

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

**DEPARTMENT:** Planning & Inspections Department

**AGENDA DATE:** Introduction: January 13, 2015  
Regular Agenda: January 20, 2015

**CONTACT PERSON NAME AND PHONE NUMBER:** Kimberly Forsyth, (915) 212-1563,  
forsythkl@elpasotexas.gov

**DISTRICT(S) AFFECTED:** District 8

**SUBJECT:**

An Ordinance renewing the Special Privilege License granted to granted to El Paso 221, L.P. by Ordinance No. 014526 and later assigned to Madison River Investments, LLC, by Ordinance No. 016963 for the maintenance and use of an existing underground tunnel encroaching within a portion of Kansas Street between Mills Avenue and Texas Avenue for a second term of fifteen years and amending the assignment provision to allow for transfer of obligations to another party through a lender.

**BACKGROUND / DISCUSSION:**

The applicant, Madison River Investments, LLC, requests renewal of a special privilege license that was granted in June 2000 for a 15 year term to allow the continued maintenance and use of an existing underground tunnel within a portion of Kansas Street between Mills Ave. and Texas Ave. The assignment portion of the ordinance is requested to be amended to allow transfer of the obligations to another party. The original license, Ordinance 014526, provided an option for renewal, and the applicant has requested an additional 15 year term. The annual fee is \$3,351.25, in accordance with the current fee schedule adopted by City Council. The City retains the right to increase or decrease the amount annually after providing notice to the applicant. Insurance has been provided per Title 15 requirements.

**PRIOR COUNCIL ACTION:**

June 24, 2000 Ordinance 014526 - approval of the special privilege license for a 15 year term.  
Aug. 12, 2008 Ordinance 016963 - assignment of the license to Madison River Investments, LLC

**AMOUNT AND SOURCE OF FUNDING:**

N/A

**BOARD / COMMISSION ACTION:**

N/A

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

**LEGAL:** (if required) N/A

**FINANCE:** (if required) N/A

**DEPARTMENT HEAD:**



Mathew S. McElroy  
Planning & Inspections Director

**APPROVED FOR AGENDA:**

**CITY MANAGER:** \_\_\_\_\_

**DATE:** \_\_\_\_\_

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

**AN ORDINANCE RENEWING THE SPECIAL PRIVILEGE LICENSE GRANTED TO EL PASO 221, L.P. BY ORDINANCE NO. 014526 AND LATER ASSIGNED TO MADISON RIVER INVESTMENTS, L.L.C. BY ORDINANCE NO. 016963 FOR THE MAINTENANCE AND USE OF AN EXISTING UNDERGROUND TUNNEL ENCROACHING WITHIN A PORTION OF KANSAS STREET BETWEEN MILLS AVENUE AND TEXAS AVENUE FOR A SECOND TERM OF FIFTEEN YEARS AND AMENDING THE ASSIGNMENT PROVISION TO ALLOW FOR TRANSFER OF OBLIGATIONS TO ANOTHER PARTY THROUGH A LENDER.**

**WHEREAS**, on June 24, 2000, the City granted a Special Privilege License to El Paso 221, L.P. to permit and regulate the maintenance and use of an existing underground tunnel within a portion of Kansas Street between Mills Ave. and Texas Ave by Ordinance No. 014526, attached hereto as Exhibit "A" (the "License") and incorporated herein by this reference;

**WHEREAS**, on August 12, 2008, the City authorized the Consent to Assignment of the Special Privilege License to Madison River Investments, LLC by Ordinance No. 016963, attached hereto as Exhibit "B" and incorporated herein by this reference; and

**WHEREAS**, the parties desire to amend the provision of the License regarding assignment, Section 12, to allow for assignment to the Grantee's lender under specific circumstances, and to renew the License per its terms for an additional fifteen years.

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

1. That Section 6. **CONSIDERATION** is hereby amended to read as follows:
  1. As consideration for this Special Privilege, Grantee shall pay to the City THREE THOUSAND THREE HUNDRED FIFTY-ONE AND 25/100 DOLLARS (\$3,351.25) per year. The annual fee shall remain the same for a period of one year from the date of execution by City Council and shall be subject to change after each one year period the License remains in effect. The City retains the right to increase or decrease the annual fee specified in this License.
  2. The City shall notify the Grantee of any proposed changes in fees as prescribed in Section 11 (Notice) of this License. This License is granted on the condition the Grantee pays for all costs associated with the Tunnel, as well as all costs for the restoration of the License Area upon the termination of this License.

3. The first annual consideration shall be due and owing prior to City Council approval of this License Renewal. 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 City Council, a full refund of the payment shall be made by the Financial Services Department within fifteen (15) days of the denial action.

**ADVANCE PAYMENT OPTION:**

1. Grantee shall have the option of pre-paying the City the entire amount for the fifteen (15) year term of the License, prior to the execution of this License. The fifteen (15) year amount is equal THIRTY-TWO THOUSAND TWO HUNDRED SIXTY-FIVE and 60/100 DOLLARS (\$32,265.60). Said \$32,265.60 reflects the present value of the total sum of annual fees for the fifteen year term, applying a three percent (3%) discount rate. 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 15 year term.
2. 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 the Tunnel required by the City pursuant to this License.
3. 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.

2. That Section 7. **INSURANCE** be amended to read as follows:

1. 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 the Grantee's insurance policies 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.

