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

DEPARTMENT: **FINANCIAL SERVICES**

AGENDA DATE: **DECEMBER 14, 2004**

CONTACT PERSON/PHONE: **GONZALO CEDILLOS, CAPITAL ASSETS MGR., X4074**

DISTRICT(S) AFFECTED: **8**

SUBJECT:

APPROVE AN ORDINANCE AUTHORIZING THE MAYOR TO SIGN A NEW LEASE AGREEMENT BETWEEN THE CITY OF EL PASO AND WHATABURGER N/K/A WHATACO OF EL PASO, LTD., FOR REAL PROPERTY LEGALLY DESCRIBED AS BLOCK A, WEST OF PIEDRAS STREET, BASSETT ADDITION, EL PASO, EL PASO COUNTY, TEXAS WITH A PRIMARY TERM OF TEN YEARS WITH ONE POSSIBLE RENEWAL TERM OF TEN YEARS. THE AGREED UPON RENTAL RATE FOR THE LEASE AGREEMENT SHALL BE ONE HUNDRED SEVENTY AND NO/100 DOLLARS ($170.00) PER MONTH.

BACKGROUND / DISCUSSION:

LEASE OF CITY-OWNED LAND TO PROMOTE ECONOMIC DEVELOPMENT AND EXTRA REVENUE TO THE CITY.

PRIOR COUNCIL ACTION:

THIS ITEM WAS PREVIOUSLY APPROVED ON DECEMBER 14, 1983.

AMOUNT AND SOURCE OF FUNDING:

MONTHLY LEASE RATE OF ONE HUNDRED SEVENTY DOLLARS AND NO/100 ($170.00) TO BE PAID TO THE CITY OF EL PASO AT ITS PRINCIPAL OFFICES IN EL PASO, TEXAS, ON THE FIRST OF EACH MONTH THROUGHOUT THE PRIMARY AND RENEWAL TERMS.

BOARD / COMMISSION ACTION:
N/A

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

LEGAL: (if required) _____ **FINANCE:** (if required) _____

DEPARTMENT HEAD: _____
(Example: if RCA is initiated by Purchasing, client department should sign also)
Information copy to appropriate Deputy City Manager

APPROVED FOR AGENDA:

CITY MANAGER: _____ **DATE:** _____

ORDINANCE NO. _____

AN ORDINANCE AUTHORIZING THE MAYOR TO SIGN A NEW LEASE AGREEMENT BETWEEN THE CITY OF EL PASO AND WHATABURGER OF EL PASO, INC. N/K/A WHATACO OF EL PASO, LTD., FOR REAL PROPERTY LEGALLY DESCRIBED AS BLOCK A, WEST OF PIEDRAS STREET, BASSETT ADDITION, EL PASO, EL PASO COUNTY, TEXAS.

WHEREAS, the City of El Paso, Texas, ("City") and Whataburger of El Paso, Inc. n/k/a Whataco of El Paso, LTD., ("Whataco") entered into a lease agreement ("Lease") December 14, 1983 with a primary term of twenty years with one possible renewal term, for that certain property known as Block "A", West of Piedras Street, Bassett Addition, El Paso, El Paso County, Texas, ("Property"); and,

WHEREAS, Whataco has requested to exercise its ten (10) year renewal option to lease the property under terms and conditions as negotiated with the City; and,

WHEREAS, the City Council of the City of El Paso ("Council") finds that the execution of this Lease serves a public purpose and is in the public interest; NOW THEREFORE,

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

That the Mayor is hereby authorized to sign, on behalf of the City, a Lease Agreement upon the following terms and conditions with Whataco of El Paso, LTD.:

1. The area to be leased is legally described as Block "A," West of Piedras Street, Bassett Addition, El Paso, El Paso County, Texas.

2. The primary term of the lease shall be for ten (10) years effective with the final passage of this Ordinance, unless sooner terminated by the City Council in accordance with the Lease Agreement itself, and with one automatic renewal for ten (10) years at the expiration of the primary term.

3. The agreed upon rental rate for the Lease Agreement shall be ONE HUNDRED SEVENTY AND NO/100 DOLLARS ($170.00) per month for the primary term of ten years with the renewal term to be a reasonable rental value as negotiated in good faith by and between the City and Whataco prior to the commencement of the renewal term, based upon a then current appraisal of the Leased Premises. Said monthly lease payments shall be payable to the City at its principal offices in El Paso, Texas, on the first of each month throughout the primary and renewal terms.

