

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

**DEPARTMENT:** Environmental Services Department

**AGENDA DATE:** Introduction: 4/27/2021  
Public Hearing: 5/11/2021

**CONTACT PERSON:** Ellen A. Smyth, P.E., Managing Director  
Environmental Services Department, 915-212-6000

**DISTRICT(S) AFFECTED:** All

**STRATEGIC GOAL:** Goal 3 – Promote the Visual Image of El Paso

**SUBJECT:**

An Ordinance granting a non-exclusive franchise to "Elmshire, LLC " to place and maintain up to 150 waste containers on sidewalks and other City property within the City of El Paso, subject to the terms and conditions described in the Ordinance.

**BACKGROUND / DISCUSSION:**

A franchise agreement is required for the placement of solid waste containers on City property. The Ordinance, acknowledged by the franchisee, identifies standards to be maintained for the placement, maintenance, and use for advertising of the solid waste containers at locations identified in the ordinance.

**PRIOR COUNCIL ACTION:**

N/A

**AMOUNT AND SOURCE OF FUNDING:**

N/A

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

**DEPARTMENT HEAD:**



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

**AN ORDINANCE GRANTING TO ELMSHIRE, LLC A  
NON-EXCLUSIVE FRANCHISE FOR WASTE  
CONTAINERS ON SIDEWALKS AND OTHER CITY  
PROPERTY**

**WHEREAS**, Elmshire, LLC desires to place waste containers on sidewalks and other City property; and

**WHEREAS**, the City of El Paso (the “City”) desires to allow Elmshire, LLC to place waste containers on sidewalks and other City property;

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

1. There is hereby granted to Elmshire, LLC, hereinafter called “Grantee,” and his assigns, a non-exclusive franchise to place and maintain up to 150 “waste containers” meeting the criteria discussed herein, on sidewalks and other City property. The size of the waste containers shall not exceed thirty-six (36) inches in height and thirty-six (36) inches in width, or as otherwise specified in the El Paso City Code, and the design and construction of the waste containers shall be subject to prior approval by the Director for the Department of Environmental Services (the “Director”) of the City. The waste containers must be durable and attractively constructed and shall at all times be maintained by Grantee in such condition as not to constitute a hazard to persons or property, or impede in any way the flow of vehicular or pedestrian traffic, with five (5) feet of free and unobstructed passage around the waste container. The specific, fixed locations of existing waste containers are on Exhibit “A”, provided, however, that should the Traffic Engineer determine that any of the waste containers on Exhibit “A” do not meet the requirements set forth herein, the Traffic Engineer shall direct Grantee to relocate or remove such waste containers in conformity

with this franchise and City Code. Grantee shall comply with City Code Section 20.18.020C, and shall register any new locations with the City’s Planning Department if any changes to Exhibit “A” locations are sought subsequent to the approval of this franchise by City Council. This franchise does not grant the right to locate waste containers on property owned or controlled by the Texas Department of Transportation (TxDOT). The location of any waste containers on TxDOT property must be by separate agreement with said state department or agency.

2. The term of this franchise shall be a five (5) year period beginning May 11, 2021, unless the agreement is otherwise terminated as provided herein. In the event the Grantee issues a written request to the City to extend the franchise at least ninety (90) days prior to the end of the initial term, the parties may agree to a one-year extension option, unless or until otherwise cancelled or terminated as provided for herein. The option may be exercised on behalf of the City administratively via signature of the City Manager.

3. Grantee may use the space on the waste containers for advertising such reputable and reliable business concerns as may contract for the space. Grantee shall not be prohibited from placing on his/her waste containers any advertisement based on content. No advertising will be permitted, however, which is for any illegal business or activity, which advertises a political party or the candidacy of any person for political office, or which is of a character deemed by the City Council to be improper for exhibition in the public streets or parks when judged by contemporary community standards.

4. If any improvements are to be constructed or repairs made, whether by the City or a utility company, on any sidewalk or other City property where Grantee has placed any waste containers, Grantee shall, upon written notice from the Director, remove any waste containers located on the

affected City property. The Director shall give Grantee fourteen (14) days written notice of the date when the construction of improvements on such City property is to begin, and Grantee shall remove such waste containers prior to the commencement of construction.

5. During the life of this franchise, Grantee shall maintain, repair or replace the waste containers as necessary, and shall keep them reasonably clean, in neat and attractive appearance, and free of odors. Grantee may change the design of the waste containers if it deems advisable, but such changes shall be subject to prior approval of the Director.

5.1 The City will provide written notice to the Grantee in the case of any problem waste container(s) and if the problem is not cured within seven (7) days of that notice, the City can order the removal of said waste container(s).

5.2 If Grantee does not remove the problem waste container(s) within seven (7) days of the City's removal order, the City will remove and dispose of the waste container(s) at the Grantee's cost.