2. Grantees shall obtain and provide a commercial general liability policy with a minimum 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 Grantees' agreement to indemnify and hold the City harmless.
3. Grantees shall procure said insurance with a solvent insurance company authorized to do business in Texas. Such policy or certificate shall provide that the insurance cannot be canceled, modified or the amount of coverage changed without thirty (30) days prior written notice to the Financial Services Department, or ten (10) days prior written notice to the Financial Services Department for cancellation based on non-payment of insurance premiums. Grantees shall file a copy of the policy or certificate of insurance with Financial Services and the 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.

#### **INDEMNITY**

**AS A CONDITION OF THIS LICENSE, GRANTEE AND PARTICIPATING MERCHANTS AGREE TO INDEMNIFY, DEFEND AND HOLD HARMLESS THE CITY, ITS OFFICERS, AGENTS, SERVANTS AND EMPLOYEES FROM ANY AND ALL CLAIMS, LOSS, DAMAGES, CAUSES OF ACTION, SUITS AND LIABILITY OF EVERY KIND, INCLUDING ALL EXPENSES OF LITIGATION (INCLUDING BUT NOT LIMITED TO ATTORNEY'S FEES AND COSTS) FOR INJURY OR DEATH OF ANY PERSON, OR FOR DAMAGES TO ANY PROPERTY ARISING OUT OF OR IN**

CONNECTION WITH GRANTEE'S AND PARTICIPATING MERCHANTS USE OF THE PUBLIC RIGHT-OF-WAY UNDER THIS LICENSE, INCLUDING ANY ACT OR OMISSION BY THE GRANTEE AND PARTICIPATING MERCHANTS, THEIR AGENTS, EMPLOYEES OR SUBCONTRACTORS, REGARDLESS OF WHETHER SUCH INJURIES, DEATH OR DAMAGES ARE CAUSED IN WHOLE OR IN PART BY THE NEGLIGENCE OF THE CITY.

1. 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.
2. 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 and Participating Merchants' activities under this License. **The City will not be responsible for any loss of or damage to the GRANTEE'S and Participating Merchants' property from any cause.**



3. That Section 11 **NOTICE** shall be amended to read as follows:

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  
300 N. Campbell Street, 2nd floor  
El Paso, Texas 79901

with copy to: City of El Paso  
ATTN: City Development Department  
801 Texas Avenue, 1st floor  
El Paso, Texas 79901

with copy to: City of El Paso  
ATTN: Financial Services Department –  
Financial Accounting & Reporting  
300 N. Campbell Street, 1st floor  
El Paso, Texas 79901

GRANTEE: Madison River Investments, LLC  
201 E. Main Drive, Suite 1516  
El Paso, Texas 79901

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

4. That Section 12. **ASSIGNMENT** is hereby amended to read as follows:

The rights granted by this Special Privilege inure to the benefit of the Grantee, and any parent, subsidiary, or successor entity now or thereafter existing. The rights shall not be assignable without the express written consent of the City through its City Manager or designee, and such consent shall not be unreasonably delayed, denied or withheld. A written copy of any assignment must be filed with the City. Any required consent shall be evidenced in writing and signed by the City Manager or designee. However, should the mortgagee of the grantee's property related to this License acquire title to the Property, whether by foreclosure, deed in lieu of foreclosure or otherwise, all rights granted under this Special Privilege will pass without the necessity of the prior written consent of the City, provided that the mortgagee provides notice to the City as provided herein stating that it expressly assumes the responsibilities and obligations under the License along with documentation that it is in compliance with the provisions of this License. In the event of foreclosure by Grantee's mortgagee, the purchaser at the foreclosure sale or the person acquiring

Grantee's interest in lieu of foreclosure shall succeed to all of Grantee's rights, interests, duties and obligations under this Agreement.

5. That the City hereby renews this License for one additional fifteen year term in accordance with Section 3 of the License.

6. All other terms and conditions of the License shall remain in full force and effect.

**PASSED AND APPROVED** this \_\_\_\_ day of \_\_\_\_\_, 2015.

**WITNESS THE FOLLOWING SIGNATURES AND SEALS:**

**THE CITY OF EL PASO**

\_\_\_\_\_  
Oscar Leeser, Mayor


**ATTEST:**

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

**APPROVED AS TO FORM:**

  
\_\_\_\_\_  
Kristen L. Hamilton-Karam  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

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

*(signatures continue on the following page)*

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this 22 day of December, 2014.

GRANTEE:

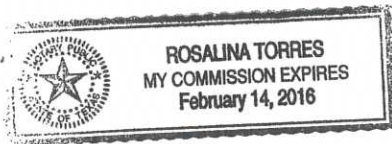
Madison River Investments, LLC

Steven Weber  
By: Steven Weber  
As: Vice President

ACKNOWLEDGMENT

THE STATE OF TEXAS           )  
  )  
COUNTY OF EL PASO        )

This instrument is acknowledged before me on this 22 day of December, 2014, by \_\_\_\_\_, on behalf of Madison River Investments, LLC, as Grantee.