4. In further consideration for the lease of the Property, Whataco shall maintain the Leased Premises and the improvements, fixtures, signs and other additions installed thereon and at its sole cost and expense, clean, maintain, replace and reconstruct, and keep in good repair at all times any drainage pipe installed by Whataco to provide proper drainage consistent with existing drainage practices of the City of El Paso on the properties adjacent to the Leased Premises in

accordance with the terms of the Lease Agreement attached hereto as Exhibit "A" and incorporated herein by this reference for all purposes.

PASSED AND APPROVED this _____ day of December, 2004.

THE CITY OF EL PASO

_____
Joe Wardy Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

APPROVED AS TO FORM:

_____
Kevin D. Elkins
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
Gonzalo Cedillos, P.E.
Capital Assets Manager

Document #: 4399
Document Name: CAM/1/Ordinance/Lease Agreement/Whataco

LEASE AGREEMENT

LEASE AGREEMENT made and entered into this _____ day of December, 2004, by and between the City of El. Paso, a municipal corporation, hereinafter referred to as "Lessor", and WHATACO of El Paso, LTD., a Texas limited partnership, or Assigns, hereinafter referred to as "Lessee".

W I T N E S S E T H:

In consideration of the mutual covenants and agreements hereinafter set forth and the Premises, the parties hereto agree as follows:

1. **Demise**. Subject to and upon the terms, condition, covenants and undertakings herein set forth, Lessor does hereby demise and lease to Lessee and Lessee does hereby lease from Lessor the real property located in the City of El Paso, El Paso County to wit:

> A portion of Block A, West of Piedras Street, BASSETT ADDITION, an addition to the City of El Paso, El Paso County, Texas, as more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof;

together with all existing improvements, fixtures and equipment located thereon (hereafter the "Premises" or the Leased Premises").

2. **Term**. The primary term of this lease shall be for a period of ten (10) years commencing on the _____ day of December, 2004. Lessee shall have the option to renew this Lease for one (1) additional period of ten (10) years, as more particularly set forth in Section 12 hereof, under the same terms and conditions set forth herein except as provided for in Section 12.

3. **Rent**. Lessee hereby agrees to pay Lessor during the primary term hereof as rental for and in consideration of the right to use and occupy the Leased Premises the amount of Two Thousand Forty and No/100 Dollars ($2,040.00) per year, payable monthly in installments of One Hundred Seventy and No/100 Dollars ($170.00), due and payable in advance on the first day of each calendar month of the primary term of this Lease.

4. **Use**. Lessor hereby grants to Lessee the right to use the Leased Premises for the purpose or purposes of drainage, ingress and egress, parking, outside storage, advertisement and/or any other lawful purpose necessary, incident or convenient to the business of Lessee being

conducted on the Leased Premises by Lessee shall not interfere with the operation of the Lessor's drainage channel located thereon. In connection therewith, Lessee shall have the right to erect signs, fences, lighting fixtures and any other improvements it may desire to better aid and facilitate its use and occupancy of the Premises and the business conducted thereon.

Lessee hereby covenants and agrees that it will comply with all laws of the United States of America and the State of Texas, city ordinances of the City of El Paso, Texas, and all other legal requirements with reference to the conduct and management of its activities on the Leased Premises, and Lessee further covenants and agrees that its agents, employees, licensees and invitees, whether business or otherwise, will conduct themselves in an orderly and legal manner while on or about said Leased Premises.

5. **Obligations and Alterations**. Lessee may make such additions, alterations and changes to the Leased Premises as Lessee may find necessary, desirable or convenient for its purposes provided, however, that such additions, alterations and changes shall not, to the satisfaction of the Deputy City Manager, interfere with the operation of Lessor's drainage channel located thereon or injure or diminish the value of the Leased Premises. Lessee shall give prior written notice to the Deputy City Manager of any additions, alterations, changes or improvements and to protect Lessor's estate and title from any liens or claims arising out of construction or installation of said improvements. Title to said additions, alterations, changes or improvements, excluding any drainage pipe and adjacent fill materials, installed or constructed by Lessee under this Lease shall remain with Lessee upon such installation or construction.