5.3 The timeframes referenced in this Section 5 may be accelerated by the City in the case of an imminent public health or safety hazard.

6. As part of the consideration for the grant of this franchise, Grantee agrees during the term hereof:

6.1 To collect all refuse from the waste containers on a schedule to be approved by the Director within five (5) days of the City's approval of this ordinance and within the timeframe subsequently approved by the Director after any change to the initially approved schedule.

6.2 To dispose of such refuse in a legal and proper manner including, but not limited to applicable City ordinance.

7. If Grantee collects and disposes of the refuse or uses his own employees to collect and dispose of the refuse, Grantee shall obtain, pay for and keep in effect a City commercial hauler's license, and shall comply with all laws, codes and ordinances applicable to the collection, hauling and disposal of refuse. Grantee may contract with a permitted hauler to collect and dispose of the refuse.

8. Grantee shall be deemed at all times to be an independent contractor and shall be responsible for his own acts. Grantee agrees to indemnify, defend and hold harmless the City, its officers, agents and employees from and against any and all loss, liability, damage, expense or claim of any nature whatsoever arising out of or incident to this franchise, which are the result of any act or omission of Grantee. Grantee shall give the City reasonable notice of any such claims or actions. Grantee shall use legal counsel reasonably acceptable to the City in carrying out its obligations hereunder. The provisions of this section shall survive the expiration or early termination of this franchise.

9. During the term of this franchise, the Grantee will carry public liability insurance by a solvent insurance company authorized to do business in Texas, for the protection of itself and the City, which shall be named as an additional insured. The limits of liability shall be at least \$250,000 for bodily injury or wrongful death of one person, \$500,000 for more than one person in the same accident, and \$100,000 property damage. The form of the policy shall be subject to approval by the City and a copy, or a certificate of insurance, shall be filed with the City Clerk. The policy shall provide that it cannot be canceled without ten (10) days prior notice in writing to the City Clerk.

10. Grantee shall comply with all applicable laws, regulations and ordinances.

11. The City may terminate this franchise without cause, for any reason whatsoever, upon thirty (30) days written notice to Grantee.

12. Upon termination of this franchise, the grant hereof, as well as the property of Grantee situated in and upon the sidewalks and other public places shall, at the option of and upon the payment by the City to Grantee of a fair valuation therefore, be and become the property of the

City. The fair valuation shall be ascertained by the arbitration and appraisal of a majority of three appraisers, one of whom shall be appointed by the City of El Paso, one of whom shall be appointed by the Grantee, and one of whom shall be appointed by the first two appraisers so appointed by the City and Grantee. If said two appraisers shall be unable to agree upon the designation of a third appraiser, or if the City or Grantee shall refuse within a period of thirty (30) days after notice to appoint or designate an appraiser, the County Judge of El Paso County, Texas, shall designate such appraiser. The valuation as fixed by a majority of three appraisers shall not include any payment or valuation because of any value derived from the franchise or the fact that it is or may be a going concern, duly installed and operated. If the City Council shall not desire to acquire the property by the payment of a fair valuation therefore, the property shall be removed by the Grantee without cost or expense to the City, and the sidewalk or other public place where the property was located shall be restored to its former condition.

13. This franchise shall not be assigned without the prior written consent of the City, which consent shall not be unreasonably withheld.

14. As consideration for this franchise, Grantee will pay to the City the annual franchise fee in the amount authorized by the El Paso City Council (in Schedule C of the City's Budget Resolution, as amended) on or before the 15th day following the granting of this franchise. In addition, on March 31, June 30, September 30 and December 31 of each year during the term of this franchise, the Grantee will submit a quarterly payment in the amount authorized by City Council per waste container in service per month. By way of example, the June 30, 2021 payment shall cover the period from the date of execution to May 31, 2021, and the September 30, 2021 payment shall cover the period from June 1, 2021 to August 31, 2021. This fee will include a report listing the

number of waste containers in service, their location and reason for removing a waste container. If the City does not receive one or more of the referenced franchise fees by their due date, the City shall send a written notice of default to the Grantee for lack of payment. The City will give Grantee ten (10) calendar days from the date of such notice to pay in full or the franchise will be terminated at the end of the ten (10) day period. If the Grantee is found to be violating the provisions of this franchise or submitting false records listing locations or number of waste containers, the penalties listed in Section 1.08.030 of the City Code shall be pursued by the City against Grantor. All payments shall be submitted to the Comptroller of the City of El Paso, at the following address: P.O. Box 1890, El Paso, Texas 79950-1890.

15. The City may conduct periodic audits of the waste container locations to ensure quarterly reporting is accurate. The Department of Environmental Services may also investigate any and all complaints addressing waste container condition, locations, and nuisances caused by these waste containers.

