

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

DEPARTMENT: Development Services / Planning Division
AGENDA DATE: Introduction 12/16/08: Public Hearing 12/23/08
CONTACT PERSON/PHONE: Esther Guerrero, Planner – 541-4720
DISTRICT(S) AFFECTED: 3

SUBJECT:

An Ordinance granting a special privilege to Robins & Morton permitting the encroachment upon a portion of public right-of-way an outdoor employee break area located beneath the Raynolds Street overpass north of Alberta Avenue. (District 3)

BACKGROUND / DISCUSSION:

The applicant is requesting the use of a portion of right-of-way beneath the Raynolds Street overpass north of Alberta Avenue as an outdoor break area for employees of the construction company that will work on the Thomason Hospital Expansion Project.

If approved, this Special Privilege will authorize the placement of a 6 foot high fence around the perimeter and will include picnic tables, portable toilets, hand wash sinks and trash receptacles. No preparation of food or open flame cooking will be permitted on the premises, only prepackaged items may be sold. The premises will be kept clean and orderly at all times.

The term of this license if granted will be for four (4) years and may be renewed for additional one (1) year periods if requested by the applicant with an annual fee of \$500.00.

PRIOR COUNCIL ACTION:

N/A

AMOUNT AND SOURCE OF FUNDING:

N/A

BOARD / COMMISSION ACTION:

Development Coordinating Committee: Approval Recommendation

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

LEGAL: (if required) N/A

FINANCE: (if required) N/A

DEPARTMENT HEAD: _____

Mathew S. McElroy, Deputy Director of Planning

APPROVED FOR AGENDA: _____

CITY MANAGER: _____ **DATE:** _____

CITY CLERK DEPT.

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ORDINANCE NO. _____

**AN ORDINANCE GRANTING A SPECIAL PRIVILEGE TO ROBINS & MORTON
PERMITTING THE ENCROACHMENT OF AN OUTDOOR EMPLOYEE BREAK AREA
UPON A PORTION OF PUBLIC RIGHT-OF-WAY LOCATED BENEATH THE
RAYNOLDS STREET OVERPASS NORTH OF ALBERTA 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 ROBINS & MORTON (hereinafter referred to as "Grantee"), for the use of public right-of-way beneath the Raynolds Street overpass:

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 Grantee, to encroach onto a portion of public right-of-way with an outdoor employee break area (hereinafter referred to as "Premises"), as more particularly shown in the attached and incorporated Exhibit "B";
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 four (4) years with the option to extend for three (3) additional one (1) year terms.

PASSED AND APPROVED this _____ day of _____, 2008.

THE CITY OF EL PASO

ATTEST:

Richarda Duffy-Momsen
City Clerk

John F. Cook
Mayor

APPROVED AS TO FORM:

Lupe Cuellar
Assistant City Attorney

APPROVED AS TO CONTENT:

Mathew McElroy, Deputy Director
Development Services

THE STATE OF TEXAS)
)
COUNTY OF EL PASO)

EXHIBIT "A"
SPECIAL PRIVILEGE

This Special Privilege is made and entered into this ____ day of _____, 2008, by and between the **CITY OF EL PASO**, hereinafter called "City," and ROBINS & MORTON, hereinafter called "Grantee," for use of certain City right-of-way located beneath the Raynolds Street overpass, north of Alberta Avenue.

WITNESSETH:

WHEREAS, Grantee is requesting the use of a portion of City right-of-way located beneath the Raynolds Street overpass in the City of El Paso, El Paso County, Texas for the placement of the outdoor employee break area, hereinafter called "Premises."

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, in consideration of the mutual covenants and agreements hereinafter set forth, the parties agree and covenant as follows:

1. **DESCRIPTION**. The City hereby grants a Special Privilege to Grantee to encroach onto a portion of public right-of-way beneath the Raynolds Street overpass (being a portion of Raynolds Street right-of-way), north of Alberta Avenue, as shown in Exhibit "B", which is attached hereto and made a part hereof for all purposes.

2. **TERM**. The term of this Special Privilege shall be for four (4) years from the date of execution of this agreement with the option to extend for three (3) additional one (1) year terms. The City shall have the sole option to renew this Special Privilege upon the request of the Grantee for additional one (1) year terms. If the Grantee desires that the City re-new this Special Privilege for an additional year, 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 or any previously granted extension thereto.

This Special Privilege shall expire without notice at the end of such expiration period unless a request for renewal is submitted in writing to the City by the Grantee as herein required. 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 upon or through public rights-of-way as permitted by this Special Privilege.

3. CONSIDERATION. As consideration for this Special Privilege, Grantee shall pay to the City an annual fee of Five Hundred and No/100 Dollars (\$500.00) for a period of four (4) years for a total sum of Two Thousand and No/100 Dollars (\$2,000.00); 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 Premises 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 with the Premises. As an express condition of this Special Privilege, and not as a mere covenant, Grantee agrees to provide the El Paso Water Utilities with a copy of the proposed site plan for the Premises depicting the location of the proposed fence showing the location of the water and sanitary sewer mains. Grantee agrees that the Premises will contain the following: a) fifteen (15) portable toilets - toilets to be serviced/sanitized twice a week; b) picnic tables - tables must be kept clean and orderly; c) a six (6) foot high chain link fence - for security purposes, the top portion of the fence may include barbed wire but must be angled inward towards the Premises; coordination with the City Street Department on the removal of the existing fence and the replacement of the fence after the Grantee vacates the Premises; d) three (3) pedestrian access gates; e) one (1) vehicular access gate - to be used only by vehicles performing maintenance on the portable toilets,

emergency vehicles, and City personnel and vehicles for emergency repairs; f) trash receptacles - trash must be collected daily and receptacles must be kept clean and sanitary; g) a minimum of two (2) hand-wash sinks - tanks for the collection of used water must be provided for each sink and must be emptied and sanitized on a regular basis; h) a vending machine area - only prepackaged items to be sold, no preparation of food items or open flame cooking will be permitted on the Premises; i) provide landscaped planters within the Premises to enhance the appearance of the Premises.

All drainage systems, fire hydrants, sanitary sewer mains, water meters and appurtenances must remain unobstructed at all times. Grantee 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. 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 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 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 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 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.

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 and a charge and servitude thereon, and shall bind the Grantee and his successors in title. Any further lease or conveyance of this property shall contain this restriction, condition and covenant and shall embody this Special Privilege by express reference.
- 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, 2nd Floor
El Paso, Texas 79901-1196

and: Robins & Morton
Attn: Eric Groat
400 Shades Creek Parkway
Birmingham, AL 35209

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,

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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:

Mathew McElroy, Deputy Director
Development Services

(Signatures continue on following page)

CITY CLERK DEPT.

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ACCEPTANCE

The attached instrument, with all conditions thereof, is hereby accepted this
8th day of DECEMBER, 2008.

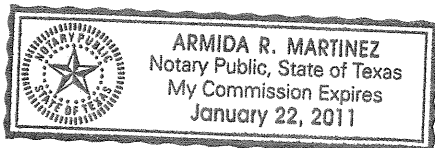
GRANTEE: ROBINS & MORTON

By: *Eric Groat*
ERIC GROAT, PROJECT MANAGER
(Printed Name and Title)

ACKNOWLEDGEMENT

THE STATE OF TEXAS)
COUNTY OF EL PASO)

This instrument is acknowledged before me on this 8 day of December,
2008, by Eric Groat as Project Manager on behalf
of **ROBINS & MORTON**.



Armida R. Martinez
Notary Public, State of Texas

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

1-22-2011
My Commission Expires: