

RESOLUTION NO. 2013-116R

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS APPROVING AN AGREEMENT WITH UNION PACIFIC RAILROAD COMPANY FOR THE CITY TO PURCHASE LAND ADJACENT TO THE RAILROAD CROSSING AT SOUTH LBJ DRIVE AND EDWARD GARY STREET FOR A PRICE NOT TO EXCEED \$423,305.00 BASED ON A FINAL SURVEY AT A RATE OF \$5.25 PER SQUARE FOOT; AUTHORIZING THE CITY MANAGER TO EXECUTE SAID AGREEMENT; AUTHORIZING THE CITY MANAGER TO ACCEPT AND EXECUTE ALL ASSIGNMENTS OF LEASES, LICENSES AND OTHER AGREEMENTS FOR THE USE OF SAID PROPERTY BY THIRD PARTIES; AUTHORIZING THE CITY MANAGER TO EXECUTE ALL CLOSING DOCUMENTS RELATED TO SUCH PURCHASE; AND DECLARING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF SAN MARCOS, TEXAS:

PART 1. To purchase land adjacent to the railroad crossing at South LBJ Drive and Edward Gary Street as described in the attached agreement for a price not to exceed \$423,305.00 based on a final survey at a price of \$5.25 per square foot is hereby approved.

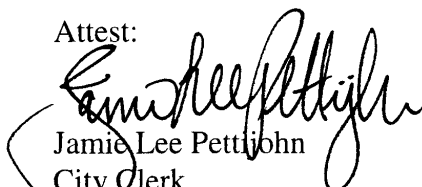
PART 2. The City Manager is hereby authorized to sign an agreement for said purchase in substantially the form of the attached agreement on behalf of the City.

PART 3. The City Manager is hereby authorized to accept and sign on behalf of the City any assignments of leases, license agreements or other agreements for the use of said property by third parties and to execute all closing documents related to the purchase.

PART 4. This Resolution shall become effective immediately from and after its passage.

ADOPTED on August 6, 2013.


Daniel Guerrero
Mayor

Attest:

Jamie Lee Pettijohn
City Clerk



ORIGINAL

August ____, 2013
Folder: 02349-60

VIA UPS Overnight
RETURN RECEIPT REQUESTED

JAMES R. NUSE, P.E., CITY MANAGER
CITY OF SAN MARCOS
630 E. HOPKINS
SAN MARCOS, TEXAS 78666

Dear Mr. Nuse:

This letter ("Agreement") confirms our understandings covering the possible sale by Union Pacific Railroad Company ("Seller") to CITY OF SAN MARCOS ("Buyer") of Seller's interest in certain real property in San Marcos, Texas.

For and in consideration of the sum of Ten Dollars (\$10.00) and other good and valuable consideration, the undersigned will recommend to Seller's Management a sale of the Property on the following terms and conditions:

Article 1. Description of Property:

- A. The Property is approximately 1.851 acres as shown on the print attached hereto as Exhibit A and made a part hereof. The legal description of the Property will be determined by Survey provided by Buyer. Survey will be at the sole cost and expense of Buyer. Survey will depict all facilities affecting the property.
- B. Before finalizing any survey, Buyer shall submit the draft survey to Seller for review and approval. Computer files of the survey and legal descriptions shall be sent via e-mail to JLHILD@UP.COM, with a subject line referencing the UPRR Folder Number 02349-60 assigned to this document. Buyer shall deliver a certified copy of the completed survey to Seller within forty five (45) days after Buyer's execution of this Agreement ("Survey Period"). Delay in obtaining or furnishing the survey to Seller shall in no event give Buyer the right to extend the Closing Date (as defined in the 'Closing – Default:' Article).

Article 2. Sale Price:

- A. The sale price ("Sale Price") for the Property shall be Four Hundred Twenty Three Thousand Three Hundred Five Dollars (\$423,305.00).

B. The Sale Price is computed as follows:

1.851 acres (80,629.6 square feet) x \$5.25 per square foot = \$423,305.00

C. The Sale Price will be adjusted on the basis set forth in Article 2-B if the area of the Property, as determined by Seller's Senior Manager Engineering Services or his authorized representative, or as determined by the survey, differs from the area set forth in Article 1-A.

Article 3. Feasibility Review/Right of Entry:

A. For Sixty (60) days from the date of execution of this Agreement by Buyer ("Feasibility Review Period"), Buyer and its agents and contractors may enter upon the Property to perform environmental audits, soil tests, engineering and feasibility studies of the Property. If the results of such audits, tests or studies, or Buyer's review of title or any other matters relating to the Property are unsatisfactory, Buyer may terminate this Agreement by giving Seller written notice before the end of the Feasibility Review Period. If no such written notice of termination is given before the end of the Feasibility Review Period, the Property will be deemed suitable for Buyer's purposes. In the event of such termination by Buyer, then Buyer shall surrender to Seller copies of all audits, soils, engineering and any other reports prepared for Buyer pertaining to the Property and such reports will become the sole property of Seller without cost or expense of Seller and this Agreement will terminate without any further force and effect, and without further obligation of either party to the other.

B. Buyer's right to enter upon the Property pursuant to Article 3-A is subject to the following:

1. Buyer will, to the extent permitted by law, indemnify, defend and save harmless Seller and/or Seller's affiliates (Seller's affiliates means any corporation which directly or indirectly controls or is controlled by or is under common control with Seller), their officers, agents and employees, against and from any and all liability, loss, costs and expense of whatsoever nature growing out of personal injury to or death of persons whomsoever, or loss or destruction of or damage to property whatsoever, where such personal injury, death, loss, destruction or damage arises in connection with the entry upon the Property by Buyer, its agents or contractors prior to Closing.
2. Buyer and Buyer's agents and contractors (collectively "Contractors") will, except as otherwise required by law, maintain in confidence all information, reports, and evaluations generated in connection with any environmental assessments and will not make disclosure without the prior written consent of Seller. If Buyer discovers hazardous or toxic substances or materials, Buyer will immediately notify Seller.
3. Buyer will promptly deliver to Seller the results and copies of any and all reports, evaluations, tests and studies generated in connection with any environmental assessments. Prior to the issuance of any final environmental report, Seller will have the opportunity to make comments, pose questions and offer recommendations to the Contractor preparing the report.

4. Buyer shall be liable for any and all liens, claims, demands, costs and expenses of whatsoever nature in any way connected with or growing out of any work done, labor performed or materials furnished at the Property on behalf of Buyer prior to Closing.
 5. If the sale of the Property does not close, Buyer will, as soon as possible and at Buyer's sole expense, restore the Property to substantially the same condition it was in immediately prior to the time Buyer entered the Property, failing in which Seller may perform the work of restoration and Buyer will reimburse Seller within thirty (30) days after rendition of bill by Seller.
- C. Absence of markers is not a warranty by Seller of no subsurface installations. Fiber optic systems, pipelines, and other structures may be buried on the Property. Before any digging/drilling/excavation, the following procedures will be followed by Buyer and Buyer's Contractors:
1. Protection of any fiber optic cable systems is of extreme importance since any break could disrupt service to users resulting in business interruption and loss of revenue and profits. Buyer will telephone 1-800-336-9193 (a 24-hour, 7-day number for emergency calls) during normal business hours (7 A.M. to 9 P.M., CT, Monday-Friday, except holidays) to determine if any fiber optic cable is buried on the Property. If it is determined that fiber optic cable is buried on the Property, Buyer shall promptly inform Seller, at the address at the bottom of the first page of this Agreement, of the results of its investigation.
 2. Before drilling or excavating with mechanized equipment, Buyer will explore with hand tools to a depth of at least eight (8) feet below the surface or will use suitable detection equipment.
- D. Notwithstanding any provisions in this Agreement to the contrary, if this Agreement is terminated for any reason whatsoever, Buyer will remain obligated to comply with the provisions of Article 3-A and 3-B and Seller will retain all of its remedies for Buyer's default under Article 3-A and 3-B.

Article 4. As Is Sale - Release:

- A. Prior to the Closing Date, Buyer will have the opportunity to make such inspections of the Property and matters related thereto as Buyer desires, including, without limitation, governmental laws and regulations to which the Property is subject, the title to the Property, and the suitability or fitness of the Property for Buyer's proposed use. Buyer acknowledges and agrees that the Property is to be sold and accepted by Buyer in an "AS IS" condition, with all faults, and Buyer acknowledges that the Property may have been used for railroad and/or industrial purposes, among other uses. Buyer agrees that any information Buyer may receive from Seller or its agents concerning the Property (including, but not limited to, any lease or other document, engineering study or environmental assessment) is furnished on the condition that Buyer will make an independent verification of the accuracy of the information. Seller does not make any representations or warranties of any kind whatsoever, either express or implied, with respect to the Property; in particular, without limitation, Seller makes no representations or warranties with respect to the use, condition, title, occupation or management of the

Property, or compliance with applicable statutes, laws, codes, ordinances, regulations, requirements (collectively "Condition of the Property"). Buyer acknowledges that it is entering into this Agreement on the basis of Buyer's own independent investigation of the physical and environmental conditions of the Property. Buyer assumes the risk that adverse physical and environmental conditions may not have been revealed by its investigation.

- B. **FROM AND AFTER CLOSING, BUYER WILL RELEASE SELLER, ITS AFFILIATES, THEIR EMPLOYEES, AGENTS, OFFICERS, SUCCESSORS AND ASSIGNS, FROM AND AGAINST ANY AND ALL SUITS, ACTIONS, CAUSES OF ACTION, LEGAL OR ADMINISTRATIVE PROCEEDINGS, CLAIMS, DEMANDS, FINES, PUNITIVE DAMAGES, LOSSES, COSTS, LIABILITIES AND EXPENSES, INCLUDING ATTORNEYS' FEES, IN ANY WAY ARISING OUT OF OR CONNECTED WITH THE KNOWN OR UNKNOWN CONDITION OF THE PROPERTY (INCLUDING, WITHOUT LIMITATION, ANY CONTAMINATION IN, ON, UNDER OR ADJACENT TO THE PROPERTY BY ANY HAZARDOUS OR TOXIC SUBSTANCE OR MATERIAL), OR ANY FEDERAL, STATE OR LOCAL LAW, ORDINANCE, RULE OR REGULATION APPLICABLE THERETO, INCLUDING, WITHOUT LIMITATION, THE TOXIC SUBSTANCES CONTROL ACT, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT, AND THE RESOURCE CONSERVATION AND RECOVERY ACT. THE FOREGOING WILL APPLY REGARDLESS OF ANY NEGLIGENCE OR STRICT LIABILITY OF SELLER, ITS AFFILIATES, OR THEIR EMPLOYEES, AGENTS OR OFFICERS.**
- C. The provisions of this Article 4 will survive the delivery of the deed and will bind and inure to the benefit of the parties hereto, their heirs, successors and assigns.

Article 5. Escrow, Title Insurance and Abstract of Title:

- A. Seller will not furnish title insurance or an abstract of title to the Property. Buyer may, at its sole option and expense, obtain a preliminary title report ("PTR") in order to review the status of title to the Property during the Feasibility Review Period. If Buyer obtains a PTR, a copy will be delivered to Seller. Seller has no obligation to cure any title defects or to assist Buyer in obtaining title insurance.
- B. If Buyer desires title insurance, Buyer shall pay the cost of any title insurance and any endorsements or changes to the title policy desired by Buyer. If an escrow is used, Buyer shall pay any and all fees relating to the escrow, including, but not limited to, any City and/or County Transfer Taxes and recording fees.

Article 6. Form of Deed; Reservations:

- A. At Closing, Seller will transfer Seller's interest in the Property to Buyer by Special Warranty Deed, subject to all outstanding rights, whether or not of record.
- B. Seller will reserve from the conveyance the following:
- (1) All minerals and mineral rights without right of surface entry.

