

**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:** 8

**SUBJECT:**

An Ordinance amending Ordinance No. 016874 which granted a special privilege license to ONIHC, L.L.C. permitting the encroachment onto public right-of-way of a sidewalk café located at 504 West San Antonio Avenue, to approve the assignment of the special privilege license from ONIHC, L.L.C. to Lava Entertainment Group, LLC and to adjust the annual fee for the special privilege license (SPL07-00018) District 8.

**BACKGROUND / DISCUSSION:**

The proposed amendment allows for the assignment of the special privilege granted to ONIHC, LLC to Lava Entertainment Group, LLC. By assigning the special privilege it transfers all duties and responsibilities of the special privilege granted by Ordinance No. 016874 to Lava Entertainment Group, LLC. Ordinance No. 016874 requires City Council approval for assignments of the special privilege license.

Also, the fees are being adjusted in accordance with the adopted Schedule C (Fee Schedule) of the FY2013 budget which reduced the fees from \$300.00 per year to \$150.00 per year.

**PRIOR COUNCIL ACTION:**

Ordinance No. 016874 approved 4-22-2008  
Ordinance No. 017178 approved 8-25-2009

**AMOUNT AND SOURCE OF FUNDING:**

N/A

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**BOARD / COMMISSION ACTION:**

N/A

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\*\*\*\*\*REQUIRED AUTHORIZATION\*\*\*\*\*

**DEPARTMENT HEAD:**

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Mathew S. McElroy, Director  
City Development Department

*Information copy to appropriate Deputy City Manager*

**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE AMENDING ORDINANCE NO. 016874 WHICH GRANTED A SPECIAL PRIVILEGE LICENSE TO ONIHC, L.L.C. PERMITTING THE ENCROACHMENT ONTO PUBLIC RIGHT-OF-WAY OF A SIDEWALK CAFÉ LOCATED AT 504 WEST SAN ANTONIO AVENUE, TO APPROVE THE ASSIGNMENT OF THE SPECIAL PRIVILEGE LICENSE FROM ONIHC, L.L.C. TO LAVA ENTERTAINMENT GROUP, LLC AND TO ADJUST THE ANNUAL FEE FOR THE SPECIAL PRIVILEGE LICENSE.**

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

**WHEREAS**, on April 22, 2008, the El Paso City Council approved Ordinance No. 016874, a copy of which is attached hereto as **Exhibit “A”** and made a part hereof for all purposes, which granted to ONIHC, L.L.C. (“Grantee”) a Special Privilege License to encroach onto portions of public right-of-way adjacent to the property located at 504 West San Antonio Avenue, City and County of El Paso, Texas with an outdoor patio café; and

**WHEREAS**, the purpose of the Special Privilege License is solely for the encroachment and operation of an outdoor patio café located on a portion of public right-of-way located within the City of El Paso, El Paso County, Texas and which real property is described in the Special Privilege License granted pursuant to Ordinance No. 016874; and

**WHEREAS**, on August 25, 2009, the El Paso City Council approved Ordinance No. 017178, a copy of which is attached hereto as **Exhibit “B”** and made a part hereof for all purposes, which amended the Special Privilege License granted by Ordinance No. 016874 to ONIHC, L.L.C., to allow for the sale and service of alcoholic beverages within the portion of public right-of-way within the outdoor patio café and to extend the term of the Special Privilege License to ten (10) years with two renewable terms of five (5) years each; and

**WHEREAS**, Grantee is requesting that Grantor approve the assignment of the Special Privilege License to Lava Entertainment Group, LLC and that the annual fee be reduced from \$300 per year to \$150 per year to be consistent with the current established fee for such Special Privilege Licenses; and

**WHEREAS**, the City agrees to further amend the Special Privilege License to approve the assignment of the Special Privilege License from ONIHC, L.L.C to Lava Entertainment Group, LLC and to reduce the annual fee for the Special Privilege License from \$300 per year to \$150 per year to be consistent with the current established fee.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

That the City Manger be authorized to sign, on behalf of the City of El Paso, the Second Amendment to the Special Privilege License granted to ONIHC, L.L.C. by Ordinance No. 016874 for the property located at 504 West San Antonio Avenue:

1. The Second Amendment to the Special Privilege shall be in a form that is attached hereto and incorporated herein as **Exhibit “C”**.
2. The Second Amendment to the Special Privilege is to approve the assignment of the Special Privilege License from ONIHC, L.L.C. to Lava Entertainment Group, LLC and to reduce the annual fee for the Special Privilege License from \$300 to \$150 to be consistent with the current established fee.

**PASSED AND APPROVED** this \_\_\_\_ day of \_\_\_\_\_, 2012.

**CITY OF EL PASO:**

\_\_\_\_\_  
John F. Cook,  
Mayor

**ATTEST:**

\_\_\_\_\_  
Richarda Duffy Momsen,  
City Clerk

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Cynthia Osborn  
Assistant City Attorney

**APPROVED AS TO CONTENT**

\_\_\_\_\_  
Mathew S. McElroy, Director  
City Development Department

Matter # 12-1007-503  
Ordinance Amending Spec Priv License  
Assignment of License/Adjustment of Fee  
504W San Antonio Avenue/Outdoor Patio Café  
Lava Entertainment Group, LLC  
COSB

ORDINANCE NO. \_\_\_\_\_

ORDINANCE NO. 016874

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO ONIHC, L.L.C. PERMITTING THE ENCROACHMENT OF A SIDEWALK CAFE' ONTO A PORTION OF PUBLIC RIGHT-OF-WAY LOCATED AT 504 WEST SAN ANTONIO AVENUE.

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

That the City Manager be authorized to sign, on behalf of the City of El Paso, a Special Privilege upon the following terms to ONIHC, L.L.C. (hereinafter referred to as "Grantee"), for the property located at 504 W. San Antonio Avenue:

1. This Special Privilege shall be in a form, which is attached hereto and incorporated as Exhibit "A;"

2. The Special Privilege is to permit the owner of property located at 504 W. San Antonio Avenue, as more particularly described by metes and bounds in the attached Exhibit "B", to encroach onto a portion of public right-of-way with one (1) sidewalk café, as more particularly shown in the attached and incorporated Exhibit "C";

3. As consideration for this Special Privilege, Grantee shall pay the City of El Paso the sum set forth in Section 3 of Exhibit "A," subject to the terms and conditions of this ordinance and Special Privilege; and

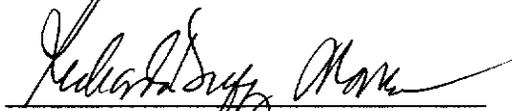
4. This Special Privilege shall be for a term of five (5) years with two renewal options, each for an additional five (5) year period.

PASSED AND APPROVED this 22<sup>nd</sup> day of April, 2008.

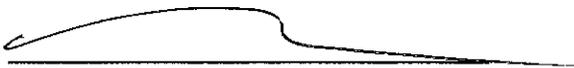
THE CITY OF EL PASO

  
\_\_\_\_\_  
John F. Cook  
Mayor

ATTEST:

  
\_\_\_\_\_  
Richarda Duffy-Momsen  
City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
\_\_\_\_\_  
Patricia D. Adauto, Deputy City Manager  
Development and Infrastructure Services

CITY OF EL PASO  
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permitted by this Special Privilege.