Rosalina Torres  
Notary Public, State of Texas  
February 14, 2016  
My Commission Expires



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**AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO EL PASO 221, L.P.,  
A TEXAS LIMITED PARTNERSHIP, TO PERMIT AND REGULATE THE MAINTENANCE  
AND USE OF AN EXISTING UNDERGROUND TUNNEL WITHIN A PORTION OF  
KANSAS STREET BETWEEN MILLS AVENUE AND TEXAS AVENUE**

WHEREAS, on June 11, 1970, the El Paso City Council approved Ordinance No. 4422 which granted a franchise to the State National Bank of El Paso to construct, maintain and use an underground tunnel (hereinafter referred to as "Tunnel") in and across a portion of Kansas Street in the block between Mills and Texas Avenues (hereinafter referred to as "Public Way") located on Kansas Street in Blocks 11 and 41 of the Mills Map; and

WHEREAS, the Tunnel connected properties of the State National Bank of El Paso on each side of Kansas Street in Blocks 11 and 41 of the Mills Map; and

WHEREAS, the Tunnel was constructed so as to not interfere with any public use of the surface of the City right-of-way, nor with any existing utility line in the area; and

WHEREAS, the term of the franchise granted under Ordinance No. 4422 is for thirty years and expires on June 11, 2000; and

WHEREAS, El Paso 221, L.P., a Texas Limited Partnership, as the successors in interest of the property (and hereinafter referred to as "Grantee") desires to continue the use and maintenance of the Tunnel as previously authorized under Ordinance No. 4422 and have filed an application for a Special Privilege License; and

WHEREAS, the Development Coordinating Committee (DCC) has reviewed the application for Special Privilege License filed by Grantee and recommended approval of the continuation of the use and maintenance of the Tunnel as herein provided; and

WHEREAS, the City Council finds that the grant of a Special Privilege upon the terms and conditions hereinafter set forth is not inconsistent with and will not unreasonably impair the public use of the right-of-way;

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

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#### SECTION 1. PURPOSE

The City of El Paso hereby grants to Grantee a Special Privilege to regulate, repair, maintain and use one (1) existing underground tunnel upon, beneath, across and along a portion of Kansas Street in the block between Mills Avenue and Texas Avenue, and as more particularly described in Exhibit "A" attached hereto and incorporated herein for all purposes, so as to connect properties of Grantee lying on each side of Kansas Street in Blocks 11 and 41 of the Mills Map.

The main Tunnel is approximately 70 feet long with its centerline approximately 67 feet, 1 inch southerly of the northerly property lines of Blocks 11 and 41 and having interior dimensions of approximately 16 feet, 6 inches in width and 10 feet in height.

There is a continuation of the Tunnel on Kansas Street and on its easterly side, at approximately right angles to the main tunnel, commencing on the northerly side of the main Tunnel and continuing northerly adjacent to the property line, being approximately 26 feet, 7 inches in length, with interior dimensions of approximately 7 feet in width and 10 feet in height.

The main Tunnel and its continuation is constructed of reinforced concrete with walls 12 inches thick, ceiling 14 inches thick and floor 4 inches thick. The top of the Tunnel roof slab varies from 1 ½ feet to 5 feet below the existing pavement.

Use of the Public Way shall be limited for the purpose of access to Grantee's parking garage located within Block 41 from the Bank building located on Block 11 and as otherwise agreed to by the parties hereto. Any use of public right-of-way other than the use of the Public Way in connection with the Tunnel is not authorized by this Special Privilege. Nothing herein shall grant any real property interest to the Grantee nor 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 or termination of this Special Privilege in accordance with the terms herein.

This Special Privilege shall not permit or be construed to permit any other private use of the City's Public Way which impairs its function as a public right-of-way. Grantee shall not construct any additional improvements, or make any additions

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or alterations on, below or over the City Public Way, without prior written consent of the El Paso City Council.

## **SECTION 2. REGULATION OF CONSTRUCTION**

Grantee shall submit to the Deputy Directors for Building Services and Engineering one (1) copy each of the as-built drawings of the existing Tunnel within the Public Way showing the design and construction specifications of the Tunnel.

Grantee has conducted a visual inspection of the Tunnel prior to acquisition of the property and Grantee has interviewed building management representatives familiar with the maintenance of the Tunnel during the period of ownership by Norwest Bank, Texas N.A. and to the best of Grantee's knowledge and belief there are no structural deficiencies or deferred maintenance issues with respect to the Tunnel.

The work done by Grantee in replacing, repairing, reconstructing, or maintaining the Tunnel shall be subject to and governed by all laws, rules and regulations of the City and State of Texas, and the U.S. Government that are applicable to insuring the work done does not unreasonably inconvenience the public in the use of the Public Way including, but not limited to the following:

A. In the event that Grantee desires to reconstruct, repair, maintain, or replace the Tunnel built hereunder which involves excavation or any surface disturbance, Grantee shall submit the plans and specifications that pertain to the rebuilding or repairs to the Public Way and the rebuilding or repairs of any of the public utilities to the Deputy Director for Building Services for approval fourteen (14) days prior to the scheduled work. Approval of such plans will not be unreasonably delayed, withheld, or denied by the Deputy Director for Building Services. In the event that emergency repairs are necessary, Grantee shall immediately notify the Deputy Director for Building Services and provide details of the proposed repair work and the traffic control plan. On weekends and holidays, the Deputy Director for Building Services shall be notified as soon as practicable regarding work performed under emergency conditions.

B. Where proposed, any excavation or trenching and other re-construction in the Public Way shall be so carried out as to interfere as little as practical with the

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surface use of the Public Way 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.

C. Grantee covenants and agrees that Grantee shall, at its own expense, repair all water lines, storm and sanitary sewer lines, service lines and water meters owned by the City that Grantee, its 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 Deputy Director for Building Services, and such approval shall not be unreasonably delayed, withheld or denied.