C. Covenants. The Property will be conveyed by Seller subject to the following covenants, conditions and restrictions, which Buyer by the acceptance of the Deed shall covenant for itself, its successors and assigns, faithfully to keep, observe and perform:

- (1) Fence Covenant. Buyer, at its sole cost and expense, shall install, within ninety (90) days after the date of delivery of the Deed, and thereafter maintain fencing or other barriers to prevent access to or encroachment on the railroad right-of-way of Seller adjacent to the trackside boundary of the Property. Buyer may maintain the fencing currently existing adjacent to the building located near the corner of South LBJ Dr. and S. Edward Gary St. until such time as the building is removed, at which time Buyer, or its successors and assigns, must install fencing along the boundary line of the Property as set forth above. All fencing or barrier must be of a design and type satisfactory to Seller, and in compliance with applicable building codes. Buyer shall submit the plans for the fencing or barrier construction to:

Union Pacific Railroad Company
Assistant Vice President - Real Estate (Folder No. 02349-60)
1400 Douglas Street, Mail Stop 1690
Omaha, Nebraska 68179

for review and approval. Seller shall complete such review and make appropriate response to Buyer within twenty (20) days after receipt of such plans by Seller. Seller shall not unreasonably withhold its approval of such plans. Such approval does not constitute a guarantee or warranty that such plans comply with applicable governmental laws, rules, regulations or ordinances, or that the fence as constructed will be structurally sound.

- (2) Railroad Proximity Covenant.

(a) Buyer acknowledges that the property abutting the southern boundary line of the Property is dedicated and used for railroad purposes, that railroad operations may create noise, vibrations, emissions, fumes and odors twenty-four (24) hours a day, and that the amount, nature and intensity of railroad operations may increase or change (collectively, the "Permitted Effects"). Buyer accepts the Property subject to the existence of the Permitted Effects.

(b) If Buyer sells or leases all or any portion of the Property, Buyer shall require all purchasers and tenants to acknowledge the location of the railroad operations abutting the Property and the existence of the Permitted Effects, and to agree in writing, for the benefit of Seller, to comply with the above covenants.

- (3) Restriction On Use. The ground floor of any structure on the Property must not be used for (i) residential, (ii) lodgings or accommodations (including, without limitation, hotels, motels, boarding houses, dormitories, hospitals, nursing homes, or retirement centers), or (iii) educational or child-care facilities (including, without limitation, schools, kindergartens or day-care centers). Notwithstanding the above, the Property may be used for institutions of higher learning except that any dormitories that may be constructed for such institution must abide by the ground floor restriction set out above.

- (4) Covenants To Run With Land. The foregoing covenants, conditions and restrictions shall run with the Property, the burdens of which will be binding on the successors and assigns of Buyer, and the benefits of which will inure to the successors and assigns of Seller. A breach of the foregoing covenants, conditions and restrictions, or the continuance thereof, may, at the option of Seller, its successors or assigns, be enjoined, abated or remedied by appropriate proceedings.

Article 7. Existing Agreements:

- A. If any lease or "Use Rights" (license or other rights to use the Property) affects the Property (whether identified by Seller before or after execution of this Agreement), Seller's rights and obligations under any such identified lease or Use Right will be assigned in full or in part to and assumed by Buyer at or after Closing.
- B. Buyer acknowledges that the Property may be subject to unidentified Use Rights. It is the responsibility of Buyer to determine if any of these unidentified Use Rights exist.
- C. Within 120 days after Closing, Buyer shall remove that certain covered shelter as shown in the Survey and identified as "COVERED CONC" from the abutting premises of Seller. The removal of such shelter shall be in accordance with a right of entry granted by Seller for such purpose. This condition shall survive closing.

Article 8. Closing - Default:

- A. **Closing will occur within thirty (30) days after expiration of the Feasibility Review Period ("Closing Date").** The Closing will be deemed to occur upon payment of the Sale Price by a cashier's or certified check, and delivery of the Deed. All Closing costs, including transfer taxes and excise taxes, will be paid by Buyer.
- B. If Closing fails to occur due to default by Seller, Buyer may terminate this Agreement as Buyer's sole remedy against Seller. In the event of such termination, neither Seller nor Buyer will have any further liability hereunder.
- C. If Closing fails to occur due to default by Buyer, Seller may terminate this Agreement and neither Seller nor Buyer shall have any further obligations or liability hereunder except for any of Buyer's surviving obligations pursuant to Article 3 (B) hereof. In no event shall Seller have any obligation whatsoever to extend the Closing Date for any reason if Buyer fails to perform.

