability and loss of any type arising from any lien or encumbrance on the License Area that arises or is alleged to have arisen from Grantee's use of the Licensed Area.

SECTION 20. 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 21. LAWS AND ORDINANCES

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

SECTION 22. ENTIRE AGREEMENT

This document contains all of the agreements between the parties and may not be modified, except by an agreement in writing signed by both parties.

SECTION 23. SEVERABILITY

Every provision of this license is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality shall not affect the validity of the remainder of this license.

SECTION 24. LAWS GOVERNING/VENUE

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

SECTION 25. RESTRICTIONS AND RESERVATIONS

This License is subject to all rights-of-way, easements, dedications, restrictions, reservations and other encumbrances of record and running with the land. If, at any time during the initial term of this license, or any extension thereof, any such rights-of-way, easements, dedications, restrictions, reservations and other encumbrances of record and running with the land, preclude, interrupt or interfere with Grantee’s use of the License Area, Grantee shall have the right to terminate this License upon giving the City prior written notice of its intent to do so.

SECTION 26. EFFECTIVE DATE

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

PASSED AND APPROVED this ____ day of _____, 2012.

(Signatures begin on following page)

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:

Lauren K. Ferris
Assistant City Attorney

Mathew S. McElroy, Director
City Development Department

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this ___ day of _____, 2012.

GRANTEE:
Edgar Lopez

By: Edgar Lopez, Property Owner

ACKNOWLEDGMENT

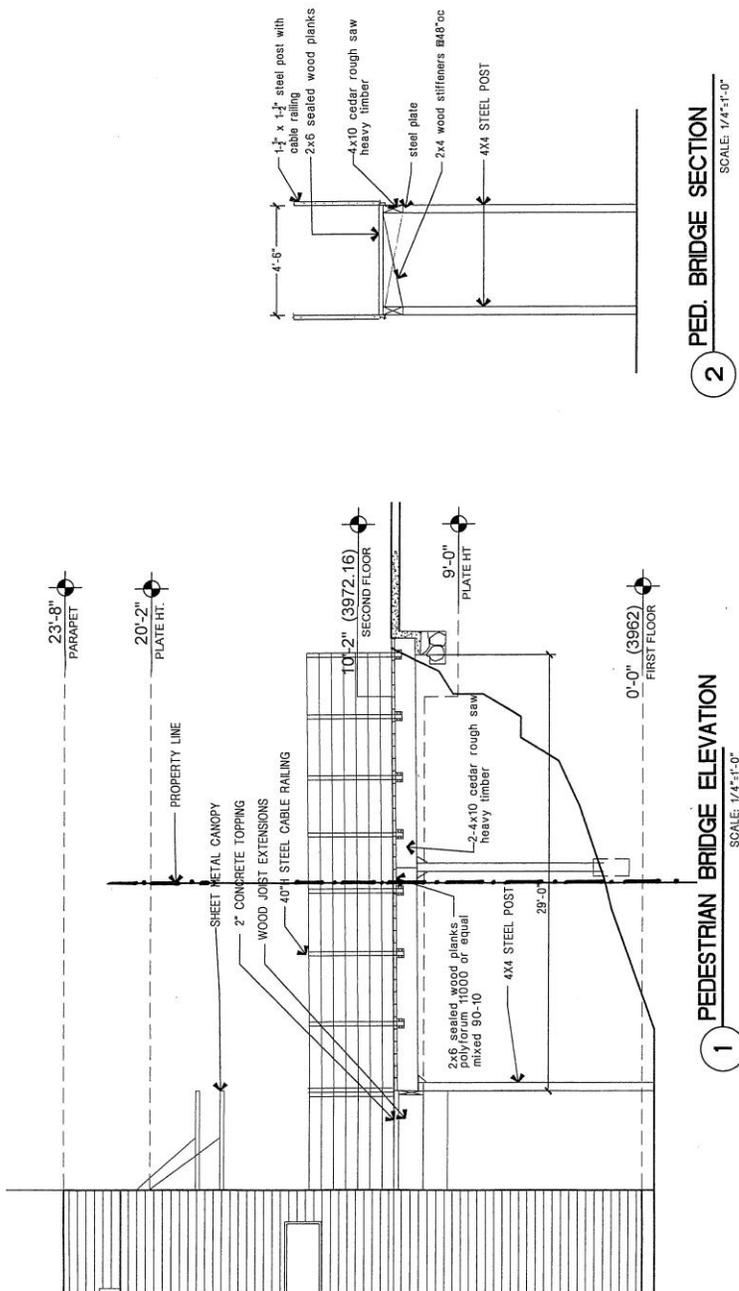
THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this _____ day of _____, 2012, by Edgar Lopez, as Grantee.

Notary Public, State of Texas

Notary's Printed or Typed Name

My Commission Expires



WHEELING PROJECT
2308 WHEELING ave.
EL PASO, TX 79930

EXHIBIT "A"

Matter # 12-1007-537 PL # 138665
Special Privilege License
Edgar Lopez/Pedestrian Bridge & Walkway/
2308 Wheeling Dr.