D. Except in an emergency, Grantee shall not bore, excavate or trench any pavement in the Public Way without first securing the prior permission of the Deputy Director for Building Services, but such permission shall not be unreasonably delayed, withheld or denied if the proposed boring, excavation or trenching is in accordance with the terms of this Special Privilege. The Deputy Director for Building Services shall be notified as soon as practicable regarding work performed under emergency conditions.

The City shall have the power at any time to order and require Grantee to cease utilization of all or any portion of the Tunnel that is dangerous to life or property until such time as such condition is eliminated, to be determined by the City in its sole discretion. Should Grantee, after notice, fail or refuse to comply within a reasonable time, the City shall have the power to remove or abate same, at the expense of Grantee, all without compensation or liability for damages to Grantee.

Work done in connection with the re-construction, repair and maintenance of such facility is subject to the continuing police power of the City.

### SECTION 3. TERM

This Special Privilege shall be for a term of fifteen (15) years from the effective date hereof, unless terminated earlier as provided herein. At the end of this term, the City shall have the option of renewing this Special Privilege for an additional fifteen (15) years upon the request of the Grantee. If Grantee wishes the City to renew this Special Privilege, Grantee shall submit a request in writing to the City no later than three (3) months prior to the expiration date of this Special Privilege. Should Grantee

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fail to submit such request for the renewal of this Special Privilege to the City as herein required, the Special Privilege shall expire upon the expiration date. Grantee understands, agrees, and accepts that the City may require that the terms, conditions, and provisions of this Special Privilege be modified as a condition for renewing the grant of the encroachment within the Public Way as permitted by this Special Privilege.

#### **SECTION 4. WORK DONE BY OTHERS**

The City expressly reserves the right to install, repair, or reconstruct the Public 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 conduits, 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 Public Way occupied by Grantee, and to change any curb or sidewalk or the street grade of any street. The City shall use reasonable diligence to limit to the extent practicable the disruption of Grantee's use of the Tunnel. 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 therefrom, 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 Grantee's Tunnel. If the City requires Grantee to remove, alter, change, adapt, or conform its Tunnel because of changes in the grade of the Public Way or in the location or manner of constructing a water pipe, sewer pipe or other underground or aboveground structure owned by the City, Grantee shall make the alterations or changes as soon as practicable when ordered in writing by the El Paso City Council 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

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alternative proposals for the El Paso City Council's consideration. If the City requires Grantee to remove, alter, change, adapt or conform its Tunnel to enable any other entity or person, except the City, to use, or to use with greater convenience, the Public Way, 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 Grantee's Tunnel; provided, however, the City shall not be responsible nor liable for such reimbursement.

**SECTION 5. RESERVATION OF SURFACE, SUBSURFACE, AND AIRSPACE RIGHTS**

The City reserves the right, subject to Section 4, to use the surface or subsurface or airspace within the Public Way covered by this Special Privilege 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 Public Way occupied by Grantee; and 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 Grantee's Tunnel, such alteration or change or relocation shall be made by Grantee when ordered in writing by the Deputy Director for Building Services without any claim for reimbursement or damages against the City; provided, however, that Grantee shall at all times be entitled to receive from appropriate governmental bodies, excluding the City, payment for alteration or relocation of its Tunnel to which it may be lawfully entitled under applicable federal or state laws with respect to relocation payments.

**SECTION 6. CONSIDERATION**

A. As consideration for this Special Privilege, Grantee shall pay to the City the sum of Five Hundred Fifty and No/100 Dollars (\$550.00) per year, for a total sum of Eight Thousand Two Hundred Fifty and No/100 Dollars (\$8,250.00). The total sum shall be due and owing prior to City Council approval of the Special Privilege. The advance payment shall be in the form of a cashier's check payable to "The City of El Paso" and delivered to the City Department of Planning, Research and Development

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for remittance to the Office of the City Comptroller. If the Special Privilege is disapproved by the City Council, a full refund of the payment shall be made by the Office of the City Comptroller within fifteen (15) days of the denial action.

B. The fee payment shall be exclusive of and in addition to all general municipal taxes of whatever nature, including, but not limited to, the ad valorem taxes and assessments for public improvements except as hereinafter provided as may be enacted during the term of this Special Privilege or any renewal.

C. The fee established in this Section shall not be affected by any relocation of Grantee's Tunnel required by the City pursuant to this Special Privilege.

D. 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 with all other applicable City Special Privileges and regulations.

#### **SECTION 7. INSURANCE**

A. Grantee shall provide the City with a certificate of insurance and shall maintain such insurance in effect during the term of this Special Privilege. Grantee agrees to indemnify and hold the City harmless from any claims for injury, death, loss or damage of any kind or character, and by whomsoever suffered or asserted, occasioned by or in connection with the use or temporary closing of the Public Way by Grantee, its agents, servants or employees or any organizations contracted by the Grantee.

Grantee shall provide public liability insurance for personal injuries and death growing out of any one (1) accident or other cause in a minimum amount of Two Hundred Thousand and No/100 Dollars (\$200,000.00) per person, and Five Hundred Thousand and No/100 Dollars (\$500,000.00) for two (2) or more persons in any one accident, and, in addition, shall provide property damage liability insurance in a minimum sum of One Hundred Thousand and No/100 Dollars (\$100,000.00) for property damage growing out of any one (1) accident or other cause. These amounts are not a limitation upon 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. All policies shall name the City of El Paso, its

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officers, agents, servants and employees as additional insureds. 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. Grantee shall file a copy of the policy or certificate of insurance with the City Clerk, the City Attorney's Office, and the Department of Planning, Research & Development. If the policy is not kept in full force and effect throughout the term of this Special Privilege. If the City receives notice that Grantee has violated this provision of the Special Privilege, the City will provide written notice to Grantee and Grantee shall have ten days to cure the violation. Failure to cure the violation within ten days of notice shall subject the Grantee to termination of the Special Privilege.