Article 9. Prorations:

Local property taxes, if any, and other assessments due and payable in the year of Closing, as well as rental under any leases or Use Rights that are being assigned, will be prorated as of the date of Closing. Buyer will assume any installments of assessments not yet due and payable.

Article 10. Negotiations – Brokers and Finders:

Negotiations relative to this transaction have been carried on by both parties without the intervention of any person which will give rise to any valid claim against either of the parties hereto, for brokerage commission or other like payment. Each party hereto shall indemnify and hold harmless the other party against and from any and all claims for brokerage commission or other like payments arising out of the transaction contemplated by this Agreement and occasioned by the indemnifying party.

Article 11. Subdivision/Platting Compliance:

It may be necessary to comply with local or state subdivision or platting laws or regulations prior to Closing. All necessary applications, maps and other requirements to comply with this requirement will be completed by Buyer at Buyer's sole cost and expense, and are subject to review and approval by Seller before filing. If Buyer fails to comply with subdivision requirements prior to the Closing Date, or if any proposed subdivision plat or parcel map contains conditions affecting Seller, the Property prior to Closing, or other real property owned by Seller, then Seller, in its sole and absolute discretion, may terminate this Agreement. Seller is not obligated to extend the Closing Date due to Buyer's failure to comply with subdivision or platting requirements prior to the Closing Date.

Article 12. Mortgage Release:

If the Property is subject to a blanket mortgage granted by Seller or a corporate predecessor of Seller, Seller will obtain a release within approximately six (6) months after Closing.

Article 13. Eminent Domain.

The parties acknowledge that Buyer has the authority to condemn the Property under its power of eminent domain. Buyer represents that it may institute eminent domain proceedings in the event that Seller does not sell the Property upon the terms set forth in this Agreement. The parties further acknowledge that Seller intends to treat the sale of the Property as sold under imminent threat of condemnation, pursuant to Section 1033 of the Internal Revenue Code of 1986 (26 U.S.C.).

Article 14. Seller's Management Approval:

BUYER ACKNOWLEDGES THAT NEITHER THIS AGREEMENT NOR THE NEGOTIATIONS LEADING TO THIS AGREEMENT CREATE ANY OBLIGATION ON THE PART OF SELLER TO SELL THE PROPERTY TO BUYER UNLESS THIS AGREEMENT IS APPROVED IN ACCORDANCE WITH SELLER'S MANAGEMENT POLICY STATEMENT. IF SUCH APPROVAL IS NOT GIVEN AND COMMUNICATED TO BUYER BY THE CLOSING DATE, THIS AGREEMENT WILL TERMINATE AND NEITHER PARTY WILL HAVE ANY FURTHER OBLIGATION.

Article 15. Disclosures and Notices to Buyer.

A. Notice Regarding Possible Liability for Additional Taxes (Texas Property Code Section 5.010). If for the current ad valorem tax year the taxable value of the Property is determined by a special appraisal method that allows for appraisal of the Property at less

than its market value, the person to whom the Property is transferred may not be allowed to qualify the Property for that special appraisal in a subsequent tax year and the Property may then be appraised at its full market value. In addition, the transfer of the Property or a subsequent change in the use of the Property may result in the imposition of an additional tax plus interest as a penalty for the transfer or the change in the use of the Property. The taxable value of the Property and the applicable method of appraisal for the current tax year is public information and may be obtained from the tax appraisal district established for the county in which the Property is located.