**3. CONSIDERATION.** As consideration for this Special Privilege, Grantee shall pay to the City the fee of Three Hundred and No/100 Dollars (\$300.00) per year for a five (5) year total of One Thousand Five Hundred and No/100 Dollars (\$1,500.00); the annual fee shall be due prior to execution of this Special Privilege by the El Paso City Council. The advance payment shall be payable to the "City of El Paso" and delivered to the Development Services Department. If the Special Privilege is disapproved by the El Paso City Council, the City shall make full refund of the advance payment within fifteen (15) days of the denial action.

Grantee expressly accepts and agrees that the fee set forth herein is subject to any and all future amendments to Section 15.08.120 of the El Paso Municipal Code. Grantee expressly agrees to pay any additional amounts as consideration for this Special Privilege, which could result from a re-computation or assessment of fees pursuant to enactment of future amendments to 15.08.120. This Special Privilege is granted on the condition that Grantee shall pay for all costs associated with the outdoor café and as well as all costs for the restoration of the Premises.

**4. USE OF PROPERTY.** This Special Privilege is granted solely for the encroachment onto public right-of-way of a sidewalk café. As an express condition of this Special Privilege, and not as a mere covenant, Grantee agrees that the sidewalk café must contain removable chairs and related appurtenances, and further agrees to restore the Premises to its original state upon removal of any of the encroachments stated herein. This Special Privilege 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 Premises, leaving the public right-of-way in a clean and orderly condition at all times when not in use as a sidewalk café. The Premises shall be temporarily fenced using the materials and methods approved by the concurrence of the Engineering and Fire Departments with a minimum clearance width of five (5) feet of unobstructed sidewalk for pedestrian traffic. Nothing contained herein shall grant or be construed to grant any real property interest to the Grantee, nor shall it give rise to any vested right in the Grantee, his assigns or successors in interest who shall not have a cause of action for damages upon revocation of this Special Privilege.

Nothing contained herein shall be construed to imply that the City is involved in

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the design, construction, maintenance or repair of the encroachments provided for herein.

5. **IMPROPER USE.** This Special Privilege shall not permit or be construed to permit any other private use of the City's right-of-way, which impairs its function as a right-of-way. Grantee shall not construct any additional improvements, or make any additions or alterations on or over the City right-of-way, without the prior written consent of the El Paso City Council.

6. **REPAIRS.** Grantee shall keep the property, Structure, and Premises in good condition and repair and in a clean, orderly and attractive condition during the term of this Special Privilege. Grantee shall be responsible for all maintenance of the Structure and Premises and shall repair any damage to the Premises regardless of the cause of such damage, at Grantee's sole expense.

7. **INDEMNITY.** As a condition of the Special Privilege, Grantee shall indemnify, defend and hold harmless the City, its officers, agents, servants and employees from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation for injury or death of any person, or for damage to any property, arising out of or in connection with Grantee's use of the public right-of-way, regardless of whether such injuries, death, or damages are caused in whole or in part by the negligence of the City.

8. **LIABILITY INSURANCE.** Grantee shall provide public liability insurance for personal injuries and death growing out of any one 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 accident or other cause. These amounts are not a limitation upon the Grantee's agreement to indemnify and hold the City harmless.

Grantee shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and

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Grantee, his officers, agents, servants or employees. All policies shall name the City of El Paso, its officers, agents, servants and employees as additional insureds to the full amount of the policy limits.

No special privilege license shall be granted by El Paso City Council until Grantee files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Development Services Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the term of the Special Privilege shall be grounds for cancellation of this Special Privilege.

9. **CANCELLATION.** Should the City at any time or for any reason decide that the right-of-way onto which any of the encroachments are needed for public use, the City may upon thirty days (30) written notice, cancel this Special Privilege at no cost to the City and may take possession of the public right-of-way. All rights of the Grantee in the Premises shall then be terminated. Grantee may cancel this Special Privilege, for any reason, upon thirty days (30) prior written notice to the City, and all rights of the Grantee shall then be terminated.

In addition, if, for a period of six (6) months, Grantee ceases to use or occupy the property for the purposes herein contemplated, or if Grantee defaults in any of his obligations under this Special Privilege and fail to correct such defaults within thirty days (30) after written notice to do so; the City may cancel this Special Privilege and take possession. All rights of the Grantee on the City right-of-way shall then terminate.

Any waiver by the City of any breach of any of Grantee's obligations shall not be deemed a continuing waiver, and shall not prevent the City from exercising any remedy it may have for any succeeding breach of the same or another obligation of the Grantee.

Upon termination of this Special Privilege for whatever reason, all encroachments shall become the property of the City and shall, at the option of the City, be removed by the Grantee without cost to the City.

10. **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 property that arises or is alleged to have arisen from Grantee's use of the Premises.

CITY OF EL PASO  
CITY CLERK  
OFFICE

11. **ASSIGNMENT.** Grantee shall not assign this Special Privilege without prior written consent of the El Paso City Council.

12. **MISCELLANEOUS.**

- a. **SIGNS:** This Special Privilege does not grant any permission to erect signage, but, rather, only authorizes an encroachment upon public right-of-way as described herein. Permission to erect signage must be obtained by Grantee pursuant to applicable City Code and ordinance provisions and subject to the restrictions and requirements contained therein.
- b. **RIGHT OF ENTRY AND INSPECTION:** The City's authorized representative shall have the right to enter upon the property at all reasonable times for the purpose of inspecting the same and determining compliance with the terms of this Special Privilege.
- c. **LAWS AND ORDINANCES:** Grantee shall comply with all statutes, laws, codes and ordinances applicable to Grantee's construction, maintenance and use of the Premises, except as specifically provided by the grant of this Special Privilege. This Special Privilege shall not grant permission for Grantee to erect the Premises without first having obtained any required building permits from the City Development Services Department. In addition, Grantee shall obtain any and all other required permits and inspections and shall pay the necessary permit fees.
- d. **SUCCESSORS AND ASSIGNS:** All of the terms, provisions, covenants and conditions of this Special Privilege shall inure to the benefit and be binding upon the parties, their successors and assigns. This Special Privilege is a restriction, condition and covenant running with the property known as 504 W. San Antonio Avenue and a charge and servitude thereon, and shall bind the Grantee and his successors in title. Any further lease or conveyance of this property known as 504 W. San Antonio Avenue shall contain this restriction, condition and covenant and shall embody this Special Privilege by express reference.