#### **SECTION 8. RIGHTS IN THE EVENT OF ABANDONMENT**

As an express condition of this Special Privilege, and not as a mere covenant, in the event Grantee abandons the Tunnel or a portion thereof, or the Tunnel placed in the Public Way hereby ceases to be used by Grantee for the purposes enumerated herein for any period of six (6) months or longer, the Special Privilege shall automatically revert to the City, its successors or assigns, 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. However, if Grantee's failure to use the Tunnel is a result of a casualty, such as fire, storm, earthquake, or other similar casualty, affecting the office building or the garage, such cessation of use shall not be deemed as abandonment, provided that the Grantee uses reasonable diligence to reconstruct the damaged portion.

#### **SECTION 9. CANCELLATION**

Grantee shall have the option to terminate this agreement at any time upon giving the City written notice sixty (60) days in advance of such termination. In addition, the City shall have the option to cancel and terminate this agreement for failure of Grantee to comply with any material provision or requirement contained in this agreement after sixty (60) days written notice to Grantee. However, if said breach or failure to comply cannot be reasonably cured within sixty (60) days, if the breaching party 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

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deemed reasonably necessary by the City to complete such curing unless such breach involves public safety.

Upon termination of this Special Privilege, prior to the expiration of the original term, Grantee shall remove its Tunnel located in the Public Way at no cost to the City. When said Tunnel is removed from the Public Way, Grantee shall restore all pavement or base, damaged or removed during the term of this Special Privilege. If any, at Grantee's own cost and expense, as determined by the Deputy Director for Building Services and in accordance with City specifications. The City may, at its option, restore all pavement or base, damaged or removed during the term of this Special Privilege, and charge such costs to Grantee who shall be responsible for payment of such repair and restoration costs. Any such restoration shall be subject to the reasonable approval of the City.

#### **SECTION 10. RECORDS**

The El Paso City Council and the Deputy Director for Building Services shall be kept fully informed by Grantee as to matters pertaining in any way to Grantee's exercise of its rights under this Special Privilege, including the replacement, reconstruction, maintenance and repair of the Tunnel within the Public Way. Grantee shall keep complete and accurate maps, construction drawings and specifications describing the location of the Tunnel within the Public Way. The City shall have the right, at reasonable times to inspect such maps, construction drawings and specifications.

#### **SECTION 11. NOTICE**

Any notice or communication required in the administration of this Special Privilege shall be sent as follows:

CITY: City of El Paso  
ATTN: Mayor  
#2 Civic Center Plaza  
El Paso, Texas 79999

with copy to: City of El Paso  
ATTN: Deputy Director for Building Services  
#2 Civic Center Plaza  
El Paso, Texas 79999

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6/19/00

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GRANTEE: El Paso 221, L.P., a Texas Limited Partnership  
1776 Yorktown, Suite 850  
Houston, Texas 77056

or to such other addresses as Grantee may designate from time to time by written notice.

#### **SECTION 12. ASSIGNMENT**

The rights granted by this Special Privilege 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 written consent of the El Paso City Council, such consent will not be unreasonably delayed, denied or withheld. However, should Bank One, Texas, N.A. ("Bank One"), the mortgagee, acquire title to the property, whether by foreclosure, deed-in-lieu of foreclosure or otherwise, all rights granted under this Special Privilege will pass without the necessity of City Council approval, provided that Bank One provides notice to the City stating that Bank One expressly assumes the responsibilities and obligations under the Special Privilege along with all documentation to be in compliance with the provisions of the Special Privilege. However, Bank One must obtain the express written consent from the El Paso City Council, to assign the Special Privilege to any other party, which consent will not be unreasonably delayed, denied or withheld. A written copy of any such assignment must be filed with the City. Any required consent shall be evidenced by a Special Privilege or resolution of the El Paso City Council that fully recites the terms and conditions, if any, upon which consent is given.

#### **SECTION 13. LEASING OR DEDICATION OF FACILITIES**

Grantee, without the consent of the El Paso City Council, shall not lease any of the Public Way it uses in connection with its Tunnel, to any non-grantee person or entity; provided that Grantee shall have the right to lease or dedicate its Tunnel or any portion thereof, or otherwise make available the Tunnel in the ordinary conduct of its business, so long as Grantee retains responsibility for servicing and repairing the Tunnel.

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8/18/00

**POOR QUALITY ORIGINAL  
BEST AVAILABLE IMAGE**

10-11-00  
12:50 PM

**SECTION 14. MISCELLANEOUS**

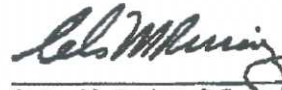
The Deputy Director for Building Services is the principal City official responsible for the administration of this Special Privilege and Grantee recognizes that questions regarding the interpretation or application of this Special Privilege shall be referred to the Deputy Director for Building Services.

**SECTION 15. EFFECTIVE DATE**

This Special Privilege shall not take effect unless Grantee shall, prior to the enactment of this Special Privilege by the El Paso City Council, file its written acceptance with the City Department of Planning, Research & Development and the City Clerk.

PASSED AND APPROVED this 27<sup>th</sup> day of June, 2000.