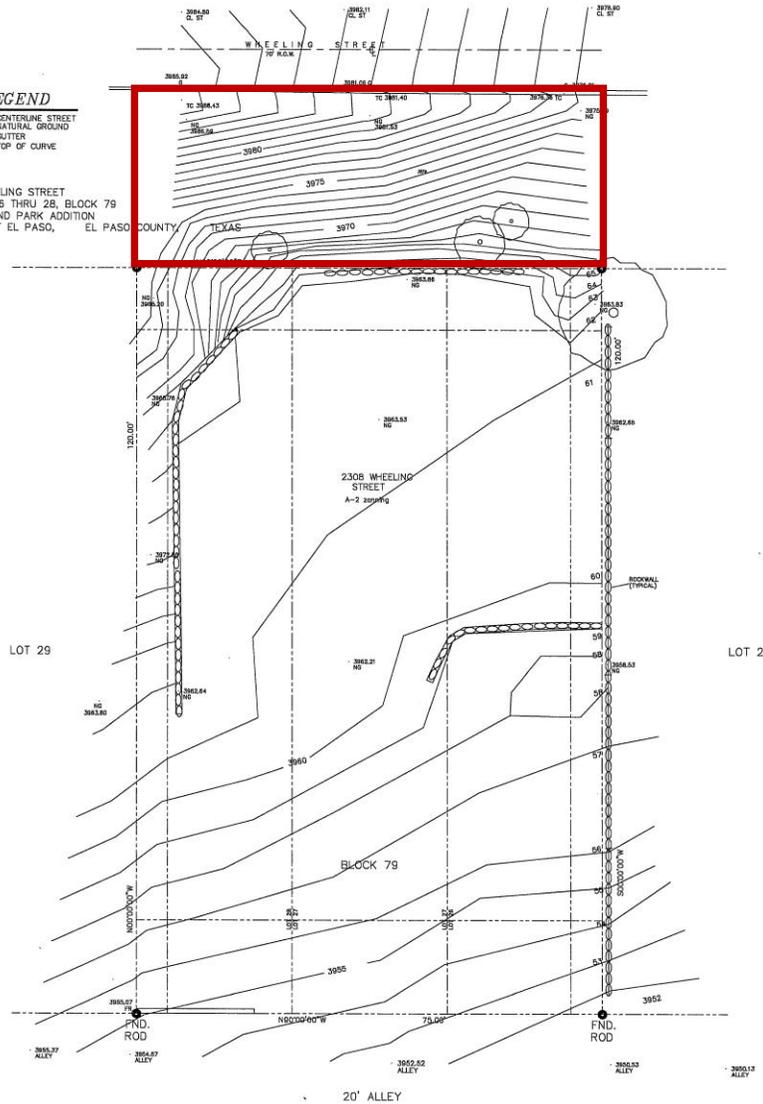
LKF

ORDINANCE NO. _____

BENCHMARK:
 CITY MONUMENT AT SOUTHEAST CORNER
 OF DAKOTA FROM INTERSECTION OF
 DAKOTA AND FEDERAL.
 ELEVATION: 3919.04

LEGEND
 CL ST = CENTERLINE STREET
 NG = NATURAL GROUND
 GUTT = GUTTER
 TC = TOP OF CURVE

0 WHEELING STREET
 LOTS 26 THRU 28, BLOCK 79
 HIGHLAND PARK ADDITION
 CITY OF EL PASO, EL PASO COUNTY, TEXAS



SCALE 1"=20'

NOTE:
 THIS SURVEY WAS
 DONE WITHOUT THE
 BENEFIT OF A
 TITLE COMMITMENT.

<p>CERTIFICATION</p> <p>I HEREBY CERTIFY THAT THE FOREGOING BOUNDARY SURVEY WAS MADE ON THE GROUND AND UNDER MY SUPERVISION AND IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. THAT THERE ARE NO ENCROACHMENTS EXCEPT AS SHOWN HEREON.</p> <p>CARLOS M. JIMENEZ R.P.L.S. No. 3950</p>	<p>JOB # 71722 DATE: 07-01-07 FIELD: JC OFFICE: EA FILE: NET:\ENRIQUE\2007\71722</p>
	<p>LOCATED IN ZONE C PANEL # 480214-0033-B DATED 10-15-82</p>
	<p>RECORDED IN VOLUME N/A PAGE N/A, PLAT RECORDS, EL PASO COUNTY, TX</p>
<p>0 WHEELING STREET LOTS 26 THRU 28, BLOCK 79 HIGHLAND PARK ADDITION CITY OF EL PASO, EL PASO COUNTY, TEXAS</p> <p>CONSULTING COMPANY 1790 LEE TREVINO DRIVE SUITE 503 EL PASO, TEXAS 79936 (915) 633-6422</p>	

EXHIBIT B

Matter # 12-1007-537 PL # 138665
 Special Privilege License
 Edgar Lopez/Pedestrian Bridge & Walkway/
 2308 Wheeling Dr.

13

LKF

ORDINANCE NO. _____