CITY OF EL PASO  
CLERK - 2 11 3:05

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

City of El Paso  
Attn: Joyce Wilson, City Manager  
#2 Civic Center Plaza, 10th Floor  
El Paso, Texas 79901-1196

with copy to: City of El Paso  
Attn: City Clerk  
#2 Civic Center Plaza, 2<sup>nd</sup> Floor  
El Paso, Texas 79901-1196

and: ONIHC, L.L.C.  
Attn: Jose Adan Fong  
504 W. San Antonio, Suite A  
El Paso, Texas 79901

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

- f. **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.
- g. **SEVERABILITY:** Every provision of this Special Privilege is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Special Privilege.
- h. **LAW GOVERNING:** The laws of the State of Texas shall govern the validity, performances and enforcement of this Special Privilege and if legal action is necessary to enforce it, exclusive venue shall be in El Paso County, Texas.
- i. The Director of Development Services or that person's designee is the principal City official responsible for the administration of this Special Privilege and Grantee recognizes that questions regarding the interpretation or application of this ordinance shall be referred to the Director of Development Services or designee.

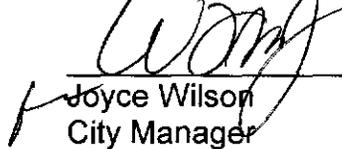
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CITY OF EL PASO

**13. RESTRICTIONS AND RESERVATIONS.** This Special Privilege 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 Special Privilege, 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 Premises, Grantee shall have the right to terminate this Special Privilege upon giving the City prior written notice of its intention to do so.

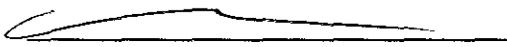
**14. EFFECTIVE DATE.** This Special Privilege shall not take effect unless Grantee files his written acceptance with the Development Services Department prior to its passage and approval by the El Paso City Council. If Grantee accepts the terms and conditions of this Special Privilege as a corporation, each of the persons accepting on behalf of such Grantee warrant to the City that the corporate Grantee is a duly authorized and existing corporation, that the corporate Grantee is qualified to do business in the State of Texas, that the corporate Grantee has full right and authority to accept the terms and conditions of this Special Privilege and that each and every person signing on behalf of the corporate Grantee is authorized to do so. Upon the City's request, the corporate Grantee will provide evidence satisfactory to the City confirming these representations.

**WITNESS THE FOLLOWING SIGNATURES AND SEALS:**

**THE CITY OF EL PASO**

  
\_\_\_\_\_  
Joyce Wilson  
City Manager

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Patricia D. Adauto, Deputy City Manager  
Development and Infrastructure Services

*(Signatures continue on following page)*

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CITY OF EL PASO

**ACCEPTANCE**

The attached instrument, with all conditions thereof, is hereby accepted this  
2<sup>ND</sup> day of April, 2008.

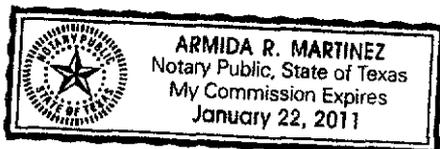
**GRANTEE: ONIHC, L.L.C.**

By: [Signature]  
Jose Adan Fong, Member  
(Printed Name and Title)

**ACKNOWLEDGEMENT**

THE STATE OF TEXAS )  
COUNTY OF EL PASO )

This instrument is acknowledged before me on this 2<sup>ND</sup> day of April,  
2008, by Jose Fong as Member, on behalf  
of ONIHC, L.L.C.



Armida R. Martinez  
Notary Public, State of Texas

ARMIDA R. MARTINEZ  
Notary's Printed or Typed Name:

January 22, 2011  
My Commission Expires:

09/19/2011 11:30:05

# BARRAGAN & ASSOCIATES

Land Planning & Land Surveying

10950 Pellicano Drive, Building "F", El Paso, Texas 79935

Ph. (915) 591-5709

Fax (915) 591-5706

## DESCRIPTION

Description of a parcel of land being a portion of Durango Street right-of-way in front of Block 160, Campbell Addition (recorded in Book 2, page 68, Plat Records of El Paso, County, Texas), an Addition to The City of El Paso, El Paso, County, Texas, and being more particularly described as follows:

**Commencing** for reference at a point of intersection of the southerly line of West San Antonio avenue and the westerly line of Durango Street, said point being the northeasterly corner for said Block 160; **THENCE**, S 00°00'00" E, along the westerly line of Durango Street, a distance of 8.67 feet to the **Point of Beginning** of this **Description**;

**THENCE**, N 90°00'00" E, a distance of 11.00 feet to a point for corner ;

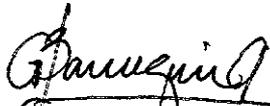
**THENCE**, S 00°00'00" E, a distance of 77.83 feet to a point for corner;

**THENCE**, N 90°00'00" W, a distance of 11.00 feet to a point for corner on the westerly right-of-way line of Durango Street;

**THENCE**, N 00°00'00" E, along said westerly line, a distance of 77.83 feet to the **POINT OF BEGINNING** of the herein parcel being described, containing 856 square feet or 0.0197 acres of land more less.

### NOTES:

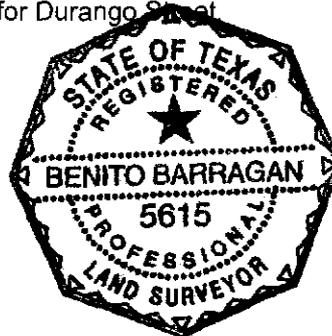
1. Not a ground Survey.
2. Bearings recited herein are based on assumed north for Durango Street.

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Benito Barragan TX R.P.L.S. 5615  
Durango st-row