THE CITY OF EL PASO




Carlos M. Ramirez, P.E.  
Mayor

ATTEST:



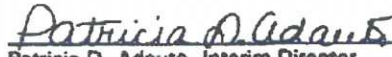
City Clerk

APPROVED AS TO FORM:

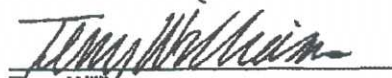


Guadalupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:



Patricia D. Adauto, Interim Director  
Planning, Research & Development



Terry Williams  
Deputy Director for Building Services

014526

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SP-00007  
8/19/00

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this 24  
day of June, 2000.

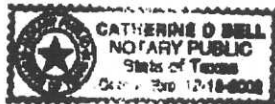
GRANTEE: EL PASO 221, L. P., A TEXAS LIMITED  
PARTNERSHIP  
By 221 NORTH KANSAS, L.L.C., a  
Texas Limited Liability Company and its  
General Partner

By: Fred B. Griffin  
Fred B. Griffin, President

ACKNOWLEDGMENT

THE STATE OF TEXAS )  
COUNTY OF HARRIS )

This instrument is acknowledged before me on this 24TH day of  
JUNE, 2000, by FRED B. GRIFFIN as President of 221 North Kansas,  
L.L.C., a Texas Limited Liability Company and its General Partner of EL PASO 221,  
L.P., A TEXAS LIMITED PARTNERSHIP, as Grantee.



Catherine D. Bell  
Notary Public, State of TEXAS  
Notary's Printed or Typed Name:  
CATHERINE D. BELL  
My Commission Expires:  
12/18/02

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014526

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SP-00007  
6/19/00



10E

**EXHIBIT "B"**

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

**Consent to Assignment**

**WHEREAS**, on June 27, 2008, the El Paso City Council approved Ordinance No. 014526 which granted to EL PASO 221, L.P. A Texas Limited Partnership, a Special Privilege License for the purpose of encroaching upon a portion of public right-of-way with an existing underground tunnel located in and across a portion of Kansas Street in the block between Mills and Texas Avenues located on Kansas Street in Blocks 11 and 41 of the Mills Map, within the City of El Paso, El Paso County, Texas hereinafter referred to as "Public Way"), a copy of which is attached hereto as Exhibit "A" 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 existing underground tunnel located on a portion of Public Way located within the City of El Paso, El Paso County, Texas; and

**WHEREAS**, EL PASO 221, L.P. A Texas Limited Partnership desires to assign all duties, obligations and responsibilities of said Special Privilege License for the existing underground tunnel; and

**WHEREAS**, Section 11 of the Special Privilege License requires the written consent of the El Paso City Council for assignment of the Special Privilege License; and

**WHEREAS**, EL PASO 221, L.P. A Texas Limited Partnership, is requesting that the City approve the assignment of the Special Privilege License granted by Ordinance No. 014526 to Madison River Investments, LLC.; and

**WHEREAS**, Madison River Investments, LLC., hereby agrees to be responsible for all duties, obligations and responsibilities under the Special Privilege License; and

**WHEREAS**, the City agrees to the assignment to Madison River Investments, LLC., of the rights, duties, obligations and responsibilities encompassed in the Special Privilege License; and

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

1. The City approves the assignment to Madison River Investments, LLC., of the rights, duties, obligations and responsibilities of the Special Privilege License granted by Ordinance No. 014526.

2. Madison River Investments, LLC., agrees to assume and perform all duties, obligations and responsibilities of said Special Privilege License.

3. Madison River Investments, 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.

4. 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: Madison River Investments, LLC.  
201 E. Main Drive, Suite 1516  
El Paso, Texas 79901-1335

5. Except as herein amended; Ordinance No. 014526 shall remain in full force and effect.

**WITNESS** the following signatures and seals:

*(Signatures on following page)*

THE CITY OF EL PASO

John F. Cook  
John F. Cook  
Mayor

ATTEST:

for Susan Ellen Heller  
Richarda Duffy Momsen  
City Clerk

APPROVED AS TO FORM:

Lupe Cuellar  
Lupe Cuellar  
Assistant City Attorney

APPROVED AS TO CONTENT:

Mathew S. McElroy  
Mathew S. McElroy, Deputy Director  
Development Services Department

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this 24 day of July, 2008.

GRANTEE:

Madison River Investments, LLC.

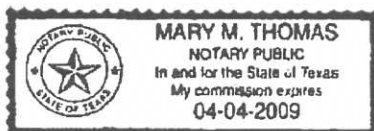
By: Christopher C. Kleberg

Title: Vice President

ACKNOWLEDGEMENT

THE STATE OF TEXAS )  
COUNTY OF EL PASO )

This instrument is acknowledged before me on this 24 day of July, 2008, by CHRISTOPHER C. KLEBERG, VICE PRESIDENT, on behalf of Madison River Investments, LLC., as Grantee.



Mary M. Thomas  
Notary Public, State of Texas

Notary's Printed/Typed Name:

Mary M. Thomas

My Commission Expires:

4/4/2009

Doc# 20080066737  
#Pages 16 #MPages 1  
6/18/2008 9:29:56 AM  
Filed & Recorded in  
Official Records of  
EL PASO COUNTY  
DELIA BRIONES  
COUNTY CLERK  
Fees \$84.00

19

I hereby certify that this instrument was filed on the date and time stamped  
hereon by me and was duly recorded by document number in the Official  
Public Records of Real Property in El Paso County.