In the event the Deputy City Manager determines that Lessee's use of the Leased Premises as contemplated herein necessitate additions, improvements or alterations to the existing drainage channel located on the Leased Premises in order to comply with applicable governmental laws, ordinances, regulations and existing drainage practices in the City of El Paso, Lessee hereby represents and warrants that said additions, alterations or improvements will be performed in a good and workmanlike manner.

6. **Repairs and Maintenance**. Lessee shall, at its sole cost and expense, maintain the Leased Premises and the improvements, fixtures, signs and other additions installed thereon in a neat, clean and attractive condition consistent with good business practice. Lessee shall, at its sole cost and expense, clean, maintain, replace and reconstruct and keep in good repair at all

times any drainage pipe installed by Lessee to provide proper drainage consistent with existing drainage practices of the City of El Paso on the properties adjacent to the Leased Premises. Lessee shall neither commit nor permit waste to be committed on said Premises, shall keep the Leased Premises to the extent covered by this Lease in sound condition and good repair, and shall neither do nor permit anything to be done to said Premises that may impair the value thereof.

7. **Utilities**. Lessee shall assume and pay for any and all costs or charges for utility services furnished to Lessee and the Leased Premises during the term hereof.

8. **Taxes**. Lessee agrees to pay any and all taxes which may lawfully be levied against the Leased Premises and Lessee's occupancy or use of the Leased Premises, or improvements and appurtenances placed thereon as the result of Lessee's right to occupancy and use of the Leased Premises under the terms and conditions of this Lease. Lessee shall obtain and pay for all licenses and permits necessary or required by law in the conduct of its business hereunder.

9. **Indemnity**. In the use of the Leased Premises, and in the exercise of the rights herein granted, Lessee shall indemnify, defend and hold the City, its officers, agents, servants and employees harmless from any and all claims, losses, damages, causes of action, suits, and liability of every kind, including all expenses of litigation, court costs, and attorney's fees, for injury to or death of any person, or for damage to any property, arising out of or in connection with Lessee's use of the Leased Premises under this Lease. The Lessee further agrees to handle and defend at its own expense, on behalf of the City and in the City's name, any claim or litigation in connection with any such injury, death or damage.

In the erection or construction of any improvements upon the Leased Premises, and in the exercise or enjoyment of the privileges herein granted, Lessee shall indemnify and save harmless Lessor from any and all claims that may proximately result to Lessor or Lessor's property because of any negligence on the part of Lessee.

10. **Liability Insurance**. In case of any action or proceeding brought against the City by reason of any such claim, Lessee, upon notice from the City, agrees to defend the action or proceeding by counsel acceptable to the City. The Lessee, at its sole cost and expense, shall, throughout the term of this Agreement, provide and keep in force for the benefit of the Lessee and the City, as an additional insured, comprehensive general liability insurance in an

amount not less than Five Hundred Thousand Dollars ($500,000.00) for bodily injury to one person for each occurrence, One Million Dollars ($1,000,000.00) for bodily injuries to more than one person arising out of each occurrence and One Hundred Thousand Dollars ($100,000.00) for property damage arising out of each occurrence, or in amounts equal to the maximum liability for damages for municipalities for claims arising under governmental functions, provided for under the Texas Tort Claims Act, whichever is greater. These amounts are not a limitation upon the Lessee's agreement to indemnify and hold the City harmless. Lessee shall maintain said insurance with a solvent insurance company authorized to do business in Texas.

All policies of insurance required by this Agreement shall be issued by insurance companies authorized to do business in the State of Texas and shall be written by companies approved by the City, such approval not to be unreasonably withheld. Certificates of insurance shall be delivered to the City at least five (5) days prior to the effective date of the policy for which the certificate is issued. Each certificate of insurance shall contain the following information at a minimum:

(a) a statement of the coverage provided by the policy,
(b) a statement certifying that the City to be listed as an additional insured in the policy,
(c) a statement of the period during which the policy is in effect;
(d) a statement that the annual premium or the advance deposit premium for such policy has been paid in advance; and
(e) an agreement by the insurance company issuing such policy that the policy shall not be canceled or reduced in any amount for any reason whatsoever without at least thirty (30) days prior written notice to the City.

11. **Nondisturbance**. Lessor hereby warrants and represents that it holds title to the Leased Premises free and clear of any liens or encumbrances. In negotiating any mortgage of the Leased Premises, Lessor shall obtain a provision to the effect that so long as Lessee is not in default under this Lease, no foreclosure of any lien of said mortgage or any other proceeding in respect thereof shall divest, impair, modify, abrogate or otherwise adversely affect any interest or rights whatsoever of Lessee under this Lease.