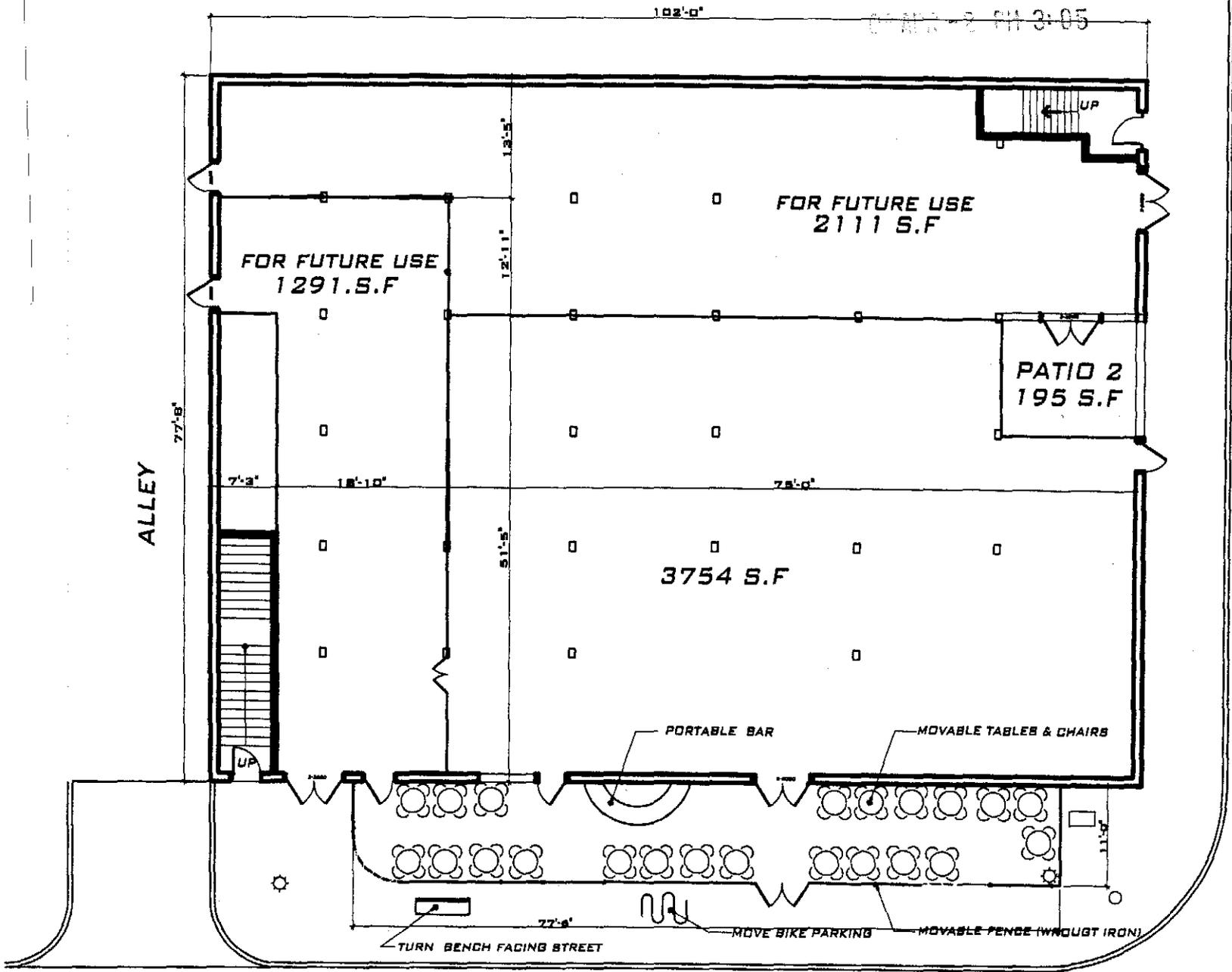
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CITY OF EL PASO

CITY CLERK DEPT.

07 APR - 2 PM 3:05



DURANGO ST.  
**PROPOSED FLOOR PLAN**

SC: 1/16" = 1'-0"

CITY CLERK DEPT.  
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**ORDINANCE NO. 017178**

**AN ORDINANCE AMENDING ORDINANCE NO. 016874 GRANTING A SPECIAL PRIVILEGE TO ONIHC, L.L.C. PERMITTING THE ENCROACHMENT ONTO PUBLIC RIGHT-OF-WAY WITH A SIDEWALK CAFE' LOCATED AT 504 WEST SAN ANTONIO AVENUE BY ADDING THE SALE AND SERVICE OF ALCOHOLIC BEVERAGES AS A PERMISSIBLE ACTIVITY IN THE PUBLIC RIGHT-OF-WAY DESCRIBED IN ORDINANCE 016874 AND EXTENDING THE TERM OF THE SPECIAL PRIVILEGE LICENSE TO TEN (10) YEARS.**

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

**WHEREAS**, on April 22, 2008, the El Paso City Council approved Ordinance No. 016874 which granted to ONIHC, L.L.C. a Special Privilege License to encroach onto portions of public right-of-way adjacent to the property located at 504 West San Antonio Avenue, City and County of El Paso, Texas, as more particularly described by metes and bounds in the attached Exhibit "B" with an outdoor patio café, a copy of which is attached and is hereto as Exhibit "C" and made part hereof for all purposes:

**WHEREAS**, the purpose of the Special Privilege License is solely for the encroachment and operation of an outdoor patio café located on a portion of public right-of-way located within the City of El Paso, El Paso County, Texas, and which real property is described in the Special Privilege License; and

**WHEREAS**, the Grantee is requesting that the Special Privilege License be amended to include provisions to allow for the sale and service of alcoholic beverages within the portion of public right-of-way within the outdoor patio café and to extend the term of the Special Privilege License to ten (10) years with two renewable terms of five (5) years; and

**WHEREAS** the City agrees to amend the Special Privilege License to include provisions to allow for the sale and service of alcoholic beverages within the portion of public right-of-way within the outdoor patio café and to extend the term of the Special Privilege License to ten (10) years with two renewable terms of five (5) years.

**NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:**

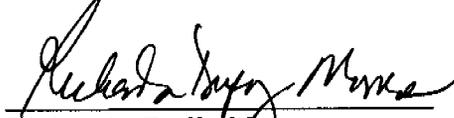
That the City Manager be authorized to sign, on behalf of the City of El Paso, an amendment to the Special Privilege Exhibit "A" of Ordinance 016874 granted to ONIHC, L.L.C., for the property located at 504 West San Antonio Avenue:

1. The Amendment to toe Special Privilege shall be in a form that is attached hereto and incorporated herein as Exhibit "A".

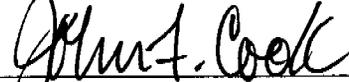
2. The Amendment to the Special Privilege is to permit ONIHC, L.L.C to sell and serve alcoholic beverages within the outdoor café designated in Exhibit "C" of Ordinance No. 016874 and to extend the term of the Special Privilege to ten (10) years with two renewal options, each for an additional five (5) year period.

PASSED AND APPROVED this 25<sup>th</sup> day of August, 2009.

ATTEST:

  
Richarda Duffy-Momsen  
City Clerk

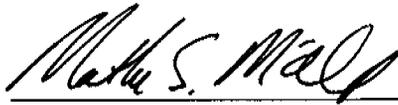
THE CITY OF EL PASO

  
John F. Cook  
Mayor

APPROVED AS TO FORM:

  
Lupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
Mathew S. McElroy  
Deputy Director – Planning  
Development Services Department

CITY CLERK DEPT.  
09 AUG 10 PM 2:53

CITY CLERK DEPT.

THE STATE OF TEXAS )  
 )  
COUNTY OF EL PASO )

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**EXHIBIT "A"  
AMENDMENTS TO THE  
SPECIAL PRIVILEGE**

**WHEREAS**, on April 22, 2008 the El Paso City Council approved Ordinance No. 016874 which granted to ONIHC, L.L.C. a Special Privilege License for the purpose of encroaching upon a portion of public right-of-way with an outdoor patio café located within the City of El Paso, El Paso County, Texas, a copy of which is attached hereto as Exhibit "D" and made a part hereof for all purposes; and

**WHEREAS**, the purpose of the Special Privilege License is associated with the encroachment and operation of an outdoor patio café located on a portion of public right-of-way located within the City of El Paso, El Paso County, Texas; and

**WHEREAS**, ONIHC, L.L.C. desires to include provisions for the sale and service of alcoholic beverages within the portion of public right-of-way within the outdoor patio café and extend the term of the Special Privilege License to ten (10) years with two renewal options, each for an additional five (5) year term; and

**WHEREAS**, Section 12 of the Special Privilege License requires modifications to the Special Privilege be in writing and signed by both parties; and

**WHEREAS**, ONIHC, L.L.C. is requesting that the City approve the amendments to the Special Privilege License granted by Ordinance No. 016874 to ONIHC, L.L.C.; and

**WHEREAS**, ONIHC, L.L.C. hereby agrees to be responsible for all duties, obligations and responsibilities under the Special Privilege License; and

**WHEREAS**, the City agrees to the amendments to the Special Privilege License granted by Ordinance No. 016874, to ONIHC, L.L.C.; and

**NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:**

1. The City approves the amendments to the Special Privilege License granted by Ordinance No. 016874, to ONIHC, L.L.C.
2. ONIHC, L.L.C. agrees to assume and perform all duties, obligations, and responsibilities of said Special Privilege License.
3. ONIHC, L.L.C. agrees to indemnify, defend, and hold harmless the City from and against any and all claims, demands, causes of action, court costs, expenses

and attorneys fees which are connected with or arising from the assignment of this Special Privilege License and the City's acceptance and recognition of the assignment of the Special Privilege License.