EL PASO COUNTY, TEXAS

*Delia Briones*

*Please return to Drawer 151*  
CITY CLERK'S OFFICE  
2 Civic Center Plaza  
El Paso, TX 79901-1196



## Planning & Inspections Department

### Mayor

Oscar Leeser

### City Council

#### District 1

Ann Morgan Lilly

#### District 2

Larry Romero

#### District 3

Emma Acosta

#### District 4

Carl L. Robinson

#### District 5

Dr. Michiel R. Noe

#### District 6

Claudia Ordaz

#### District 7

Lily Limón

#### District 8

Cortney C. Niland

### City Manager

Tommy Gonzalez

**TO:** The Honorable Mayor and City Council  
Tommy Gonzalez, City Manager

**FROM:** Kimberly Forsyth, AICP, CNU-A. *KLF*  
Lead Planner

**DATE:** January 5, 2015

**SUBJECT:** Special Privilege license renewal - Kansas Street Tunnel

A special privilege license was approved by City Council on June 24, 2000 (Ordinance 014526), granting El Paso 221, L. P. permission to use and maintain existing underground tunnels across a portion of the Kansas Street right-of-way between Mills Ave. and Texas Ave. The tunnels provide access and connection from the parking garage to the bank and office building. The main tunnel is approximately 70 feet long, 16 feet 6 inches wide, and 10 feet in height. The secondary tunnel is approximately 26 feet 7 inches long, 7 feet wide and 10 feet in height. No changes are proposed to the existing construction or dimensions of the tunnels.

The original term was for 15 years with an option to renew for an additional 15 years. The license was subsequently assigned to Madison River Investments, LLC on August 12, 2008 (Ordinance 016963). Madison River Investments seeks to renew and extend the term for the additional 15 years and to amend the assignment language to allow for the transfer of the obligations to another party through a lender.

The annual fee for the special privilege approved in 2000 was \$550. This has been updated in accordance with the City's current fee schedule for a sub-surface encroachment, and is currently \$3,351.25. The City retains the right to increase or decrease the fee annually after providing notice to the applicant. The first annual payment and the insurance required by Title 15 have been provided by the applicant.

Staff recommends approval of renewing and amending the special privilege license.



Planning & Inspections Department

City 3 | 801 Texas Avenue | El Paso, Texas 79901 | (915) 212-0083

*Dedicated to Outstanding Customer Service for a Better Community*



## **Recommendation/Public Input**

- Planning & Inspections Recommendation: Approval
- Public Input: None received





**Applicant: Madison River Investments, LLC**

**Type of Special Privilege: Subsurface ROW encroachment  
(existing tunnels)**

**Location: Under Kansas St. between Mills Ave. & Texas Ave.**

**Term: 15 years**

**Annual Fee: \$3,351.25**

**Previous approvals:**

- Ordinance 014526 granted a 15 year term for the tunnel to El Paso 221 LP**
- Ordinance 016963 authorized assignment to Madison River Investment, LLC**



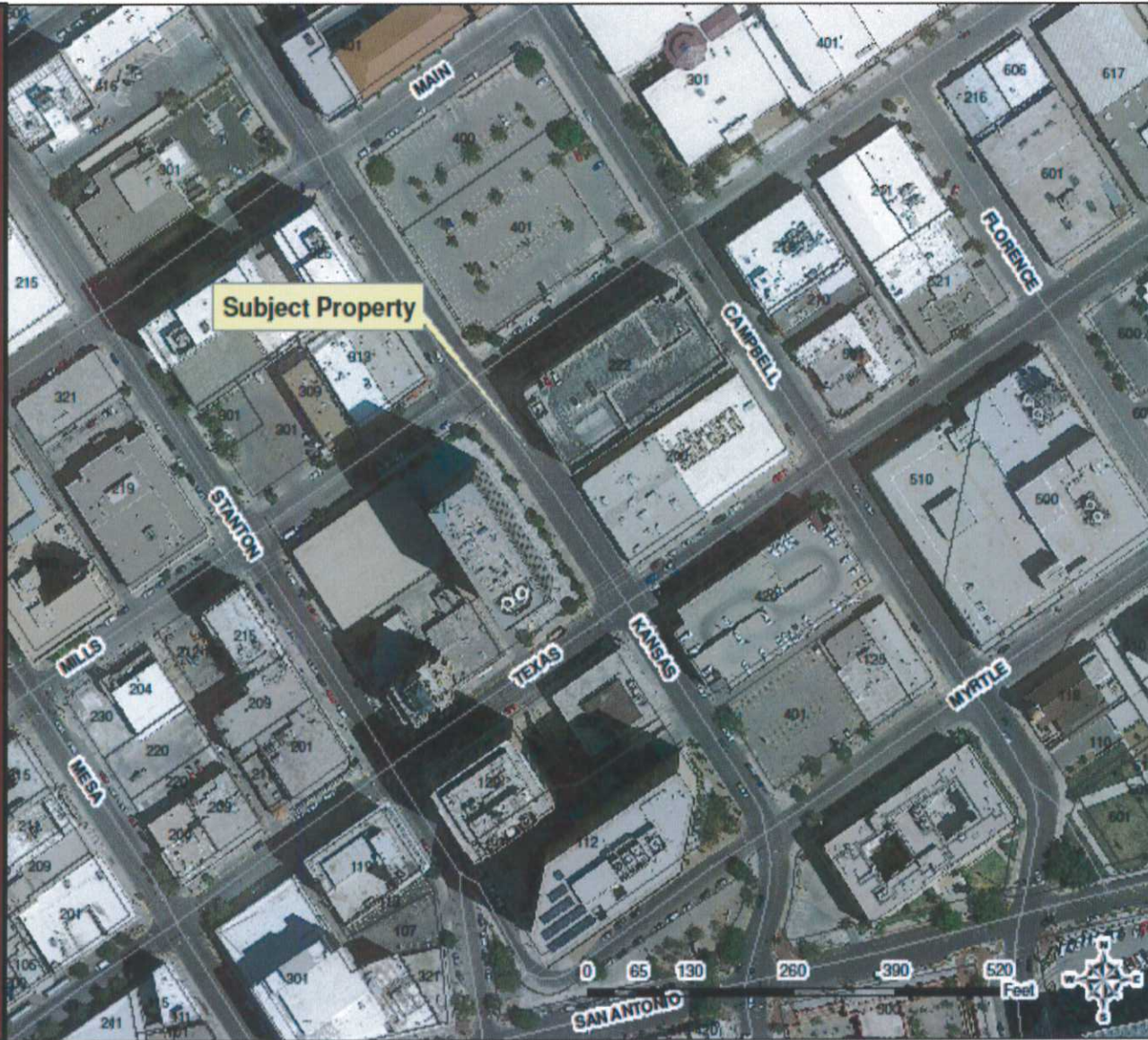
Special Privilege License - Kansas Street Tunnel