- B. Annexation Disclosures. If the Property is located outside the limits of a municipality, the Property may now or later be included in the extraterritorial jurisdiction of a municipality and may now or later be subject to annexation by the municipality. Each municipality maintains a map that depicts its boundaries and extraterritorial jurisdiction. To determine if the Property is located within a municipality's extraterritorial jurisdiction or is likely to be located within a municipality's extraterritorial jurisdiction, Buyer should contact all municipalities located in the general proximity of the Property for further information.
- C. Notice of Water and Sewer Service. Pursuant to Section 13.257 of the Texas Water Code, Seller provides Buyer with the following notice:

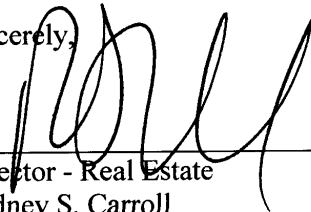
"The Property may be located in a certificated water or sewer service area, which is authorized by law to provide water or sewer service to the Property. No other retail public utility is authorized to provide water or sewer service to the properties in the certificated area. If the Property is located in a certificated area, there may be special costs or charges that you will be required to pay before you can receive water or sewer service. There may be a period required to construct lines or other facilities necessary to provide water or sewer service to the Property. You are advised to determine if the Property is in a certificated area and contact the utility service provider to determine the cost that you will be required to pay and the period, if any, that is required to provide water or sewer service to the Property.

Buyer hereby acknowledges receipt of the foregoing notice at or before the execution of this Agreement."

At the Closing, Buyer agrees to execute a separate copy of the foregoing notice, in a form required by Section 13.257 of the Texas Water Code, to be subsequently recorded in the real property records of the county in which the Property is located.

If you agree with the foregoing terms and conditions with respect to the possible purchase of the Property, please indicate your acceptance of these terms and conditions by signing in the acceptance space provided below and returning one copy to Jim Hild at the address listed on the bottom of the first page of this letter, in order that it is received by **Seller no later than August ____, 2013**. Please also indicate below how you wish to take title. If you should have any questions, please call Jim Hild at (402) 544-8614.

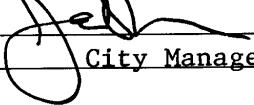
Sincerely,



Director - Real Estate
Rodney S. Carroll

ACCEPTED AND AGREED THIS 6th DAY OF August, 2013.