4. ONIHC, L.L.C. agrees to enclose the outdoor patio café with wrought-iron fencing as approved by the City of El Paso Development Services Department – Planning Division and the Texas Alcoholic Beverage Commission.

5. ONIHC, L.L.C. agrees to maintain all applicable licensing for the sale and service of alcoholic beverages, for the property located at 504 West San Antonio Avenue.

6. ONIHC, L.L.C. agrees to 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.

7. All notices provided shall be sent by certified or registered mail, return receipt requested, postage fully prepaid, addressed to the proper party at the following addresses:

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

with copy to: City of El Paso  
Attn: City Clerk  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

and: ONIHC, L.L.C.  
Attn: Jose Adan Fong  
504 W. San Antonio, Suite A  
El Paso, Texas 79901

8. Except as herein amended; Ordinance No. 016874 shall remain in full force and effect.

**WITNESS THE FOLLOWING SIGNATURES AND SEALS:**

*(Signatures are on the following page)*

**THE CITY OF EL PASO**

Joyce Wilson  
Joyce Wilson  
City Manager

**APPROVED AS TO FORM:**

Lupe Cuellar  
Lupe Cuellar  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

Mathew McElroy  
Mathew McElroy  
Deputy Director-Planning

**ACCEPTANCE**

The attached instrument, with all conditions thereof, is hereby accepted this 25<sup>th</sup> day of August, 2009.

**GRANTEE: ONIHC, L.L.C.**

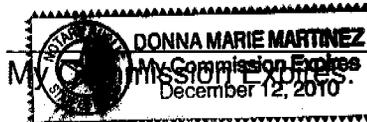
By: Jose Adam Fony  
Jose Adam Fony PRESIDENT  
(Printed Name and Title)

**ACKNOWLEDGEMENT**

**THE STATE OF TEXAS )**  
**COUNTY OF EL PASO )**

This instrument is acknowledged before me on this 25<sup>th</sup> day of June, 2009, by Jose Adam Fony as President, on behalf of ONIHC, L.L.C.

Donna Marie Martinez  
Notary Public, State of Texas  
Donna Marie Martinez  
Notary's Printed or Typed Name:



## BARRAGAN & ASSOCIATES

Land Planning & Land Surveying

10950 Pellicano Drive, Building "F", El Paso, Texas 79935

Ph. (915) 591-5709

Fax (915) 591-5706

### DESCRIPTION

Description of a parcel of land being a portion of Durango Street right-of-way in front of Block 160, Campbell Addition (recorded in Book 2, page 68, Plat Records of El Paso, County, Texas), an Addition to The City of El Paso, El Paso, County, Texas, and being more particularly described as follows:

**Commencing** for reference at a point of intersection of the southerly line of West San Antonio avenue and the westerly line of Durango Street, said point being the northeasterly corner for said Block 160; **THENCE**, S 00°00'00" E, along the westerly line of Durango Street, a distance of 8.67 feet to the **Point of Beginning** of this **Description**;

**THENCE**, N 90°00'00" E, a distance of 11.00 feet to a point for corner ;

**THENCE**, S 00°00'00" E, a distance of 77.83 feet to a point for corner;

**THENCE**, N 90°00'00" W, a distance of 11.00 feet to a point for corner on the westerly right-of-way line of Durango Street;

**THENCE**, N 00°00'00" E, along said westerly line, a distance of 77.83 feet to the **POINT OF BEGINNING** of the herein parcel being described, containing 856 square feet or 0.0197 acres of land more less.

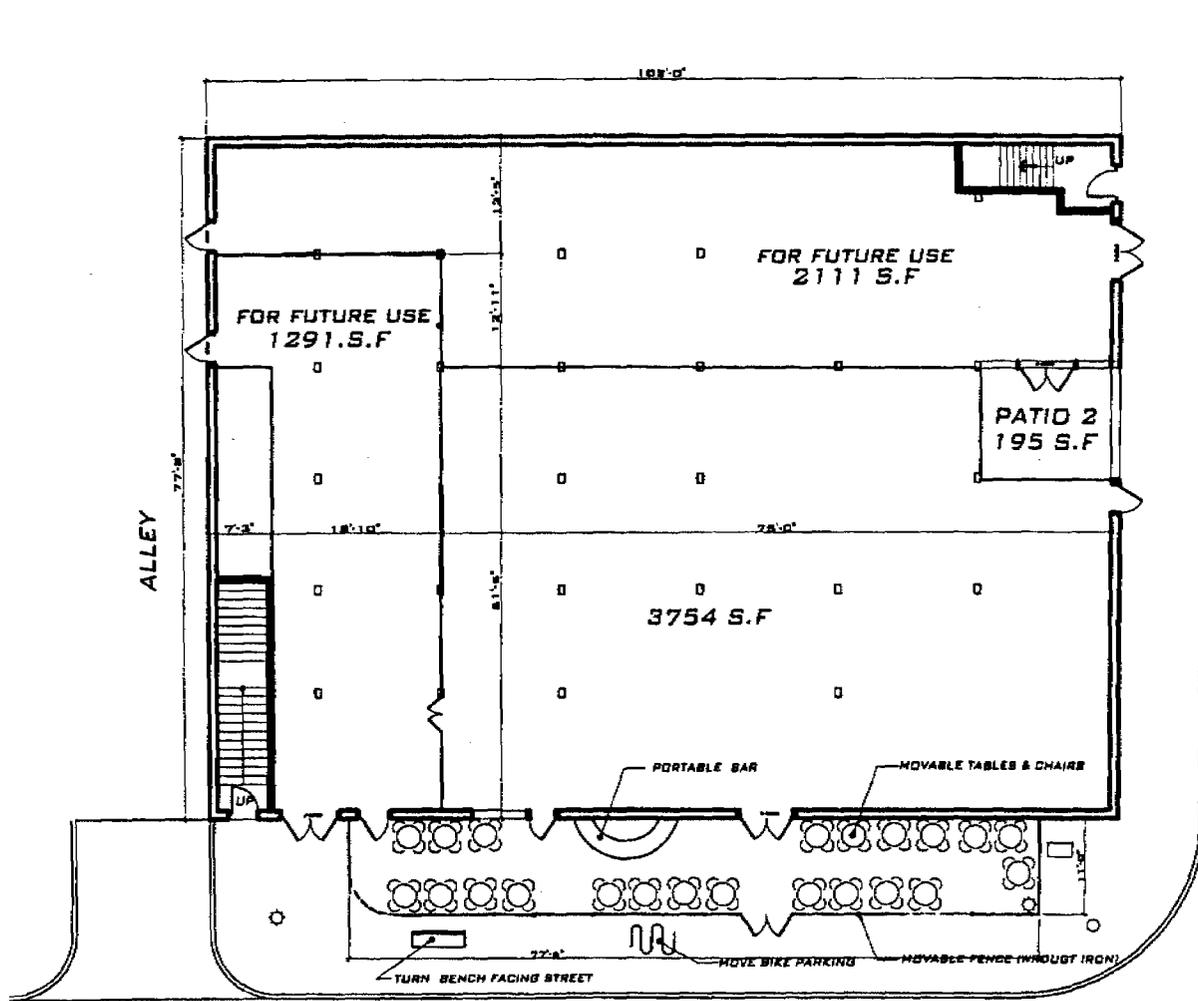
### NOTES:

1. Not a ground Survey.
2. Bearings recited herein are based on assumed north for Durango Street.

Benito Barragan TX R.P.L.S. 5615  
Durango-st-row

12/24/07





DURANGO ST.  
**PROPOSED FLOOR PLAN**

SC: 1/16"=1'-0"

SAN ANTONIO ST.

ORDINANCE NO. 016874

AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO ONIHC, L.L.C. PERMITTING THE ENCROACHMENT OF A SIDEWALK CAFE' ONTO A PORTION OF PUBLIC RIGHT-OF-WAY LOCATED AT 504 WEST SAN ANTONIO AVENUE.

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

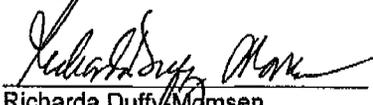
That the City Manager be authorized to sign, on behalf of the City of El Paso, a Special Privilege upon the following terms to ONIHC, L.L.C. (hereinafter referred to as "Grantee"), for the property located at 504 W. San Antonio Avenue:

1. This Special Privilege shall be in a form, which is attached hereto and incorporated as Exhibit "A;"
2. The Special Privilege is to permit the owner of property located at 504 W. San Antonio Avenue, as more particularly described by metes and bounds in the attached Exhibit "B", to encroach onto a portion of public right-of-way with one (1) sidewalk café, as more particularly shown in the attached and incorporated Exhibit "C";
3. As consideration for this Special Privilege, Grantee shall pay the City of El Paso the sum set forth in Section 3 of Exhibit "A," subject to the terms and conditions of this ordinance and Special Privilege; and
4. This Special Privilege shall be for a term of five (5) years with two renewal options, each for an additional five (5) year period.

PASSED AND APPROVED this 22<sup>nd</sup> day of April, 2008.

THE CITY OF EL PASO

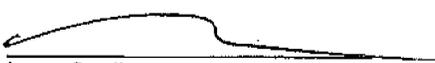
ATTEST:

  
Richarda Duffy Momsen  
City Clerk

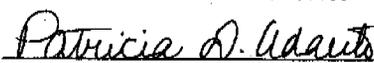
  
John F. Cook  
Mayor

CITY CLERK DEPT.  
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APPROVED AS TO FORM:

  
Lupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

  
Patricia D. Adauto, Deputy City Manager  
Development and Infrastructure Services



permitted by this Special Privilege.

3. **CONSIDERATION.** As consideration for this Special Privilege, Grantee shall pay to the City the fee of Three Hundred and No/100 Dollars (\$300.00) per year for a five (5) year total of One Thousand Five Hundred and No/100 Dollars (\$1,500.00); the annual fee shall be due prior to execution of this Special Privilege by the El Paso City Council. The advance payment shall be payable to the "City of El Paso" and delivered to the Development Services Department. If the Special Privilege is disapproved by the El Paso City Council, the City shall make full refund of the advance payment within fifteen (15) days of the denial action.

Grantee expressly accepts and agrees that the fee set forth herein is subject to any and all future amendments to Section 15.08.120 of the El Paso Municipal Code. Grantee expressly agrees to pay any additional amounts as consideration for this Special Privilege, which could result from a re-computation or assessment of fees pursuant to enactment of future amendments to 15.08.120. This Special Privilege is granted on the condition that Grantee shall pay for all costs associated with the outdoor café and as well as all costs for the restoration of the Premises.

4. **USE OF PROPERTY.** This Special Privilege is granted solely for the encroachment onto public right-of-way of a sidewalk café. As an express condition of this Special Privilege, and not as a mere covenant, Grantee agrees that the sidewalk café must contain removable chairs and related appurtenances, and further agrees to restore the Premises to its original state upon removal of any of the encroachments stated herein. This Special Privilege 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 Premises, leaving the public right-of-way in a clean and orderly condition at all times when not in use as a sidewalk café. The Premises shall be temporarily fenced using the materials and methods approved by the concurrence of the Engineering and Fire Departments with a minimum clearance width of five (5) feet of unobstructed sidewalk for pedestrian traffic. Nothing contained herein shall grant or be construed to grant any real property interest to the Grantee, nor shall it give rise to any vested right in the Grantee, his assigns or successors in interest who shall not have a cause of action for damages upon revocation of this Special Privilege.

Nothing contained herein shall be construed to imply that the City is involved in

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the design, construction, maintenance or repair of the encroachments provided for herein.

5. **IMPROPER USE.** This Special Privilege shall not permit or be construed to permit any other private use of the City's right-of-way, which impairs its function as a right-of-way. Grantee shall not construct any additional improvements, or make any additions or alterations on or over the City right-of-way, without the prior written consent of the El Paso City Council.

6. **REPAIRS.** Grantee shall keep the property, Structure, and Premises in good condition and repair and in a clean, orderly and attractive condition during the term of this Special Privilege. Grantee shall be responsible for all maintenance of the Structure and Premises and shall repair any damage to the Premises regardless of the cause of such damage, at Grantee's sole expense.

7. **INDEMNITY.** As a condition of the Special Privilege, Grantee shall indemnify, defend and hold harmless the City, its officers, agents, servants and employees from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation for injury or death of any person, or for damage to any property, arising out of or in connection with Grantee's use of the public right-of-way, regardless of whether such injuries, death, or damages are caused in whole or in part by the negligence of the City.

8. **LIABILITY INSURANCE.** Grantee shall provide public liability insurance for personal injuries and death growing out of any one 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 accident or other cause. These amounts are not a limitation upon the Grantee's agreement to indemnify and hold the City harmless.