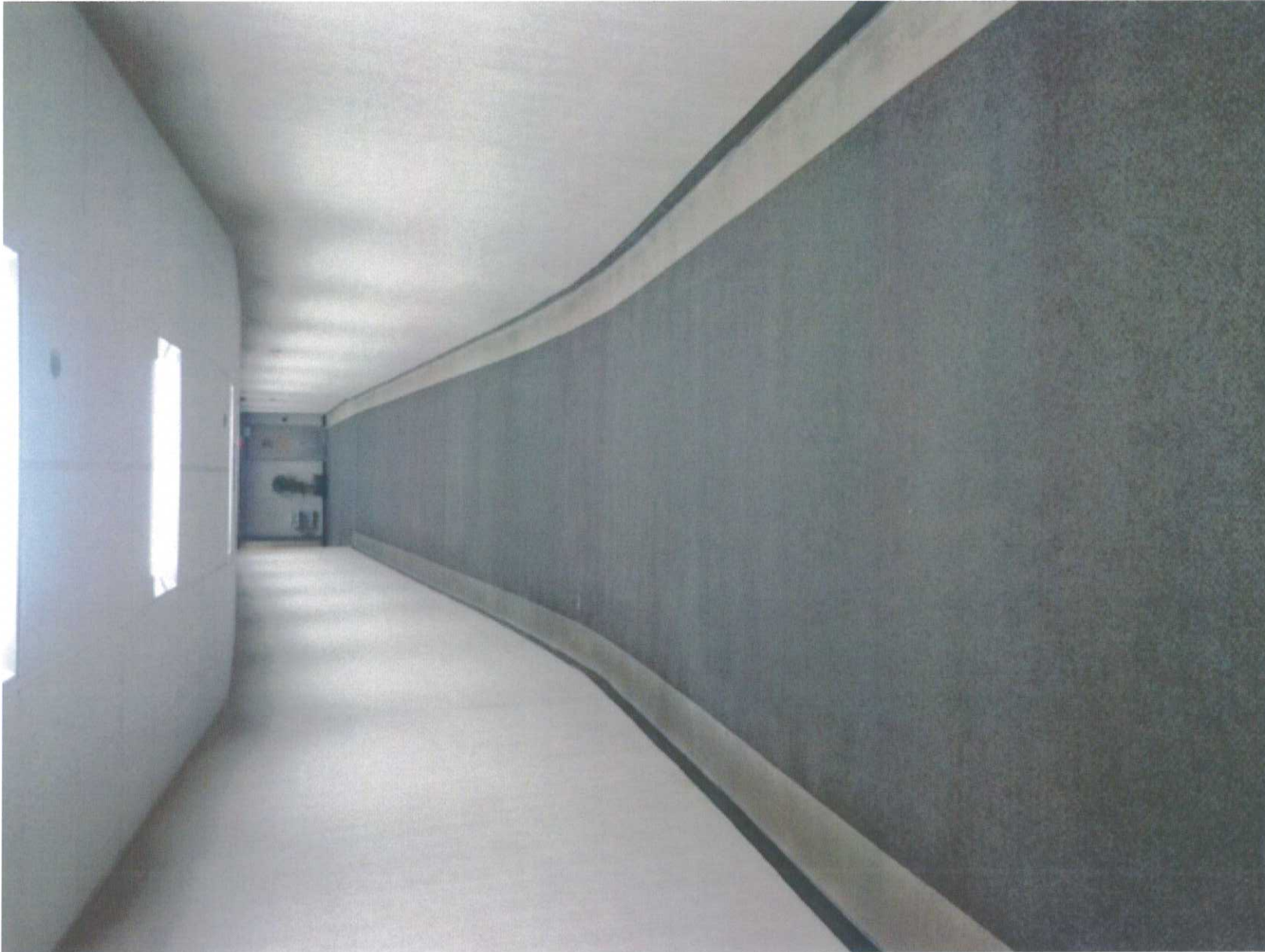


Special Privilege License - Kansas Street Tunnel





SERVICE SOLUTIONS SUCCESS



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SERVICE SOLUTIONS SUCCESS





SERVICE SOLUTIONS SUCCESS