CITY OF SAN MARCOS

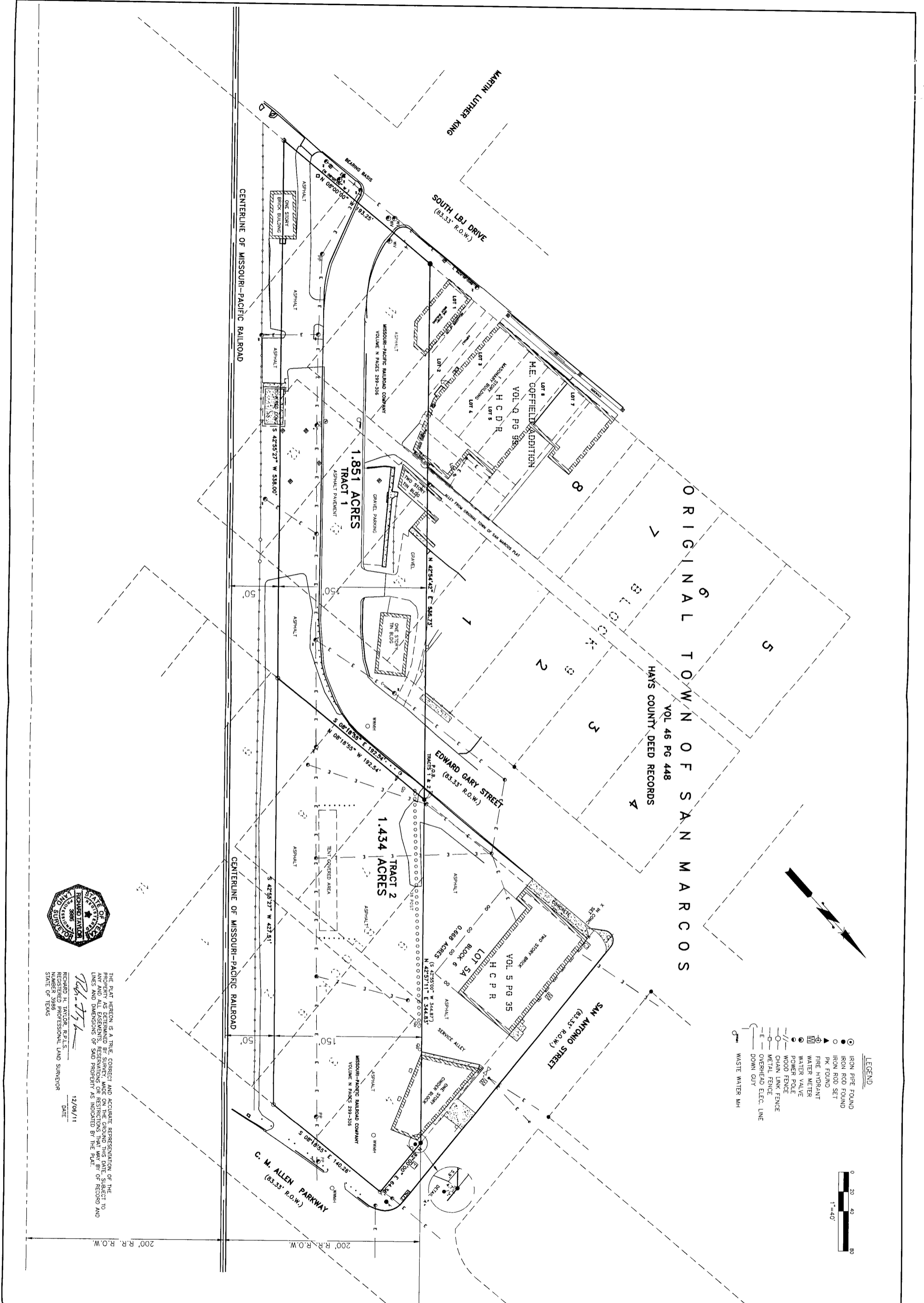
By: 
Its: City Manager

Title to the Property will be taken as follows:

The City of San Marcos, Texas, a municipal corporation

If Corporation, State of incorporation:

Texas

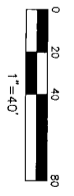
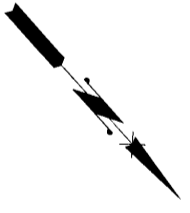


THE PLAT HEREON IS A TRUE, CORRECT AND ACCURATE REPRESENTATION OF THE PROPERTY AS DETERMINED BY SURVEY, MADE ON THE GROUND THIS DATE, SUBJECT TO THE RIGHTS AND INTERESTS OF OTHER PARTIES AND TO THE RESTRICTIONS, LIMITATIONS AND CONDITIONS OF RECORD AND TO THE EXTENT AND DIMENSIONS OF SAID PROPERTY AS INDICATED BY THE PLAT.

RHT
 RICHARD H. TAYLOR, R.P.L.S.
 REGISTERED PROFESSIONAL LAND SURVEYOR
 STATE OF TEXAS

12/08/11
 DATE

- LEGEND**
- IRON PIPE FOUND
 - IRON ROD FOUND
 - IRON ROD SET
 - PK FOUND
 - FIRE HYDRANT
 - WATER METER
 - WATER VALVE
 - POWER POLE
 - WOOD FENCE
 - CHAIN LINK FENCE
 - METAL FENCE
 - OVERHEAD ELEC. LINE
 - DOWN GUY
 - WASTE WATER MH



RR ROW
 SHEET: SHEET 1
 OF

1.851 ACRE TRACT AND A 1.434 ACRE TRACT BEING A PORTION OF LOTS 1, 10 THRU 14, BLOCK 9 LOTS 1 THRU 4 AND LOTS 6 THRU 9, BLOCK 6 ORIGINAL TOWN OF SAN MARCOS MISSOURI-PACIFIC RAILROAD COMPANY ROW CITY OF SAN MARCOS HAYS COUNTY, TEXAS

DRAWING INFORMATION

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|------------------|---------------------|
| DESIGNED BY: RHT | DATE: 11/28/11 |
| DRAWN BY: RMM | PROJECT NO: 11-3882 |
| APPROVED BY: RHT | PLOT SCALE: 40' |
| FILE NAME: RR | |

ASH & ASSOCIATES
surveying and mapping
 142 JACKSON LANE
 SAN MARCOS, TEXAS 78666
 (512) 392-1719
 FAX (512) 392-1928

REVISIONS

| NO. | REVISION | APPD. | DATE |
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