16. In addition, Grantee shall allow the City to use ten percent (10%) of its advertising space on its waste containers to publicize upcoming City-sponsored events and City-related community services messages. The Grantee will meet with the Director within 10 days following the execution of this ordinance and again annually as of the date of the granting of this franchise to discuss the number and location of spaces available for City use. The locations shall be fixed until such time as the City agrees to a different location. The City shall be entitled to use ten percent (10%) of the total advertising spaces which the Grantee had available during the immediately preceding three (3) months. There shall be no more than one space for City use per waste container. The Grantee reserves the right to try to solicit sponsorship for the spaces allotted for City use. The City reserves

the right to approve the wording and design of such advertisements and to accept sponsors. If the Grantee does not have a sponsor for the spaces allotted for City use, the City has the option to furnish its own signs for placement by the Grantee on the waste containers. The City reserves the right to give the Grantee thirty (30) days written notices to update or change the advertisement wording or design of a space reserved for City use.

17. Grantee herein shall indicate the acceptance of the provisions of this Ordinance in writing within five (5) days after the passage thereof.

18. Written notice to the other party may be provided at the following addresses, or at a new address as provided in writing to the nonmoving party by a party which has moved its physical location within thirty (30) days of said relocation without the necessity of amending this contract:

City: City of El Paso  
Attn: City Manager  
P.O. Box 1890  
El Paso, Texas 79950-1890

Grantee: Elmshire, LLC  
Attn: Brett Goldberg or Tyler Lyon  
1423 E. Missouri Ste. A  
El Paso, Texas 79902



PASSED AND APPROVED this \_\_\_\_ day of \_\_\_\_, 2021.

**CITY OF EL PASO:**

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

**ATTEST:**

\_\_\_\_\_  
Laura D. Prine  
City Clerk

**APPROVED AS TO FORM:**

*Wendi N. Vineyard*

\_\_\_\_\_  
Wendi N. Vineyard  
Assistant City Attorney

**APPROVED AS TO CONTENT:**

*Ellen A. Smyth*

\_\_\_\_\_  
Ellen A. Smyth, P.E., Director  
Department of Environmental Services

*(Acceptance and Acknowledgment follow on next page)*

**ACCEPTANCE AND ACKNOWLEDGMENT**

ACCEPTANCE

The above instrument, with all conditions thereof, is hereby accepted this \_\_\_\_\_ day of \_\_\_\_\_, 2021.

**ELMSHIRE, LLC**

\_\_\_\_\_  
By: Brett Goldberg

\_\_\_\_\_  
By: Tyler Lyon

ACKNOWLEDGEMENT

THE STATE OF TEXAS    )  
  )  
COUNTY OF EL PASO    )

This instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2021, by Brett Goldberg, of Elmshire, LLC.

\_\_\_\_\_  
Notary Public, State of Texas  
Notary's Printed or Typed Name:

My Commission Expires:

\_\_\_\_\_

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

ACKNOWLEDGEMENT

THE STATE OF TEXAS    )  
  )  
COUNTY OF EL PASO    )

This instrument was acknowledged before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2021, by Tyler Lyon, of Elmshire, LLC.

\_\_\_\_\_  
Notary Public, State of Texas  
Notary's Printed or Typed Name:

My Commission Expires:  
  
\_\_\_\_\_

**EXHIBIT "A"**

Site locations for Elmshire, LLC waste containers:

<b>Main Street</b>	<b>Cross Street</b>	<b>No. Authorized</b>
1100 Hawkins	Panda Ex./Cielo Vista	2
Helen of Troy	Corona Del Sol	1
Helen of Troy	Villa Del Sol	1
JOE BATTLE	Eschenbrener	1
JOE BATTLE	Lorenzo Ruiz	2
JOE BATTLE	New World	1
JOE BATTLE (N)	BOB HOPE	1
JOE BATTLE (S)	BOB HOPE	1
MCCOMBS	RICK HUSBAND	1
MCRAE	ALBUM	2
MCRAE	SIMS	3
Mesa Hills	Bluff Ridge	1
MONTANA	Rutherglen	1
NORTH DESERT	ENCHANTED SPRINGS	2
Northwestern	Hoover	1
Pellicano	Bob Hope	2
Pellicano	Ted Houton	1
Pellicano	Pullman	2
Pellicano	Gene Torres	1
Pellicano	Cedar Oak	1
Pellicano	Lomaland	2
Redd	Parque Del Sol	1
Rojas	Henry Brennan	2
Rojas	Merchantile	3
Rojas	Don Haskins	2
Saul Kleinfeld	Turner	3
Thunderbird	Dew	2
Thunderbird	Caprock	1
Viscount	Larry Mahan	1
Viscount	Darlina	1
Viscount	EPCC Admin Ser.	2
Viscount	Catalpa	1
Vista Del Sol	Lomaland	2

Vista Del Sol	Pullman	2
Vista Del Sol	Bob Hope/ Jose Bombach	2
Vista Del Sol	Peter Cooper	2