12. **Renewal Option**. Lessee shall have the option to renew this Lease for one (1) additional period of ten (10) years. The amount of rent to be due and payable for the renewal term shall be a reasonable rental value as negotiated in good faith by and between Lessor and Lessee prior to the commencement of the renewal term, based upon a then current appraisal of

the Leased Premises the cost of said appraisal to be shared equally by Lessor and Lessee. In all other respects the renewal term of this Lease shall be upon the same terms and conditions as set forth herein.

If Lessee elects to exercise the renewal option set forth herein, Lessee shall give Lessor notice in writing at least thirty (30) days prior to the expiration of the primary term of Lessee's intent to exercise said option.

13. **Holding Over**. Lessee agrees that upon the expiration of the primary term or any renewal period or any extension hereof, Lessee shall immediately vacate and remove itself from the Leased Premises. In the event Lessee shall hold over after the expiration of the primary term of this Lease, or any renewal period or extension hereof, with the permission of Lessor, such tenancy shall be month-to-month tenancy.

14. **Lessee's Personal Property**. It is hereby agreed that upon the expiration or cancellation of this Lease or any renewal period or extension hereof, Lessee shall have the right to remove any and all personal property and improvements, excluding any drainage pipe and adjacent fill materials installed by Lessee on or about the Leased Premises. Lessor shall retain any drainage pipe and adjacent fill material which have been installed on the Leased Premises by Lessor.

15. **Default**. This Lease may be terminated by Lessor, and Lessee shall be declared to be in default hereunder if Lessee shall:

(a) Be in default in the payment of the whole or any part of the rental amounts agreed to paid herein, as set forth above in Section 3, for a period of thirty (30) days after the time such payment becomes due;

(b) Make a general assignment for the benefit of creditors;

(c) Abandon the Leased Premises or a substantial portion thereof for a period of thirty (30) days;

(d) File a voluntary petition in bankruptcy; or

(e) Default in the performance of any of the covenants, terms and conditions required herein to be kept and performed by Lessee when such default continues for a period of thirty (30 days after receipt of written notice from Lessor of said default.

If any of the events enumerated in this Section 15 shall occur and after due notice Lessee has failed to cure or correct or has begun proceedings to correct the same, Lessor may, at any

time thereafter during the continuance of said default, terminate this Lease by giving Lessee thirty (30) days written notice, such termination to be effective upon the date specified in such notice.

Any waiver by Lessor of any breach of any of the Lessee's obligations set forth herein shall not be deemed to be a continuing waiver and shall not prevent Lessor from exercising any remedy it may have for any succeeding breach of the same or any succeeding breach of the same or any other obligation of Lessee.

16. **Miscellaneous**.

(a) **Attorney's Fees**. In the event of litigation between the parties hereto arising out of rights or obligations hereunder, asserted by either or both parties hereto, or to enforce any of the terms and conditions arising out of this Lease, the prevailing party shall be entitled to recover from the other party reasonable attorneys' fees, court costs and expenses of said litigation.

(b) **Notices**. All written notices to Lessor and Lessee hereunder shall be addressed as follows:

Lessor: The City of El Paso
Attention. Gonzalo Cedillos, P.E.
Capital Assets Manager
2 Civic Center Plaza, 6th Floor
El Paso, TX 79999

Lessee: Whataco of El Paso, LTD.
Attention: Mr. John Pass
3011 Garden City Highway
Midland, TX 79701

All said written notices required under this Lease shall be deemed delivered upon receipt by the appropriate party and all such written notices shall be sent for delivery postage prepaid, by registered or certified mail, return receipt requested.

(c) **Lessor's Title; Peaceful Possession**. Lessor hereby covenants and agrees that at and until the granting and delivery of this Lease, it is well seized of the Leased Premises and had good title thereto, free and clear of all liens and encumbrances having priority over this Lease; and that Lessor has the right and authority to lease the same as hereinabove set forth. Lessor further covenants and agrees that all things have happened and been done to make its granting of said Lease effective as of the date hereof, and Lessor warrants to Lessee peaceful

possession and quiet enjoyment of the Leased Premises during the term hereof, or during any renewal period or extension hereof, upon performance of Lessee's covenants herein.