Grantee shall maintain said insurance with a solvent insurance company authorized to do business in Texas. The policy shall provide that the insurer will defend against all claims and lawsuits which arise and will pay any final judgment of a court of competent jurisdiction against the City, its officers, agents, servants or employees and

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Grantee, his officers, agents, servants or employees. All policies shall name the City of El Paso, its officers, agents, servants and employees as additional insureds to the full amount of the policy limits.

No special privilege license shall be granted by El Paso City Council until Grantee files a copy of the policy or certificate of liability insurance as herein set forth with the City Clerk, the City Attorney's Office, and the Development Services Department. Such policy or certificate shall provide that the insurance cannot be canceled or the amount of coverage changed without ten (10) days prior written notice to the City Clerk. Failure to keep the policy in full force and effect throughout the term of the Special Privilege shall be grounds for cancellation of this Special Privilege.

9. **CANCELLATION.** Should the City at any time or for any reason decide that the right-of-way onto which any of the encroachments are needed for public use, the City may upon thirty days (30) written notice, cancel this Special Privilege at no cost to the City and may take possession of the public right-of-way. All rights of the Grantee in the Premises shall then be terminated. Grantee may cancel this Special Privilege, for any reason, upon thirty days (30) prior written notice to the City, and all rights of the Grantee shall then be terminated.

In addition, if, for a period of six (6) months, Grantee ceases to use or occupy the property for the purposes herein contemplated, or if Grantee defaults in any of his obligations under this Special Privilege and fail to correct such defaults within thirty days (30) after written notice to do so; the City may cancel this Special Privilege and take possession. All rights of the Grantee on the City right-of-way shall then terminate.

Any waiver by the City of any breach of any of Grantee's obligations shall not be deemed a continuing waiver, and shall not prevent the City from exercising any remedy it may have for any succeeding breach of the same or another obligation of the Grantee.

Upon termination of this Special Privilege for whatever reason, all encroachments shall become the property of the City and shall, at the option of the City, be removed by the Grantee without cost to the City.

10. **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 property that arises or is alleged to have arisen from Grantee's use of the Premises.

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11. **ASSIGNMENT.** Grantee shall not assign this Special Privilege without prior written consent of the El Paso City Council.

12. **MISCELLANEOUS.**

- a. **SIGNS:** This Special Privilege does not grant any permission to erect signage, but, rather, only authorizes an encroachment upon public right-of-way as described herein. Permission to erect signage must be obtained by Grantee pursuant to applicable City Code and ordinance provisions and subject to the restrictions and requirements contained therein.
- b. **RIGHT OF ENTRY AND INSPECTION:** The City's authorized representative shall have the right to enter upon the property at all reasonable times for the purpose of inspecting the same and determining compliance with the terms of this Special Privilege.
- c. **LAWS AND ORDINANCES:** Grantee shall comply with all statutes, laws, codes and ordinances applicable to Grantee's construction, maintenance and use of the Premises, except as specifically provided by the grant of this Special Privilege. This Special Privilege shall not grant permission for Grantee to erect the Premises without first having obtained any required building permits from the City Development Services Department. In addition, Grantee shall obtain any and all other required permits and inspections and shall pay the necessary permit fees.
- d. **SUCCESSORS AND ASSIGNS:** All of the terms, provisions, covenants and conditions of this Special Privilege shall inure to the benefit and be binding upon the parties, their successors and assigns. This Special Privilege is a restriction, condition and covenant running with the property known as 504 W. San Antonio Avenue and a charge and servitude thereon, and shall bind the Grantee and his successors in title. Any further lease or conveyance of this property known as 504 W. San Antonio Avenue shall contain this restriction, condition and covenant and shall embody this Special Privilege by express reference.

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

City of El Paso  
 Attn: Joyce Wilson, City Manager  
 #2 Civic Center Plaza, 10th Floor  
 El Paso, Texas 79901-1196

with copy to: City of El Paso  
 Attn: City Clerk  
 #2 Civic Center Plaza, 2<sup>nd</sup> Floor  
 El Paso, Texas 79901-1196

and: ONIHC, L.L.C.  
 Attn: Jose Adan Fong  
 504 W. San Antonio, Suite A  
 El Paso, Texas 79901

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

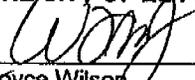
- f. **ENTIRE AGREEMENT:** This document contains all of the agreements between the parties and may not be modified, except by an agreement in writing signed by both parties.
- g. **SEVERABILITY:** Every provision of this Special Privilege is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of the Special Privilege.
- h. **LAW GOVERNING:** The laws of the State of Texas shall govern the validity, performances and enforcement of this Special Privilege and if legal action is necessary to enforce it, exclusive venue shall be in El Paso County, Texas.
- i. The Director of Development Services or that person's designee is the principal City official responsible for the administration of this Special Privilege and Grantee recognizes that questions regarding the interpretation or application of this ordinance shall be referred to the Director of Development Services or designee.

13. **RESTRICTIONS AND RESERVATIONS.** This Special Privilege 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 Special Privilege, 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 Premises, Grantee shall have the right to terminate this Special Privilege upon giving the City prior written notice of its intention to do so.

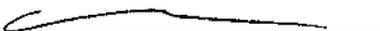
14. **EFFECTIVE DATE.** This Special Privilege shall not take effect unless Grantee files his written acceptance with the Development Services Department prior to its passage and approval by the El Paso City Council. If Grantee accepts the terms and conditions of this Special Privilege as a corporation, each of the persons accepting on behalf of such Grantee warrant to the City that the corporate Grantee is a duly authorized and existing corporation, that the corporate Grantee is qualified to do business in the State of Texas, that the corporate Grantee has full right and authority to accept the terms and conditions of this Special Privilege and that each and every person signing on behalf of the corporate Grantee is authorized to do so. Upon the City's request, the corporate Grantee will provide evidence satisfactory to the City confirming these representations.

**WITNESS THE FOLLOWING SIGNATURES AND SEALS:**

THE CITY OF EL PASO

  
\_\_\_\_\_  
Joyce Wilson  
City Manager

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Lupe Cuellar  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

  
\_\_\_\_\_  
Patricia D. Adauto, Deputy City Manager  
Development and Infrastructure Services

*(Signatures continue on following page)*

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**ACCEPTANCE**

The attached instrument, with all conditions thereof, is hereby accepted this  
2<sup>nd</sup> day of April, 2008.

**GRANTEE: ONIHC, L.L.C.**

By: [Signature]  
Jose Aaron Fajó, Member  
(Printed Name and Title)

**ACKNOWLEDGEMENT**

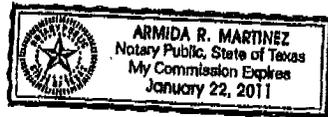
THE STATE OF TEXAS )  
COUNTY OF EL PASO )

This instrument is acknowledged before me on this 2<sup>nd</sup> day of April,  
2008, by Jose Fajó as Member, on behalf  
of ONIHC, L.L.C.