(d) **Binding Effect: Successors or Assigns**. All of the terms, covenants and agreements herein contained shall be binding upon and shall inure to the benefit of all successors and assigns of the respective parties hereto.

(e) **Time is of the Essence**. Time is and shall be deemed to be of the essence in respect to the performance of each provision of this Lease.

(f) **Law Governing**. The laws of the State of Texas shall govern the validity, performance and enforcement of this Lease.

(g) **Gender and Number**. Words of any gender used in this Lease shall be held and construed to include any other gender, and words in the singular number shall be held to include the plural and vice-versa unless the contents dictate otherwise.

(h) **Entire Agreement**. This Lease contains all of the agreements and conditions made between the parties hereto and may not be modified orally or in any manner other than by an agreement in writing signed by the parties hereto and any respective successors in interest. The laws Of the State of Texas shall govern the validity, performances and enforcement of this lease.

(i) **Severability**. The invalidity or illegality of any provision hereof shall not affect the remainder of this Lease.

(j) **Right of Entry and Inspection**. Lessor's authorized representative or agent shall have the right to enter upon the Leased Premises for the purpose of inspecting the drainage pipe and determining compliance with the terms of this Lease upon providing Lessee with one (1) business day prior written notice. Inspection and entry upon the Premises by Lessor's authorized representative or agent shall be done in a manner and at reasonable times which will not interfere with the business of Lessee being conducted on the Leased Premises. Notwithstanding the foregoing, however, in the event of an emergency, Lessor's authorized representative or agent shall have the right to enter upon the Leased Premises for the purpose of insuring that the drainage pipe is clear and unobstructed.

(k) **Signs**. All signs on the property shall comply with all building codes and ordinances of the City of El Paso, El Paso County, Texas. Signs on the Leased Premises shall be limited to those identifying the uses being conducted on the Premises and those necessary for

informational and directional purposes.

(l) **Property Title**. Consummation of this Lease in no way obligates Lessor to convey to Lessee title to the Leased Premises in the event Lessor elects to dispose of title to the Leased Premises.

(m) **Outside Lighting**. Lessee hereby convents and agrees that outside lighting, except security lighting, on the Leased Premises will not be operated at such hours or with such intent to constitute a nuisance to the occupants of other property in the neighborhood.

THE CITY OF EL PASO

By_____
Joe Wardy, Mayor

ATTEST:

_____
Richarda Duffy Momsen
City Clerk

(Signatures continue on following page)

WHATACO of El Paso, LTD.

By: _____
Title: _____

APPROVED AS TO FORM:

_____
Kevin D. Elkins
Assistant City Attorney

APPROVED AS TO CONTENT:

_____
Gonzalo Cedillos, P.E.
Capital Assets Manager

Document #: 1225
Document Name: CAM/1/Lease Agreement/Whataburger

PAISANO
PIEDRAS
GREAT BEAR
WHATABURGER
BLDG
BLDG
AREA = 7283.02 SQ. FT.
N53°20'48"E
1.94'
122.18'
N55°50'54"E
59.50'
S34°01'12"E
122.33'
S56°12'58"W
58.65'
S35°46'24"E
117.55'
N53°20'48"E
134.64'
S36°39'12"E
N
SCALE: 1"=40'

EXHIBIT 'A'

EXHIBIT 'A'

Being a portion of a drainage channel
west of the existing Piedras Street
and south of Bassett Addition, Block A
City of El Paso, El Paso County, Texas
Prepared for: Fred McKinstry
September 16, 1983

METES & BOUNDS DESCRIPTION

Description of a parcel of land being a portion of a drainage channel west of the existing Piedras Street and south of Bassett Addition Block A, City of El Paso, El Paso County, Texas being more particularly described by metes and bounds as follows to wit;

Beginning at the northwest corner of Lot 38; Thence South 36°39'12" East a distance of 134.64 feet; Thence North 53°20'48" East a distance of 117.55 feet to the "POINT OF BEGINNING";

Thence North 53°20'48" East a distance of 1.94 feet;

Thence North 55°50'54" East a distance of 122.18 feet;

Thence South 34°01'12" East a distance of 59.50 feet;

Thence South 56°12'58" West a distance of 122.33 feet;

Thence North 35°46'24" West a distance of 58.65 feet to the "POINT OF BEGINNING" and containing in all 7,283.02 square feet or 0.1672 acres of land more or less.

Tony G. Conde, P.E.
CONDE, INC.

883-68-3
R.O.