[Signature]  
Notary Public, State of Texas

ARMIDA R. MARTINEZ  
Notary's Printed or Typed Name:

January 22, 2011  
My Commission Expires:



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## BARRAGAN & ASSOCIATES

Land Planning & Land Surveying

10950 Pellicano Drive, Building "F", El Paso, Texas 79935

Ph. (915) 591-5709

Fax (915) 591-5706

### DESCRIPTION

Description of a parcel of land being a portion of Durango Street right-of-way in front of Block 160, Campbell Addition (recorded in Book 2, page 68, Plat Records of El Paso, County, Texas), an Addition to The City of El Paso, El Paso, County, Texas, and being more particularly described as follows:

**Commencing** for reference at a point of intersection of the southerly line of West San Antonio avenue and the westerly line of Durango Street, said point being the northeasterly corner for said Block 160; **THENCE**, S 00°00'00" E, along the westerly line of Durango Street, a distance of 8.67 feet to the **Point of Beginning** of this Description;

**THENCE**, N 90°00'00" E, a distance of 11.00 feet to a point for corner;

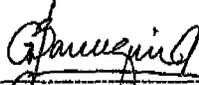
**THENCE**, S 00°00'00" E, a distance of 77.83 feet to a point for corner;

**THENCE**, N 90°00'00" W, a distance of 11.00 feet to a point for corner on the westerly right-of-way line of Durango Street;

**THENCE**, N 00°00'00" E, along said westerly line, a distance of 77.83 feet to the **POINT OF BEGINNING** of the herein parcel being described, containing 856 square feet or 0.0197 acres of land more less.

### NOTES:

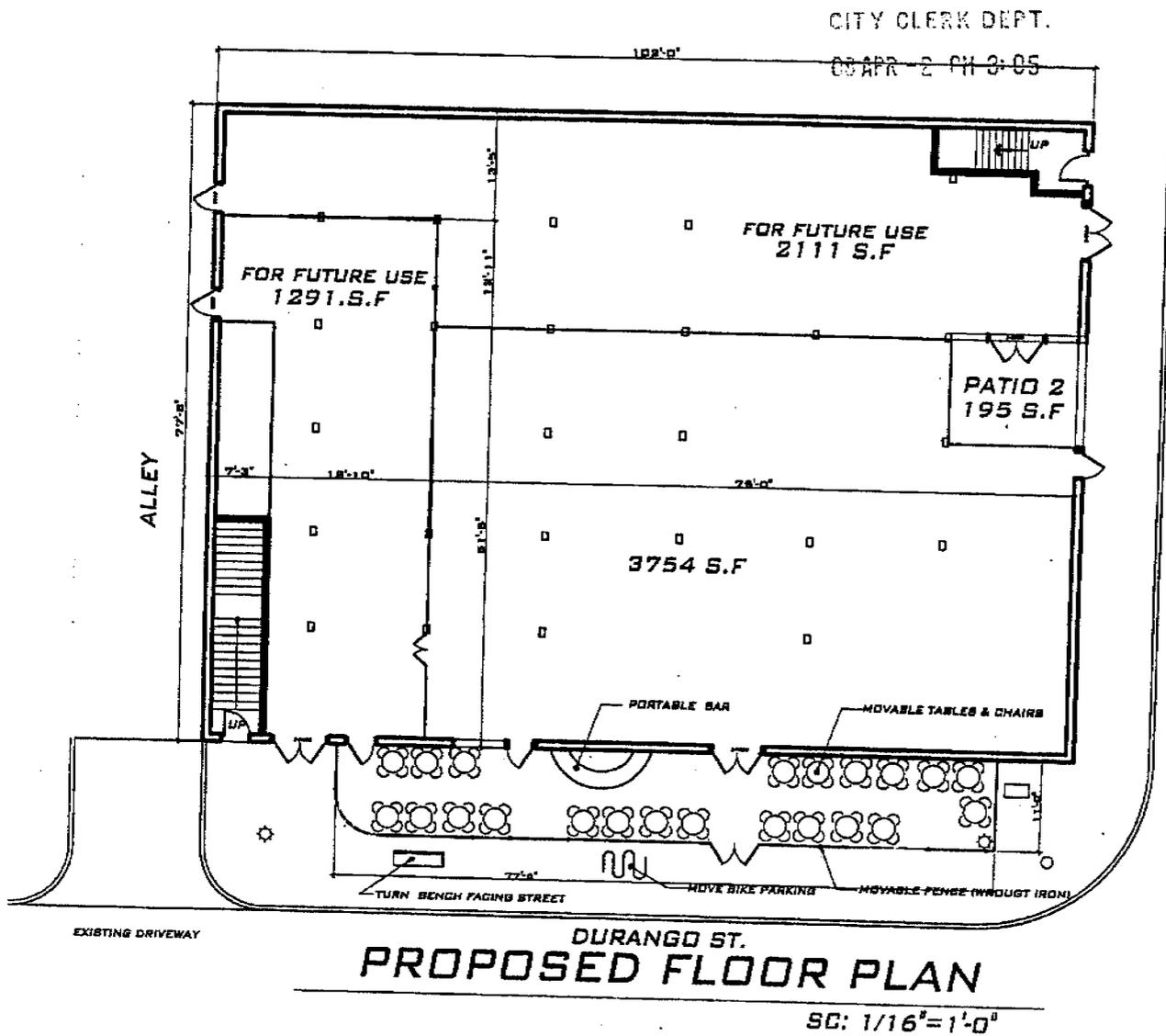
1. Not a ground Survey.
2. Bearings recited herein are based on assumed north for Durango Street.

  
Benito Barragan TX R.P.L.S. 5615  
Durango st-row

12/24/07



CITY CLERK DEPT.  
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SAN ANTONIO ST.



**NOW, THEREFORE, IT IS HEREBY AGREED AS FOLLOWS:**

1. The City approves the assignment of the Special Privilege License granted by Ordinance No. 016874, from ONIHC, L.L.C. to Lava Entertainment Group, LLC.
2. The annual fee for the Special Privilege License shall be One Hundred Fifty and No/100 Dollars (\$150.00).
3. Lava Entertainment Group, LLC agrees to assume and perform all duties, obligations, and responsibilities of said Special Privilege License.
4. Lava Entertainment Group, LLC agrees to indemnify, defend, and hold harmless the City from and against any and all claims, demands, causes of action, court costs, expenses and attorneys fees which are connected with or arising from the assignment of this Special Privilege License and the City's acceptance and recognition of the assignment of the Special Privilege License.
5. Lava Entertainment Group, LLC agrees to maintain all applicable licensing for the sale and service of alcoholic beverages, for the property located at 504 West San Antonio Avenue.
6. Lava Entertainment Group, LLC agrees to 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 and name the City as an additional insured.
7. All notices provided shall be sent by certified mail, postage fully prepaid, addressed to the proper party at the following addresses:

City of El Paso:

City of El Paso  
City Development Department  
2 Civic Center Plaza, 5<sup>th</sup> Floor  
El Paso, Texas 79901

Grantee:

Lava Entertainment Group, LLC  
Attn: Luz Gaona, President  
504 W. San Antonio Avenue  
El Paso, Texas 79901

8. Except as herein amended, all other provisions of the Special Privilege License Granted by Ordinance No. 016874 shall remain in full force and effect.

